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Beckett, Jason A. (2005) *The end of customary international law? : a purposive analysis of structural indeterminacy*. PhD thesis.

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THE END OF CUSTOMARY  
INTERNATIONAL LAW? A  
PURPOSIVE ANALYSIS OF  
STRUCTURAL  
INDETERMINACY.

PhD Thesis  
University of Glasgow

Jason A. Beckett

Submitted in fulfilment of the degree of PhD within the School  
of Law, University of Glasgow, September 2005.

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## ACKNOWLEDGEMENTS:

This thesis would never have been written without the help and support – financial, moral, intellectual, and personal – of many people. Without the additional guidance of my supervisors, what was written would never have been rendered intelligible.

Thus my first, and my greatest, debt of gratitude goes to my supervisors, Iain Scobbie and Scott Veitch. I could not have asked for better people to work with. They gave me freedom and they indulged my ideas, and yet also brought a sense of organisation, discipline, and structure when that was required. For that structure I am most heavily indebted, but it is their support, indulgence, and nurturing which shall remain with me forever. Put simply, without these two great academics and good friends, I could not have thought out, let alone intelligibly communicated, the ideas to follow. Naturally, however, even their patience was tested at times, and neither can bear any responsibility for the errors, omissions, and the unintelligible passages in a thesis they nurtured, but upon which they did not, ever, impose themselves. They found, and held open, an institutional and intellectual space in which it could grow; for that debt there are no words.

The people who have read drafts, made suggestions on partially constructed ideas, suggested lines of reading or thought, and helped to tighten up my ideas and their exposition, are too numerous to name. I hope you all know who you are, because I cannot thank you individually. Nonetheless, from within that group, some do absolutely merit individual thanks: Jörg Kammerhofer and Akbar Rasulov have given so much that they will probably be even more relieved than I am that this project is finally over. This work would not have been the same without them; nor would my experience as a PhD student. These two, alongside my supervisors, have maintained my belief in an academia intent on the pursuit of knowledge, not career prestige.

At an early stage, Eileen O’Sullivan forced me to clarify my ideas and the direction of my thinking; Martin PrechtI encouraged me to write, to get it down on paper. Jen Hendry has been there throughout, with words of wisdom, and of encouragement. On a more personal level, Sam Ryan and James Sweeney have done wonders for my confidence in the darker hours; their support too is gratefully acknowledged. The same is true of Grietje Baars and Lorna McGregor; all four can also take credit for academic and stylistic input. Ronnie Yearwood’s cheerful diligence has been a source of inspiration; Bronwen Jones and Victoria Rodley’s declared belief in my ability has been invaluable.

Finally, and most importantly, my family: without my mum and dad’s support – emotional as well as financial – I would never have reached a level even to commence writing a PhD; my partner, Nancy, has been a constant tower of strength, her support has, on all levels, and in all things, been unwavering. I doubt this work would be here now without her. To my son Christopher, I owe thanks and apologies in equal measure. He may never know how many weekends, and family evenings he sacrificed to make this thesis possible. He never grumbled about having to do so; even as I grumbled at him for things that were not his fault. I hope, one day, he will understand the light he has brought to my life.

Needless to say, no-one but me is responsible for this thesis; but what good is there, and those ideas which are clearly expressed, must be credited in large part to those mentioned above; and the others I could not credit individually. Thank you all.

## ABSTRACT:

Despite Franck's claim that public international law (PIL) has moved into its "post-ontological state", where controversy no longer surrounds its status *as law*, controversies over the ontology of PIL, and especially of customary international law (CIL) remain endemic. These controversies concern the ontology of the law itself; its status as a brute or an empirical fact. They have been internalised within different theories of law, and between theories within the discourse of legal theory; but they have not been resolved. These controversies fuel the attack by CLS, and New Approaches to International Law (NAIL), scholars against a liberal-legal order all too easily portrayed as fundamentally indeterminate, a cover for its subjects' political interests.

This indeterminacy is unavoidable within any theory which understands law as a brute fact, because the 'brute fact' of the social practice of law cannot reduce complexity in a manner adequate to the production of determinate legal norms. As a direct consequence of this, law is best understood as an institutional fact, or more precisely, as an ideal idea. To understand law in this way is also to attenuate its relationship to empirical reality. This involves identifying the specificity of the legal, and that involves taking a stance on what the law is for. Only once we have determined what the law is for can we analyse how this purpose is manifested in the reality of the legal system.

It is from this point that we can determinately identify legal norms, because the relationship between the form and purpose of law determines the empirical identifiers by which the presence of the specifically legal can be signified. The specificity itself is the manifestation of law's unique role, of the additional utility that law brings to human life. It could be understood as the legitimacy promise, or the ideological apology, of law.

Where CLS, and other critical discourses, seek to "uncover" and "explode" the ideologies and biases of law, to demonstrate its inability to fulfil its promises, the present work is intended to initiate the task of demanding that law, and especially CIL, live up to those very promises. But first, the nature of these promises, and the structure and purpose of law must be examined, analysed, and where necessary contested and decided, or rather, *defined*. In this regard, the hidden assumptions of legal theory must be uncovered and problematised; the debates over law must be disaggregated, before law itself can be properly determined. Only after these tasks have been completed can the nihilist challenges of NAIL be met.

This thesis argues that CIL is best understood as an independent system of rules, against which state conduct may be assessed; rather than as a necessarily authoritative institutional reality. This highlights the distinction between law-creative, and merely legally evaluable, state actions. The theory presented in the final chapter – which is developed from the methodology outlined in the preceding four chapters – acts as a lens through which those actions of states which alter or develop CIL may be distinguished from those actions which ought, merely, to be judged in the light of CIL. This allows us to distinguish legal from illegal state conduct, regardless of the absence or presence of enforcement. This distinction between the legal and the illegal is distinct from, analytically prior to, and more important than, the enforcement of legal commands.

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## **ABBREVIATIONS:**

AJIL	American Journal of International Law
BYBIL	British Yearbook of International Law
CIL	Customary International Law
CLJ	Cambridge Law Journal
CLS	Critical Legal Studies
EJIL	European Journal of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
MLR	Modern Law Review
NAIL	New Approaches to International Law
NATO	North Atlantic Treaty Organisation
OJLS	Oxford Journal of Legal Studies
PCIJ	Permanent Court of International Justice
PIL	Public International Law
UN	United Nations

## INTRODUCTION

My thesis was initiated in an attempt to understand the structure and function of customary international law: where its rules come from, and how they may be identified. It was driven by what I perceived as the personalisation of legal doctrine, and the consequent descent into idiosyncrasy; the way in which the rules of customary law appeared to reflect little more than the desires and pet projects of its analysts. This can be readily appreciated by anyone working in the field, and is easily illustrated.

Amnesty International, in a report on the Palestinian Authority entitled *Silencing Dissent*,<sup>1</sup> stated that: “The UDHR is considered to be part of customary international law.”<sup>2</sup> This makes the declaration – which was specifically designed as a *non-binding* statement of aspiration – legally binding on all states. Similarly, many authors have suggested a customary ‘right’ to humanitarian intervention,<sup>3</sup> others that the “precautionary principle” of environmental law has entered the *corpus* of customary international law.<sup>4</sup>

Yet more authors,<sup>5</sup> and indeed the International Court of Justice itself, have claimed customary status for the Geneva Conventions of 1949, in whole or in part:

With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it

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<sup>1</sup> Available at: <http://www.amnesty.org.il/reports/PASD0.html>

<sup>2</sup> Section 2: SAFEGUARDS UNDER INTERNATIONAL HUMAN RIGHTS LAW Available at: <http://www.amnesty.org.il/reports/PASD2.html>

<sup>3</sup> Teson F., “Collective Humanitarian Intervention” 17 *Michigan Journal of International Law* (1996) 323.

<sup>4</sup> See Birnie P. and Boyle A. *International Law and the Environment*, p. 118.

<sup>5</sup> Meron T., “The Geneva Conventions as Customary Law”, 81 *AJIL* (1987) 348.

stated that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ . . .”, that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”<sup>6</sup>

However, no authors, academics, or practitioners of international law (of whom I am aware) have suggested customary rights to torture, to genocide, or to racial segregation. But torture is an endemic aspect of international life; genocides occur; and racial segregation seems to be becoming a reality, at least in the UK and USA. Meanwhile, human rights are offered scant respect in practice; ‘humanitarian interventions’ on those rare occasions they occur, or are claimed, provoke protest; and we continue to gamble with our ecological future.

It would appear that only ‘nice’ rules can become customary international law; or, perhaps more plausibly, that these authors are quite simply making it up as they go along. Personal preferences are being passed-off as legal rules; but that would seem to deny the specificity of the legal. It would seem to *subvert* law’s claims to transcend personal preference and desire. This process, and the academic discourses it has spawned, have an air of the unreal, of the absurd. Legal norms are being plucked from thin air, and *that* set the ground for my enquiry.

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<sup>6</sup> Advisory Opinion of the International Court on the *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*. Delivered 9 July 2004. The text of the Opinion, may be found on the Court’s website – [www.icj-cij.org](http://www.icj-cij.org). The text of the opinion is also available as UN Doc.A/ES-10/273, and at 43 ILM 1009 (2004).



Not that anyone actually admitted to offering no more than a personal preference. All hid behind a veneer of legal formality, and yet their answers nonetheless held that unmistakable air of unreality. The answers were simply ‘given’, taken for granted, and assumed to obviously exist. And yet – to make matters worse – different participants gave different, and conflicting, answers. None developed the premises from which those answers flowed; certainly none appeared to engage that process of development itself. There seemed no reason *for* the competing answers; *a fortiori* there appeared no way to choose between them. This left us with an unconstrained choice as to the content of international law, and *that* conflicted with my basic understandings of what law did, of what law was for.

Therefore, I set out to make sense of this question (what is the meaning of law?), to develop a schema of understanding within which the competing accounts of the nature and content of law could be developed. I sought the premises, and the ‘workings out’ which had to lie latent behind the asserted answers. I sought, ultimately to make the answers intelligible, to locate them, make them commensurable, and to allow for their evaluation.

*However*, what I do *not* do – though in honesty I did set out to do – is to claim to have the final say. Instead, I merely identify a *question*, and endeavour to demonstrate why that question is important. Beyond that, I can merely elucidate the conditions under which the question can be engaged; though I do also sketch an outline of my preferred answer.

This enquiry is subdivided into five distinct sections:

In chapter one, I engage theories of legal positivism. I do this for three related reasons: firstly, because legal positivism is the legal theory which most obviously claims to be able to just ‘identify’ legal norms; secondly because, despite that fact, legal positivism is my favoured theory; and thirdly, to demonstrate the heterogeneity of legal positivism as a movement, and the superiority of its conceptual variant.

In chapter two, I discuss David Dyzenhaus’ fundamental critique of legal positivism, in an attempt to demonstrate that its force is restricted to empirical legal positivism. However, in doing so, I also unearth the *task* facing conceptual legal positivism: not to show that it is the correct legal theory; but rather to demonstrate that it is the *best* (available), the most preferable, legal theory.

Chapter three elaborates upon this task, illustrating how legal theories can be made commensurable, and therefore, how the preferability of theories may be assessed. Finally, this chapter demonstrates how the tools developed in Neil MacCormick’s institutional theory of law (which are examined in chapter two) can be used to ‘operationalise’ his thesis on rational reconstruction as an *abstract form* of the best available theory.

Chapter four shifts analysis from legal theory *per se* to the theory of customary international law. Using the evaluative grid developed in chapter three, but augmenting this with Martti Koskenniemi’s devastating critique of international law as caught between apology and utopia, I demonstrate why all extant theories of

customary international law are flawed. I also demonstrate why these flaws – which are structural in nature – *had* to occur.

Finally, in chapter five, I move from critique to possibility, from deconstruction to reconstruction. In this chapter I move from utilising to inverting Koskenniemi's critique. I attempt to develop a theory of customary international law, capable *both* of adopting the premises *and* denying the conclusions of Koskenniemi's critique. To do so, I develop a specific implementation of chapter three's fully operational rational reconstruction. The aim here is to demonstrate how conceptual legal positivism could operate (and, in practice, does partially operate) at the international level, to produce determinate legal norms. In doing so, I hope to demonstrate *why* this is the preferable legal theory, but also to draw attention to some of the costs inherent in understanding and developing law in this "best light".

## CHAPTER 1: WHOSE POSITIVISM? WHICH OBJECTIVITY?

### Introduction:

Although often portrayed as a unified entity, legal positivism is in fact a broad and deeply divided enterprise. Even among those who acknowledge these divisions, emphasis is generally placed on the hard-soft divide within legal positivism. However, there is another, deeper, division, this time of a methodological nature between empirical and conceptual legal positivists. This divide generally goes

unnoticed due to an exclusive focus on municipal law, as the paradigm of law *per se*. This limited focus has allowed substantive agreement to overwhelm and disguise irreconcilable methodological differences.

A brief glance at public international law allows a broadening of perspective which brings this methodological divide, and the pathological consequences of overlooking it, into clearer relief. The argument toward which this thesis builds is that the agreement on focussing on “the empirical aspects” of the law, which pertains in legal positivism, in fact disguises a much deeper disagreement over *both* what is to be observed, and the nature of observation itself. Moreover, this disagreement neatly, but completely, fractures the unity of legal positivism as a school of legal theory; it obliges us to take sides within legal positivism, even before the term can be given a coherent meaning. This chapter represents a preliminary step toward a more accurate mapping of legal positivism, rejecting empirical legal positivism, before ultimately endeavouring to demonstrate the superiority of the conceptual strand of legal positivism.

### LEGAL POSITIVISM: A UNITY SUNDERED?

Legal theory today is a fractured and disjointed discourse, with the classic divide between “legal positivism” and “natural law” providing the most obvious dichotomy. However, this dichotomy, as well as simplifying debate, also functions to disguise divisions within both camps, to present their unifying features as central, the distinguishing features of each specific theory as marginal. At least as regards legal positivism, this is tenuous at best; if not downright false.

As Gardner has pointed out,<sup>1</sup> legal positivism is both a broad church, and a much maligned one. Before locating myself within this movement, it is first worth briefly delimiting the movement as a whole. If legal positivists are to be understood or classified as a group or a school (at least within legal philosophical debate) they must be “united by a thesis rather than merely a theme”.<sup>2</sup> That is, it is not enough that legal positivists emphasise focus “on certain aspects of legal thought and experience (namely the empirical aspects)”,<sup>3</sup> but we must also have a unifying philosophical proposition. Gardner kindly provides this:

(LP\*) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).<sup>4</sup>

In other words, legal positivism’s prime concern is to identify what the law *is*, not what it ought to be. Of course this is *also* true of “anti-positivist” theories, as critics of legal positivism are also concerned with what the law is; the specific claim of legal positivism is that what the law *is* is in no way *dependent upon what the law should be*; whereas anti-positivist theories would hold that what the law *is*, is in some manner dependent on what the law ought to be. However, this legal positivist claim, as Gardner once again emphasises, does *not* preclude criticism of law on moral grounds,

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<sup>1</sup> Gardner J. “Legal Positivism: 5 ½ Myths” 46 *American Journal of Jurisprudence* (2001) p. 199.

<sup>2</sup> *Ibid* p. 199.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid* p. 201.

but rather emphasises the fact that the content of law must be known *before* it can be understood, evaluated, and ultimately critiqued.<sup>5</sup>

This is an important point, as one of the classic myths about legal positivism is that its focus on validity precludes other forms of criticism and thus ‘validates’ evil regimes and legal systems. Legal positivism says no such thing, but instead denies that normativity (as opposed to systemic membership) derives directly from validity.<sup>6</sup>

(LP\*) then possesses a “comprehensive normative inertness”, which many misunderstand or refuse to accept.<sup>7</sup> It does not endorse norms, neither does it advocate conduct in accordance with legal norms: (LP\*) is simply a foundation for these further evaluative moves.<sup>8</sup>

This thesis can be easily reconciled with the Hartian camp of legal positivism, as it is compatible with the belief that legal positivism is an exercise in “descriptive sociology”,<sup>9</sup> and philosophically concerned only with the conditions under which legal knowledge (whose existence and ‘legalness’ are simply assumed) can be understood. “Legal philosophy is not wholly (or even mainly) the backroom activity of identifying what is good or bad about legal practice, and hence of laying on practical proposals for its improvement (or failing that, abandonment).”<sup>10</sup> Legal

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<sup>5</sup> *Ibid* pp. 223-4.

<sup>6</sup> Validity is another apparent agreement masking deep disagreement, especially as to the ontological status of rules, norms, and law; and especially between Hartian and Kelsenian approaches to legal theorising. See notes 133-7 and accompanying text, *infra*; see also chapter 5 notes 65-8 and accompanying text.

<sup>7</sup> Gardner, *supra* note 1, p. 203.

<sup>8</sup> In this sense, Gardner appears to share his pre-theoretical commitments with Kelsen rather than Hart (see note 111 *supra*, and accompanying text). However, and this is one of the paradoxes of positivist theory, despite their deeply antithetical methodological and ontological commitments, Hart and Kelsen actually reach many similar conclusions on the nature and functioning of domestic legal systems. Again an apparent agreement disguising far more deep-rooted and important disagreements.

<sup>9</sup> Hart H. L. A. *The Concept of Law* (2nd ed.) p. v.

<sup>10</sup> Gardner, *supra* note 1, p. 203.

positivism is the part of legal philosophy which is not about separating good from bad. Legal positivism is simply about identifying what the law is, which norms are legally valid in any given area, and this is the prerequisite for *any* evaluation of the content of those norms. Even an anarchist could endorse LP\*.<sup>11</sup> However, Gardner also acknowledges the necessarily interpretative nature of all observation:

Philosophers who defend (LP\*), like all other philosophers, are offering an interpretation of their subject matter that plays up the true and important and plays down the true but unimportant. But what is important about legal norms, even what is important for their evaluation, need not be something that lends value or merit to them.<sup>12</sup>

So although legal positivism is a value free process of norm identification, it is not an empirically neutral one. The legal observer does not acquire an Archimedean perspective, but can only emphasise his own evaluation of the important over the unimportant, having of course first decided what to observe; or rather, having first advanced his own *definition* (whether articulated or unarticulated, recognised or unrecognised, conscious or unconscious) of the subject matter itself.

Once more an apparent agreement hides a centrally important point of disagreement. This disagreement concerns the nature and differentiation of the “subject matter” itself; it concerns *what* should be observed? In other words, what is “the true”? That is: what actually exists, what is known to exist? How should “the true” *of law* be

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<sup>11</sup> *Ibid* p. 207.

<sup>12</sup> *Ibid* p. 206.

understood? How should we determine what is true of law, what is known to exist about law? *What* is the (correct) subject matter for legal observation?

However, Gardner's central point here is simply that what is important need not be what is valuable or good. This aspect of legal positivism, this understanding of law, assumes the reality of law "as it is" and contrasts this to (what legal positivists perceive as) the ideological illusion of "law as it ought to be". However, this contrast, especially if made evaluatively (good legal positivism against bad natural law) is not really an aspect of LP\*, but rather a manifestation of positivity welcoming (PW).<sup>13</sup> That is, a belief in the necessary redeeming merit of all law in treating like cases alike. However, PW is *not* an integral part of (LP\*) which is normatively inert. Naturally enough the anarchist adopting (LP\*) will not also endorse PW. (LP\*) then is posited as a normatively inert claim, not a legal claim as such, but a claim as to what makes a legal claim legal; no more, no less.

This links (LP\*) closely to Austin's (in)famous claim that "the existence of law is one thing, its merit or demerit quite another".<sup>14</sup> However, while Austin, and of course Bentham, largely founded Anglo-American legal positivism, the subsequent history of that school has been one of refinement of, rejection of, and even flight from their ideas. These refinements have led to a degree of fragmentation within legal positivism itself, most noticeably the divide between hard and soft legal positivists, and secondarily a divide between what I shall term conceptual and empirical legal positivists.

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<sup>13</sup> *Ibid* pp. 205-7.

<sup>14</sup> Austin J. *The Province of Jurisprudence Determined* p. 157.



For present purposes the conceptual/empirical divide is the most important sub-division within legal positivism, however the hard/soft divide does merit a brief explanation. The hard/soft divide was first explicated by Coleman<sup>15</sup> and is a response to legal positivist difficulties in accurately theorising adjudicative practices.<sup>16</sup> Essentially, soft positivists allow for moral factors in the identification of law provided only that some other legally valid norm provides for this. Hard positivists deny such a possibility, believing instead (appearances notwithstanding) that a norm which appears to allow legal validity on the basis of merit (in the following example, merit being defined as reasonableness) in fact “delegates to some official (say a judge) the task of validating further norms himself or herself by *declaring* them reasonable”.<sup>17</sup> Only those norms *declared* valid (e.g. because of their reasonableness) are legally valid (or indeed legally reasonable). Therefore, any given norm’s validity remains contingent solely on its source (the judge) rather than its merits in any real sense; i.e. in any sense opposable to the judge’s declaration.<sup>18</sup> In other words, the decision (on the putative norm’s reasonableness) is purely intra-systemic, in the sense that the extra-systemic factors, (e.g. the judge’s views on reasonableness) which *are* necessary to the decision, only become *legally* relevant, (the putative norm only becomes law) once (and because) the judge (*qua* system official) has determined that it is reasonable, and thus is law.

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<sup>15</sup> Coleman J. “Negative and Positive Positivism” *Journal of Legal Studies* 11 (1982) 139. Coleman uses the phrase “hard fact positivism”, but not “soft” positivism, in this essay. Nonetheless, the distinction between hard and soft – synonymous with that between positive and negative – has become standard nomenclature.

<sup>16</sup> These difficulties will be explicated *infra*, and the beginnings of a solution will be developed in chapter 2.

<sup>17</sup> Gardner, *supra* note 1, p. 201.

<sup>18</sup> This only applies to the highest point in the legal system, as a lower court decision can, of course, be reversed by a higher court. However, on the hard positivist view this would not entail that the norm was validated or invalidated by its content *per se*, but only by the higher court’s *declaration* of (e.g. the reasonableness of) its content.

Hart is ambiguous on the hard/soft divide,<sup>19</sup> but clearly exemplifies the empirical observational (descriptive) strand of legal positivism. However, the conceptual/empirical divide is itself a more complex matter. As Gardner noted, legal positivists are by and large interested in the “empirical” aspects of legal practice, the law as it is, not as it might or should be. However, this focus presupposes a definition of law as something which can, in some sense, be observed. Moreover, law must be understood as something quite specific, differentiated from other social systems, and thus susceptible to analysis as a distinct phenomenon. Empirical legal positivists must assume that law can be identified through unstructured, pure, observation; that “the true” unproblematically exists, and thus displaces analysis *entirely* to “the important”.

In other words, empirical legal positivism makes a number of foundational assumptions, assumptions which are neither disclosed nor defended; and furthermore, assumptions which can be problematised. The basic assumption is the factual existence of the rule of recognition in institutional practice, as Hart notes in the *Concept of Law*:<sup>20</sup>

By providing an authoritative mark it [the rule of recognition] introduces, although in embryonic form, the idea of a legal system (95)

The assertion that it [the rule of recognition] exists can only be an external statement of fact (110)

its [the rule of recognition’s] existence ... must consist in an actual practice

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<sup>19</sup> Gardner disagrees, arguing that Hart conceptually relies upon soft-positivism, at least in the postscript to the second edition of *The Concept of Law*: see Gardner, *supra* note 1, p. 201, esp. note 3.

(111)

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. ... those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and ... its rules of recognition specifying the criteria of legal validity ... must be effectively accepted as common public standards of official behaviour by its officials. (116)

These assumptions, which must precede even understanding and so description, are captured, *in their evaluative setting*, by Raz:

It turns on evaluative conceptions about what is significant and important about central social institutions: i.e. legal institutions. But in claiming that these features are important one is not commending them as good.<sup>21</sup>

Raz is an extremely careful writer, which makes a particular point of interest out of his use of "i.e." *id est* ("that is") in the above quotation. Raz does not claim that central social institutions *might be* legal but rather that the central social institutions *are* (by definition) legal institutions.<sup>22</sup> This is, in Gardner's terms, "the true" for Hartian theory. It is *not* the empirical world as such, but merely the elision of law with central social institutions (that is, the elision of law and the exercise of centralised

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<sup>20</sup> These, and all other references, are to the 2<sup>nd</sup> Edition.

<sup>21</sup> Raz J, "Authority, Law, and Morality" in Raz J., *Ethics in the Public Domain* p. 236.

<sup>22</sup> This seems to be confirmed in *Practical Reason and Norms*, esp. p 154; but is placed alongside the enigmatic (and unexpanded) claim that "There can be human societies which are not governed by law at all". This claim is manifestly ambiguous in that it could refer to societies with centralised institutions which apply something other than law (though what this might be, and how it might be differentiated

authority), which is taken to be unproblematically “true”; inherent in the idea of law as such.

Law, from this perspective, is what courts, and other legal officials and institutions, *do*, and therefore is to be discovered, delimited, and defined through empirical observation of actual legal practices. At its extreme point, this would become a methodological approach indistinguishable from ethnomethodology or any other form of social scientific empiricism. However, legal positivism rarely<sup>23</sup> goes to such extremes, preferring instead to observe particular practices on the assumption that they are law and will provide coherent data about the existence and nature of law:

One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious.<sup>24</sup>

Conceptual legal positivists – and indeed other conceptual theorists of law – deny the possibility of such ‘pure’ observation, noting instead that law must be defined – differentiated as a specific social phenomenon – *before* it can be observed. In other words, for conceptual legal positivists “the true” is itself a problematic category, which must be resolved *before* analysis can move to “the important”; and yet it may be truth that makes something important, or even importance which functions to make something (appear) true. Fundamentally, however, from this conceptual perspective,

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from law is unclear). Therefore the alternative, that “societies not governed by law” refers to human societies lacking institutional centralisation, appears the more likely meaning.

<sup>23</sup> Morrison has suggested that the New Haven project is precisely a legal positivism of this type, a legalisation of the strictly social scientific positivism of the American Legal Realist movement. See Morrison J. L. *John Austin*, esp. chapter 6.

<sup>24</sup> Hart, *supra* note 10, p. 104.

the elision of law and centralised authority on which “the true” of empirical legal positivism is founded, is *itself* an act of choice.

Thus the conceptual position entails the belief that empirical legal positivists are labouring under a complete misapprehension of their own projects, which are in fact impossible. Therefore conceptual legal positivists start with a *definition* of law which underpins and structures their *subsequent* observations of the practice of law.<sup>25</sup> In other words, even before he had formulated it, conceptual legal positivists had *already* rejected Raz’s claim that “the concept of law is not a product of the theory of law.”<sup>26</sup> Conceptual positivists also prospectively rejected Hart’s claim that “legal norms have no “essence”, nothing that makes them distinctively legal”.<sup>27</sup> This search for an essence of law, this descriptive technique, was adopted by John Austin, and subsequently developed and refined by Hans Kelsen. It is to Austin’s work, and the beginnings of Anglo-American legal positivism that attention must first be turned.

### CONCEPTUAL LEGAL POSITIVISM (I): AUSTIN:

Austin sought to define law first and *then* identify its scope and limits, to determine the “province of jurisprudence”. Thus Austin’s work is primarily analytic,<sup>28</sup> or

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<sup>25</sup> This may be problematic for (LP\*), as a definition must come close to – if it is not in fact already synonymous with – a call for “formal merits”; a call Gardner specifically notes as being at odds with legal positivism. See Gardner, *supra* note 1, at p. 208.

<sup>26</sup> Raz “Two Views of the Nature of the Theory of Law: A Partial Comparison” in Coleman J. (ed.) *Hart’s Postscript* 1 at p. 36.

<sup>27</sup> Gardner J. “The Legality of Law” 17 *Ratio Juris* (2004) 168 at p. 170.

<sup>28</sup> Austin can, perhaps, be credited with inventing the school of analytic jurisprudence, however I have chosen to reject this term on the basis of what I perceive as subsequent misuse, but at any rate because the term can too easily give rise to misunderstanding. This is because Hart (whom I see as the exemplar of empirical legal positivism, or “descriptive sociology” in his own designation) is often termed – and indeed in certain respects is – an analytic jurist. For the purposes of the present work the crucial distinction is between the conceptual and the empirical, with the possibility that the analytic in fact straddles this border denying that term utility here.

conceptual, in nature. His first aim is to distinguish “law, simply and strictly so called” from things with which it “is often confounded”.<sup>29</sup> That is Austin sought to clearly differentiate law from those “objects to which it is related by *resemblance* [or] ... *analogy*”. Put simply, not everything called or considered to be law actually is law, and failure to recognise and combat this leads to confusion and the failure of legal theory. Austin’s task, therefore, was to define for law “the largest meaning which it has, without extension by metaphor or analogy”.<sup>30</sup> Austin had to, and did, *posit* a definition of law:

A rule laid down for the guidance of an intelligent being by an intelligent being having power over him.<sup>31</sup>

For Austin, “laws or rules, properly so called, are a *species* of commands”,<sup>32</sup> and commands are significations of desire “distinguished from other significations of desire ... by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded”.<sup>33</sup> This gives rise to Austin’s infamous sanction based model of duty:

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.<sup>34</sup>

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<sup>29</sup> Austin, *supra* note 15, p. 18.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* p. 21

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* p. 22.

The first thing which should be noted here is that, despite its importance to law and legal theory, this is a general definition of obligation. The definition is not restricted to legal obligation, and therefore is separable from Austin's definition of law, which may in turn be separable from his definition of obligation. Thus, even if law has to be obligatory in an Austinian model, this does not entail that Austin's particular definition of obligation has to apply.

There are two distinct problems with Austin's definition of obligation. The first, as Hart notes, is its unrootedness, or circularity, in that the sanction is *both* the cause and effect of obligation. Austin draws no distinction between obligation and compulsion.<sup>35</sup> However, *contra* Hart, this (alone) does not undermine Austin's definition of law as such. This is because not all commands, and less still all obligations, count as *law* in the Austinian model. Nonetheless, I do agree with Hart that Austin's definition of obligation – and consequently even his definition of positive legal obligation – is wrong.

Hart is surely correct that the presence, and breach, of an obligation legitimates sanctions. This being so, the existence of obligation cannot be predicated on the threat of sanction. However, this does not escape the second point, that the re-enforcement of the obligation (the reconstruction of the obligation) as a strictly legal obligation can be rooted in the nexus between obligation and sanction (in the form of centralised violence) a necessity indeed which Hart himself seems implicitly to acknowledge<sup>36</sup>. The key point here is that regardless of the *initial* source of the obligation, the peculiarly *legal* force of the obligation is the liability to sanction for breach.

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<sup>35</sup> See Hart, *Concept*, pp. 80-1 This is the distinction that Hart confusingly re-labels as that between "having an obligation" and (merely) "being obliged".

This is the second (the distinctly *legal*) problem with Austin's definition: it is problematic insofar as it entails that, absent a sanction no obligation (or at least no specifically legal obligation) exists to be breached. The two issues (obligation and sanction) remain conceptually distinct, but the duty to obey law remains a central aspect of the definition of law. Absent a duty of obedience there would be no command, absent a command there would be no law: a law is a command backed by the threat of a sanction in the event of non-compliance.

However, although for Austin all laws are commands, not all commands are laws: "Commands are of two species",<sup>37</sup> viz. the general and the particular. Laws are general commands only, a law or rule "obliges *generally* to acts or forbearances of a *class*".<sup>38</sup> Other commands are occasional or particular, aimed at specific people or events. Finally, Austin sought to separate laws from other forms of rules. A rule is laid down by a *superior* to an *inferior*, but the status of superior and inferior is a relative one.<sup>39</sup> Rules can have one of two sources, they can come from God or from men. Those emanating from God are styled "divine"<sup>40</sup> and are not relevant to the present study. What is important is the key distinction in those rules emanating from men, rules Austin terms "positive", the distinction between "positive law" and "positive morality":<sup>41</sup>

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<sup>36</sup> *Ibid* pp. 82-4, and 110.

<sup>37</sup> Austin, *supra* note 15, p. 25.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* p. 30.

<sup>40</sup> See, e.g. *ibid* p. 110.

<sup>41</sup> *Ibid*.



By the common epithet *positive*, I denote that both classes flow from human sources. By the distinctive names *law* and *morality*, I denote the difference between the human sources from which the two classes respectively emanate.<sup>42</sup>

Jurisprudence is the science of positive *laws*, not of positive rules, but is uninterested in the moral merits of those laws, merely their existence:

*Jurisprudence* ... is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.<sup>43</sup>

However, the key to the science of jurisprudence remains the differentiation of law from other normative orders, and particularly from other general rule based normative orders:

In order to [facilitate] an explanation of the marks which distinguish positive laws, I must analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law ... is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.<sup>44</sup>

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* p. 112.

In other words, laws properly so called (positive laws) do not emanate from just any superior, but only from the supreme superior, the sovereign. The sovereign is the “determinate political superior” of a given territory, that is of an “independent political society”. The sovereign must be habitually obeyed by the bulk of the population of that society, while offering *habitual* obedience to no determinate *human* superior.<sup>45</sup> The sovereign is thus understood as the *legally* illimitable political superior in a given territory.<sup>46</sup> Thus, the key distinctions between positive law and positive morality are that the latter does not emanate from a sovereign, and is not backed by sanction in the event of non-compliance. Therefore, determining the province of jurisprudence accurately involves consistently applying these criteria to delimit the scope of law properly so called, and then to determine its relationship with other normative orders.<sup>47</sup>

However, emanation from the sovereign can occur directly or indirectly; i.e. a law is “a direct or circuitous command of a ... sovereign”.<sup>48</sup> This does, however, entail that every law – as a species of commands – “flows from a *determinate* source, or emanates from a *determinate* author”.<sup>49</sup> Thus, “every positive law ... is a direct or circuitous command of a ... sovereign ... in the character of political superior: that is to say ... a command ... to a person or persons in a state of subjection to its author.”<sup>50</sup>

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<sup>44</sup> *Ibid.* pp. 116-7.

<sup>45</sup> *Ibid.* pp. 166-9.

<sup>46</sup> This is a logical entailment of the Austinian definition of law, see *ibid* pp. 211-3, however, does not imply that the sovereign be factually, morally, or politically unconstrained. This notion of sovereignty as absolute (*de facto*) unlimited power is specifically dismissed by Austin, see *ibid* p. 182. Moreover, *contra* Hart, the sovereign is *not* outside or above the law, Austin is in fact clear that the sovereign is bound by the law, but that the sovereign remains free to change the law should he wish; this distinction can be very important, especially when the sovereign is a collegiate body (e.g. the British Parliament). Here each member is bound by the law (in the normal way) until the collegiate body (*as a unity*) elects to change that law.

<sup>47</sup> *Ibid* p. 165.

<sup>48</sup> *Ibid.* p. 109.

<sup>49</sup> *Ibid* p. 117.

<sup>50</sup> *Ibid.* p. 118.

Austin's understanding of law is *essentialist*, only those rules possessing specifically defined characteristics are laws properly so called:

But of positive moral rules, some are laws proper, or laws properly so called: others are laws improper or improperly so called. Some have all the essentials of an *imperative* law or rule: others are deficient in some of those essentials, and are styled *laws* or *rules* by an analogical extension of the term.<sup>51</sup>

The primary task of the jurist then is to enumerate those essentials, and using the definition thus developed to differentiate law from non-law. However, it is important to realise that this distinction is not (necessarily) an evaluative one, between good law and less good positive morality. It is simply a matter of definition and analytic consistency and accuracy. For Austin, the essential characteristics of law (the necessary and sufficient criteria for recognising something as law) are: a sovereign command, backed by a sanction in the event of non-compliance, laid down as a general rule applying to a class of people or actions.

International law is not law properly so-called according to this definition, having neither emanated from a sovereign body, nor being supported by sanctions in the event of non-compliance.<sup>52</sup> Instead public international law is a branch of positive morality in the Austinian system, but no less a science of rules because of this.<sup>53</sup> Nor is it necessarily less efficacious:

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<sup>51</sup> *Ibid* p. 119.

<sup>52</sup> See *ibid.* e.g. pp. 112 and 123.

<sup>53</sup> *Ibid.* p. 112.

The given society may form a society political and independent, although that certain superior be habitually affected by laws which opinion sets or imposes.<sup>54</sup>

This is *not* a (positive) legal limitation because it is not obedience to rules posited. In other words, public international law does not emanate from a determinate source, and so cannot be understood as a command.<sup>55</sup> Thus public international law forms a branch of positive morality, this is a direct implication of the consistent application of Austin's definition of law to the data of international intercourse. It is not, however, a pejorative classification. The Austinian task, as noted is conceptual in nature. He set out to differentiate law from other normative orders, and in order to do so, he realised that he had first to define law. Law was a *confused object of observation*, and therefore pure observation could not help to define law. This is why Austin finally decides that definition is the key to understanding law, and that laws properly understood as the imperative commands of a determinate sovereign provide "the key to the science of jurisprudence".<sup>56</sup>

#### A NEW BEGINNING? THE LEGACY of H.L.A. HART:

If Austin exemplifies the conceptual strand of legal positivism – even though we may dispute, and shall certainly have occasion to refine, some of his central ideas,

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<sup>54</sup> *Ibid* p. 170

<sup>55</sup> See *ibid.* e.g. pp. 117-8. It is, I believe, possible to define public international law *as law* within a(n at least) neo-Austinian model. This is because Austin accepts that the "members of a Sovereign body" are subjects in relation to that body as a corporate entity. There is no reason not to perceive this as an accurate description of (the ideal of) the relationship between independent states and the "international community", although of course, Austin does not do so. On this possibility, see *ibid* pp. 218-23.

<sup>56</sup> *Ibid* p. 21.

definitions, and their necessary implications<sup>57</sup> – H. L. A. Hart equally exemplifies the empirical strand. In contra-distinction to Austin’s logical application of abstract definitions to observation, Hart defines the legal positivist project as an exercise in “descriptive sociology”. Where Austin sought logical consistency – in the face of common understandings of law – by the application of a *definition* of law, Hart sought descriptive accuracy in the true *identification* or *description* of law.

### Hart’s Concept of Law:

The basis of Hart’s criticism of Austin is that he did not adequately describe the law. In particular, the dogmatic Austinian definition of law as the sovereign command is perceived and portrayed as simply too unitary and too simplistic to describe plausibly an institution as complex as a modern legal system. Specifically, Austin’s definition of law (command backed by sanction) could not incorporate or explain legal powers (e.g. contract law, or wills) and had to reconstruct these unrealistically to stay within his dogmatic definition. Austin’s intellectual crime, in Hart’s eyes, was to allow his category choices to dominate over his empirical observations. However, of course, this leaves open the question of *what* to observe; and *why* to do so, i.e., how to *justify* that choice.

Hart’s solution to this was to focus less on abstract dogma (definitions) and to concentrate instead on observing and interpreting the actual actions of legal officials, whatever or whoever they might be. In essence, law, for Hart, was to be understood as the ordered distillation of the acts of legal officials. Law, for Hart, is *observed* as a

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<sup>57</sup> This is one of several tasks attempted by Hans Kelsen, and is elaborated upon *infra*.

real feature of real reality, it is not defined or accepted in its own counter-factuality or idealised existence, nor, obviously, is its functioning observed in the ideal – as it is for Austin or Kelsen – but only in certain regularities of actual empirical conduct.

Thus, for Hart, positivist legal theory is primarily descriptive; empirical rather than normative. Hart focussed on what legal officials actually did, rather than on what could be (syllogistically) derived from abstract moral orders, or dogmatic definitions. However, Hart's theory also remained rooted in the idea of rules, and more particularly of law as general rules,<sup>58</sup> legal norms. Thus Hart's focus on the conduct of officials was generic, not specific. Hart was a legal positivist, not a legal realist in the guise of sociological positivist.<sup>59</sup> He was not predicting the outcomes of particular cases in particular courts, but instead developing the concept of a legal system (*in abstracto*).<sup>60</sup>

Drawing on his own observations Hart acknowledged *both* a degree of discretion in the acts of legal officials, *and* a degree of constraint brought about by the law. Law *determined* some decisions, while it merely *conditioned* others. This is the origin of the famous Hartian distinction between cases falling (respectively) into the core and penumbra of legal rules.<sup>61</sup> However, this theory of interpretation is of secondary importance, at least until the theory of norm identification is itself more fully explored. Unfortunately, Hart does not really offer a definition of the object of his

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<sup>58</sup> Hart "Positivism and the Separation of Law and Morals" in Hart *Essays in Jurisprudence and Philosophy* 49 at p. 81; see also *The Concept of Law* chapter 8.

<sup>59</sup> See Hart, *supra* note 9, p. 64 and also pp. 132-4.

<sup>60</sup> Hart is not a conceptual legal positivist in my sense of that term, simply because his focus is on the 'empirical reality' of a legal system assumed to be factually extant. Consequently, although he terms the *object* of his analysis the concept of law, that object is, itself, empirical in nature. Hart's project remains descriptive; empirical, not conceptual. On Hart's focus on legal systems rather than law, see note 87, and accompanying text, *infra*.

<sup>61</sup> *Supra*, note 9, pp. 121-32.

analysis; in fact he expressly notes that his “purpose is not to provide a definition of law”.<sup>62</sup> Despite the title of his central text, Hart does not offer a *Concept of Law* as such. This, I believe, is because his primary focus was not law as such, but the evolution from pre-legal to legal thought, and the necessity of creating an *institutionalised legal system* to ensure this.<sup>63</sup>

What is clear is that, for Hart, the legal system is the advanced legal order, the mere set of legal rules the primitive, having only the potential to evolve into a legal system, and only a true legal system will (indeed can) have surmounted all the defects of pre-legal decision making.<sup>64</sup> The defining element of such a system is that it is formed from “the union of primary and secondary rules” unified by a rule of recognition. This union is described by Hart as:

Not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled ... the jurist<sup>65</sup>

That is:

In the combination of these two types of rules there lies what Austin wrongly claims to have found in the notion of coercive orders, namely, ‘the key to the science of jurisprudence’.<sup>66</sup>

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<sup>62</sup> *Ibid* pp. 16-7.

<sup>63</sup> *Ibid*, pp. 91-9.

<sup>64</sup> *Ibid* esp. p. 93.

<sup>65</sup> *Ibid* p. 97.

<sup>66</sup> *Ibid* p. 79.

Primary rules are direct legal obligations, the type of rule Austin claimed formed the whole of law, orders backed by sanctions. Secondary rules are rules about rules, about how to find rules, how to alter rules, and who may apply those rules, and how they may do so. Secondary rules give institutional existence to primary rules (even when those primary rules are not generally followed in practice), but can themselves only be discovered through observation of official actions.<sup>67</sup> What the union of primary and secondary rules does is to allow us to structure and focus our observation of judicial practice, and thus to describe the law more accurately. This is achieved, in no small part, by our newly enriched and nuanced understanding of rules. However, it also relies – in complex societies – on a second distinction between system officials and legal subjects.<sup>68</sup>

However, it is equally important to understand the role of rules in Hartian legal theory. Law is not simply a description of what people actually do,<sup>69</sup> any more than it is a description of what they morally ought to do. Law is a description of what people are legally obligated to do, as understood by the rules against which legal officials will judge the conduct of others.<sup>70</sup> This creates a distinction between conduct and (legal) obligation, and between (legal) duty and habit,<sup>71</sup> which can only be explained in terms of a distinction between the internal and external points of view.<sup>72</sup>

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<sup>67</sup> This is true even for the so-called private powers, the secondary rules allowing e.g. for the creation of contracts or wills. The question is not, is never, how private individuals *use* these rules, but rather which private changes will be officially sanctioned; which private exercises of powers will be *recognised* and, thus enforced, by legal officials.

<sup>68</sup> *Ibid* pp. 59-60.

<sup>69</sup> Actually, this is exactly what law in a primitive society is for Hart; the role of validity in the Hartian schema is to preserve the existence of a rule even in the face of endemic non-compliance. This is not possible in simple societies, where laws just are, rather than in complex societies where they exist by virtue of their pedigree (validity), see p. 69 *ibid*.

<sup>70</sup> *Concept* (2<sup>nd</sup> ed.) pp. 136-41.

<sup>71</sup> Hart, *supra* note 12, pp. 54-6.

<sup>72</sup> Actually, Hart's main disciples Raz and MacCormick seem to agree that Hart's distinction here, although a good start, is too crude, as the internal perspective can itself be divided into two, a



An external point of view is a purely empirical observation of the conduct of citizens, and would, as Hart explains, draw no distinction between the observation that drivers tend to stop at red lights and the observation that they tend to listen to the radio whilst so stopped.<sup>73</sup> It is the perspective of an extra-terrestrial visitor, and of limited utility to understanding social organisation generally, and the law in particular.<sup>74</sup> The internal point of view is another matter entirely. The internal point of view in relation to complex modern societies requires another distinction be drawn, that between officials and subjects of the legal order, as only the former require an internal perspective, the latter simply obey the law (for whatever reason) playing an essentially passive role in the legal system. Austin's "habit of obedience" covers citizens well, but:

The weakness of the doctrine is that it obscures or distorts the other relatively active aspect, which is seen primarily ... in the law-making, law-identifying, and law-applying operations of officials or experts of the system.<sup>75</sup>

It is thus from the actions of such "officials and experts" that the true content of the legal system is to be abstracted. This is where the inherent weaknesses of the

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perspective of understanding and one of commitment. This is well captured in the postscript to MacCormick's *Legal Reasoning and Legal Theory* (2<sup>nd</sup> ed.)

<sup>73</sup> See MacCormick N., *HLA Hart* p. 30.

<sup>74</sup> *Ibid* pp. 86-7. It should be noted that Hart does make reference to three points of view here, two external and an internal view of commitment to the system. One external view acknowledges and factors in the commitment of *others* to the system. These seem essentially analogous to Raz's "S1, S2, S3" perspectives. See Raz J., *Practical Reason and Norms* pp. 171-7.

<sup>75</sup> *Ibid* p. 60. It is also worth noting the very visual implications of Hart's analysis here, the phrase "obscure or distort" in particular seems to imply an object of direct observation, and further to imply that the weakness of Austin's theory is its limited utility as a grid of intelligibility. Where Austin understands observation as a metaphor, Hart takes it to be a concept. This will be developed *infra*; in the terms to be deployed there, Hart is basically accusing Austin of providing analysts with a poor quality microscope.

observational approach to legal theory begin to surface. The rule of recognition is the ordered distillation of the pronouncements of legal officials. This leads firstly to difficulties in identifying legal officials,<sup>76</sup> and secondly in ordering their actions so as to uncover underlying rules. No-one but system officials can create an institution, and only an institution can give law institutional (counter-factual) existence. However, if the existence is counter-factual, it can only be demonstrated by reference to the institution, but the institution is justified and identified only by reference to the rules it produces and applies. This is patently circular.

The issue of counter-factual existence, and the different senses in which this may be understood, explained, *and* recognised is clearly crucial to the present project. With that in mind, a brief explanation of what this term means, and how it is to be used, is necessary. Counter-factual entities have no *real* existence, no *direct presence* in the corporeal world. They are precisely *not* “brute facts”. Instead, their existence is dependent on human agency and human belief; consequently they exist (at least ultimately) because, and *therefore as*, they are defined by human beings. Law has such a counter-factual existence. It is not *real* in the sense that an undiscovered (or uncharted) island is real. Consequently legal theories are not evaluated by descriptive accuracy, because the object of their analysis is – at least in part – *constituted by their description*.

However, laws can be understood as counter-factual in at least two distinct ways.

They can be purely counter-factual, identifiable only through their congruence with an agreed definition (as in Kelsen, Austin, and, most notably, in Fuller). *Alternatively*,

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<sup>76</sup> This is of particular pertinence in theorising international law, where the institutionalised monopoly of violence is theoretical only.

laws could be understood as counter-factual only in the more limited sense that they do not have a *direct* existence, observable in the *actual regularities* of their subjects' conduct; but only an *indirect* existence in their recognition by the authoritative institutions of a given political order. Here the existence is not purely counter-factual because it is dependent upon the *factual existence* of the central institutions. It is dependent upon the *factual existence* of the continuing authority of those institutions whose beliefs and behaviour sustain the rules' existence.<sup>77</sup> In this sense then, the rules have an institutional existence rather than a purely counter-factual existence.<sup>78</sup>

#### Purpose and Reality: Hartian Methodology:

Hart's methodological commitment to the empirically verifiable led him to focus on the activities of actually extant and authoritative institutions. The move from the pre-legal to the legal is driven by the efficiency gains produced by institutionalisation. Consequently, Hart was principally concerned with those gains. As Dyzenhaus notes:

Hart's account of the rule of recognition explains legal authority as an institution which comes into being to maximise the efficacy of command structures in a complex society<sup>79</sup>

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<sup>77</sup> Again the *direct* nature of observation should be noted here. Hart takes observation to be a concept in the sense of its being the real observation of physically extant phenomena; of a concept of law which resides outside legal theory. On the two views of observation, see notes 105-110, and accompanying text, *infra*.

<sup>78</sup> We could, therefore, follow Searle, and call such rules (or the ideal, e.g. law, which they comprise) "institutional facts". Indeed I am tempted to do just that, but again an ambiguity slips in (which shall be explored more fully in the next chapter) between two forms of "institutional fact" one derived from actual institutional behaviour (the Hartian institutional fact), the other purely counter-factual and based on the idea of a "thought-object" (MacCormick's advance on the Hartian model). See also MacCormick N. and Weinberger O. *The Institutional Theory of Law*.

This caused Hart to perceive the law as the most important of the institutionalised normative orders:

When courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules.<sup>80</sup>

As we shall have cause to consider, this may also mean that Hart was trapped by his own logic; forced into perceiving the (content of the) most important of the institutionalised normative orders (in any given society) as law:

This [the rule of recognition] will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.<sup>81</sup>

From the inefficacy of a particular rule ... we must distinguish a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say ... it never established itself as the legal system ... or ... that it had ceased to be the legal system.<sup>82</sup>

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<sup>79</sup> Dyzenhaus D. "Fuller's Novelty" in Witteveen and van der Burg (eds.) *Rediscovering Fuller* 78 at p. 94.

<sup>80</sup> Hart, *supra* note 10, pp. 101-2.

<sup>81</sup> *Ibid* p. 94.

<sup>82</sup> *Ibid* p. 103.

Hart's declared aim is to "provid[e] an improved analysis of a municipal legal system" which he does not define, but whose existence he takes for granted.<sup>83</sup>

Unfortunately, there is a paradox here, an early appearance of what may be called "the inductive fallacy." Hart defines law as the actions of legal officials, and legal officials as those whose actions demonstrate law – but why focus on courts rather than public bars or laundrettes? The obvious answer is, of course, that Courts are where "law" happens, but this, in turn, presupposes a definition of law. That is, the definition which Hart sets out to distil from observation in fact predates and constructs his observational perspective, and therefore the data of his observation. Hart has *already* decided what he wants to understand and focus upon (the exercise of centralised authority) in his analysis of *law*.

Law, for Hart, is about rules,<sup>84</sup> and rules can be formed into either sets or systems. This is equally true of legal rules. Therefore, not all legal rules (laws) are part of a legal system, and law does not rely on the legal system for its existence.<sup>85</sup>

Unfortunately, the specific quality which would advert to the existence of law (or the designation of a particular rule as a legal rule) is not provided by Hart. That said, it is I believe fair to assume that (despite superficial protestations to the contrary) Hart implicitly adopted Austin's definition of law as a command (or, for Hart, rule) backed by a sanction (for Hart serious social sanction).<sup>86</sup> Law then has *two* fixed characteristics, it is structured around rules, and its decisions are authoritative.<sup>87</sup>

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<sup>83</sup> This also shows the implicit bias in Hart's theory against perceiving public international law as "law", as he defines law solely in terms to be drawn from its municipal, institutionalised, paradigm cases.

<sup>84</sup> This is stated clearly, e.g. *ibid* p. 87.

<sup>85</sup> See, e.g., *ibid*, pp. 67, 79, and chapter 10.

<sup>86</sup> *Ibid*, esp. pp. 82-4 and 110.

<sup>87</sup> The idea of rules is, of course, intended to be wider and more nuanced than that of "Commands", encompassing ideas *both* of obligation (as opposed to compulsion) and of powers, of secondary rules. However, the success of this distinction depends on the assumption that Hart is correct, and Kelsen

However, Hart is making two other, and more important, points here. Firstly, not every rule backed by a sanction is law, *and* secondly not every law – still less every breach of law – is *directly* backed by a sanction. Therefore, according to Hart, we need a better technique to identify law, a technique which is manifested in the Rule of Recognition. The failure Hart detects in Austin is the latter's implicit reliance on a "one size fits all" rule of recognition, which is declared by Hart to be empirically deficient, as he highlights:

The failure to see that the "command" of a sovereign is only one particular form of a general feature which is no doubt logically necessary in a legal system, *viz. some* general test or criterion whereby the rules of the system are identified.<sup>88</sup>

This is a problem, and one Hart determines to solve empirically. He does so by refocussing the question, instead of asking "what is law?" Hart asks "how do we identify a rule of *this* (x) system?"; with the system simply assumed to be a legal system. Thus, in attempting to refine Austin's question, Hart in fact reifies the legal system into an empirical reality and the object of direct observation.

Again, this alteration in focus is well captured by Gardner:

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wrong, in claiming that powers should *not* be understood as "dependent norms". Moreover, Hart is, in fact, ambivalent about the relationship between sanctions and law. He acknowledges that sanctions *are necessary* to the concept of municipal law (p. 213), but also acknowledges (p. 215) that they may not be necessary to the designation of PIL *as law*; however, PIL would still require to be "binding" in some other manner.

<sup>88</sup> Hart "Definition and Theory in Jurisprudence" 70 LQR (1954) 37 at p. 38 note 1.

Hart showed how ... legal norms have no “essence” nothing that makes them distinctively legal, except that they are norms belonging to one legal system or another ... One needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-legal systems. Only when armed with that information can one identify legal norms (including laws) as legal norms. One distinguishes laws ... as norms belonging to legal systems. *Pace* Kelsen, one does not distinguish legal systems as systems made up of laws ... legal systems are the basic units of law.<sup>89</sup>

This paradigmatic shift in thought is evident in Hart’s Inaugural Lecture “Definition and Theory in Jurisprudence”.<sup>90</sup> In this essay, Hart rejected the idea of advance definition as a technique for reaching or improving our understanding of legal concepts. Instead, he shifted the focus of analysis to the contextualised *use* of legal terminology, and claimed to be *elucidating* the underlying concepts.<sup>91</sup> However, in order to develop and test understandings in this way the legal system must itself be *presupposed* as the objective domain of analysis. In other words, absent a controlling definition, some other external arbiter of truth or accuracy is required, and only a legal system *presupposed as extant and legal*, can fulfil this role. The problem, of course, is that this technique cannot then be transferred to the legal system as such, unless *another* system (or category) is posited as providing the objective domain of analysis in which the correct identification and elucidation of legal systems (as such) could be evaluated.

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<sup>89</sup> Gardner “Legality” 170-1 paragraph breaks suppressed, and note omitted.

<sup>90</sup> *Supra*, note 85.

<sup>91</sup> See e.g. *Concept* p. 208.

Although they cannot define law as such, (after all, for Hart, nothing can<sup>92</sup>) rules are a very important aspect of the Hartian legal world view. The key defect Hart perceived in Austin's work was the idea that only one kind of rule, the sovereign command, could be considered to be law. Hart disagreed as, for him, this would "distort the ways in which [laws] are spoken of, thought of, and actually used in social life".<sup>93</sup> Austin's description was incomplete and inaccurate, he had allowed logical consistency to override empirical observation, that is, he had fallen into the classic dogmatist's pitfall. This was a mistake Hart would not repeat. Law existed, it could be observed and described, but only by focussing upon "simple truths about different forms of social structure [, truths which] can, however, easily be obscured by the obstinate search for unity and system where these desirable elements are not in fact to be found."<sup>94</sup> Observation must be given priority over dogmatic definition, and – assuming the "system" in the quotation to be a legal system, as no other system seems appropriate – law as such must be conceptually separated from the legal system.<sup>95</sup>

A contradiction begins to surface here, as Hart seems – to say the very least – unsure about the relationship between law and legal system. Outwith the *Concept of Law*, as Gardner suggests, Hart's work appears to indicate that the two are inseparable, that understanding of the law is derivative on understanding of the legal system. One way

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<sup>92</sup> See note 62 and accompanying text *supra*; *Concept* pp. 16-7.

<sup>93</sup> *Ibid* p. 78. Here, I believe, we see the impact of the linguistic philosophy of Hart's friend J. L. Austin; Hart, following Austin, believed that "a sharpened awareness of words [would] sharpen our perception of the phenomena". (*ibid* p. v). Once more, the observational overtones of Hart's language are revealing, Austin's work 'distorts' an object of analysis (the law) itself extant externally to that act of observation.

<sup>94</sup> *Ibid* p. 230.

<sup>95</sup> This seems to me to be the basic claim of chapter X of the *Concept*; however, Hart never talks about primitive sets of "laws", but only ever of sets of "rules" (which seem in his analogies to cover everything from etiquette to PIL). Moreover, and more confusingly, he does at times refer to the international *legal system* but he also notes expressly "the rules [of PIL] which are in fact operative constitute not a system but a set of rules" concluding that a basic rule of recognition does not (as yet) "represent an actual feature of the system"; *Concept* p. 231.



to avoid contradiction would be to ignore chapter 10 of the *Concept*, to treat it as a mistake, or a red herring. But, of course, that chapter was *not* excised from the second edition, and thus we can assume Hart did not perceive it in that way. Consequently, we must consider other ways of reconciling this apparent contradiction.

The key lies in Gardner's analysis itself:

One needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-legal systems.<sup>96</sup>

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

Thus, for Hart, law *is*, and law is what legal officials consider it to be. Law is discovered by observing, classifying, and understanding the activities (and rhetoric) of legal officials. This is accomplished through structured, but responsive, empirical observation and does not rely on a metaphysics of definition nor of morality. Law has

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<sup>96</sup> See note 87, *supra*.

little by way of fixed characteristics, it has a thin ontology<sup>97</sup> based on an idea of rules and obligation or authority; (advanced) legal systems bear the additional identifying characteristic of a rule of recognition unifying a synthesis of primary and secondary rules. There is, however, no necessary connection between law and legal system, nor between law and morality, in the Hartian universe. It is important to note that this claim is staked, by Hart, as a factual, not a normative, one.<sup>98</sup>

So, Hart's primary focus is really the *institutionalisation* of the law in the form of a legal system, the move from the "pre-legal to the legal world" and the societal advantages this brings. However, as Fuller notices, and implicitly bases much of his critique upon, this raises an undeclared methodological choice or even contradiction. Is data to be observed because of its *legal* or rather because of its *institutional* nature?<sup>99</sup> Although Hart acknowledges that the existence of law does not depend on the existence of an institutionalised legal system, he does not explain the specifically legal form of the former, nor for that matter does he explain the specifically legal form of the legal system. This is where the nexus to authority (i.e. the official monopoly of 'legitimate' violence) comes into relief, in what Fuller terms a "confusion" between "deference to constituted authority and fidelity to law".<sup>100</sup>

"For Hart, the foundation of any legal system is an observable rule of recognition that guides official behaviour in the ascertainment of laws."<sup>101</sup> The rule of recognition

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<sup>97</sup> On the possible ontologies of law, see Amselek P. and MacCormick N., (ed.s) *Controversies About Law's Ontology*

<sup>98</sup> It may also be important to note, per Gardner, that both claims are radically overstated, and indeed wrong, see *supra* note 1, pp. 222-5.

<sup>99</sup> Raz, see note 21 *supra*, appears to avoid contradiction here, but only through an act of *choice* which completely elides the institutional and the legal, making the former the empirical identifier of the latter.

<sup>100</sup> Fuller L. *The Morality of Law* (2nd ed.) p. 41.

<sup>101</sup> Kramer M., "The Rule of Misrecognition in the Hart of Jurisprudence" 8 OJLS (1988) 401, at p. 406.

*actually exists*, and is *actually observable*, it is observed in the regularities of official conduct, the law – in its counter-factual existence – is the *product*, the effect, of these regularities, thus it cannot be their cause. In primitive, or pre-legal,<sup>102</sup> societies, law can still exist, but it cannot do so counter-factually. In other words, in such societies, the *existence* of laws is real, and is to be ascertained from the empirical regularities of *actual conduct*. A legal rule exists where people actually modulate their behaviour according to its demands; should this actual regularity wither, so would the rule. The rules have no distinct ontological status, only empirical existence, and when they can no longer be empirically observed, they no longer exist. “If, there [in a primitive society], the internal point of view is not widely disseminated there could not logically be any rules”.<sup>103</sup>

In advanced, or legal, societies, matters are quite different. Here the rule of recognition renders the actual empirical regularities of the masses’ conduct, in relation to any *specific* rule, irrelevant.<sup>104</sup> What counts instead are the regularities of official conduct. Where legal officials customarily recognise and implement (as law) any particular form of rules – generally rules from a specific source or set of sources – these rules can exist (regardless of how the masses react to them) by virtue of that recognition and implementation:

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<sup>102</sup> For Hart, a pre-legal society is a society without a legal system; not, *necessarily*, a society without law.

<sup>103</sup> Hart, *Concept*, p. 114.

<sup>104</sup> See note 24, and accompanying text, *supra*. The distinction is between the existence of individual rules, which does not rely on their empirical efficacy, and the existence of the legal system as a whole, which *does* rely upon its empirical efficacy. For the legal system, as such, to exist there must be a general obedience of the rules (as a whole), by the citizenry; and an acceptance of the rule of recognition by system officials. *Concept* p. 113. This would seem also to entail a general acceptance by the subjects of the system, of the institutions of the system, so that officials could be identified, and a rule of recognition distilled.

The rules of the simple structure are, like the basic rule [the rule of recognition] of the more advanced systems, binding if they are accepted and function as such.<sup>105</sup>

Conceptually, in order for a legal system to exist it must have a rule of recognition. However, this rule has no necessary content. In practice its content will vary from legal system to legal system. Nonetheless, in each system, behind the surface differences, is an underlying identity, rules are recognised on the basis of an agreed formal regularity (their source), the legal system is identified by the existence of a rule telling us how to recognise legal rules of that system; by a rule of recognition. The rule of recognition – itself directly derived from the observation of *actual institutional behaviour* – facilitates the institutional existence of law, its counter-factual existence, or validity.

The rule of recognition, like the existence of a legal system, is a matter of *fact*, an empirically observable reality. This is the key difference between Hart and Raz on the one side and Austin and Kelsen on the other. All agree that law, properly understood as a legal positivist thesis, is capable of impartial observation in two senses: first, law can be impartially observed; second, law itself can ‘impartially’ observe the world. It is the second point, or rather the obviously metaphorical nature of the second claim, which best illustrates the disagreement over the first. The key is understanding the specific sense of impartiality implicit in law. This is well captured by MacCormick:

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<sup>105</sup> *Ibid.*, p. 230.

[T]here is nothing antipositivistic about saying that law is not value-free.

Nobody in their right mind – and there are at least some positivists who are in their right mind – has ever suggested or would ever suggest that the law itself is value-free.<sup>106</sup>

Rather, law is impartial in the very specific sense that it is fully cognisant of its own partialities and biases and it applies these *consistently*. Substantively, law is arbitrary, it is a codification of values, a “congealed politics”<sup>107</sup>, or the *insulated* outcomes of political struggles.

However, and this is just as important, the same *metaphorical* sense of impartial observation applies to the analysis of law itself. Here, however, definition plays the role of legal rules; definition *structures observation in a consistent manner*, just as rules would structure evaluation in a consistent manner. Thus on the one hand, Austin and Kelsen understand observation as a metaphor; they seek to describe a counterfactual ideal; the ideal idea of law as a *product* created and ‘signified’ by the existence of defined empirical phenomena, but itself an entity additional to those phenomena. Hart and Raz on the other hand, take observation to be a concept; they seek to describe *actual behaviour*. This alters the focus of observation and analysis quite dramatically. Austin and Kelsen focus on the *legal* qualities which make law law. That is, these theorists offer defined empirical identifiers of law, features which differentiate law from other social (and even regulative) practices.<sup>108</sup>

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<sup>106</sup> MacCormick, *supra* note 70, p. 233.

<sup>107</sup> Asmal K., “Truth Reconciliation and Justice: The South African Perspective” 63 MLR (2000) 1 at p. 15 note 72

<sup>108</sup> In both cases, and in my opinion inaccurately, these identifiers are defined as the connection to centralised violence in the form of sanction for breach. *However*, and this is the key point, it is the

Hart and Raz on the other hand, focus on the *institutional* qualities of law in advanced societies<sup>109</sup> – or in more primitive circumstances on the factual existence of law (regularities of conduct, laws like those of the natural sciences)– which provide law with an *actual* existence to be observed. Thus there must be *some* factually ascertainable regularity: be it the actual regularity of conduct which gives real existence to legal norms in a primitive society; *or* the actual social centrality of the norm-issuing (and *therefore* legal) institution. Here it is the *actual existence* of the institution which facilitates the institutional existence of legal norms in advanced societies.

Hart has to focus on the factually ascertainable, that is the institutions, and seek “the law” as a unifying concept abstractable from the multiplicity of institutionalised legal systems. Without a Rule of Recognition there can be no legal system – though there can be law based not on the Kelsenian, or institutionalised, model of “normative imputation” (an if-ought understanding) but on a purely natural scientific notion of causation (an if-then understanding) – but without system officials we have no-one from whose conduct and rhetoric a rule of recognition could be abstracted. Moreover, without a legal system, we cannot have legal officials. The more we concentrate, the more the rule of recognition begins to sound like a *definition* of law – or perhaps it is *legal system* that is defined, and the rule of recognition observed so as to faithfully portray the methodological and substantive *differences* between legal systems.

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presence of the defined identifiers, and not (necessarily) institutional location *as such*, which indicates the existence of laws and legal systems.

<sup>109</sup> Perhaps this is clearest in Raz’s unguarded conflation, “central social institutions: i.e. legal institutions” (*supra* note 21). It is not the presence of any defined empirical feature (e.g. the relation to sanctions), as such, which identifies law (as law), but rather the status of the body (the institution) from

For Hart, the rule of recognition *as a concept* – the existence of a rule of recognition (regardless of its particular content) – is the identifying mark of a legal system. When there is a body of legal officials who can be factually observed as adopting a common standard (whatever that might be) for the identification (the *recognition*) of legal rules, *and* where this body has access to (or, more accurately, is subservient to the possessor of) the institutionalised monopoly on legitimate violence, then a rule of recognition, and hence a legal system, exists. What that body of officials recognise is the law (and therefore *must be* law) by virtue of their recognising (and applying) it. The rule of recognition *as substance* facilitates the identification of rules within a given legal system (which is now effectively reduced to an institutionalised coercive order) based on abstractly formulating what that system's officials will recognise, implement, apply, and enforce. So long as the system remains generally efficacious, the content of the rule of recognition remains the definition of law.

There are, however, two things which can be said with confidence about law in the Hartian system: first, law is about rules; second, law is capable of being observed. These statements are true of law *as such*, and not merely of (laws in) legal systems. This means that rules *must* have an existence. However, this existence *could* be either factual or counter-factual, though in either case the rule must remain capable of being observed. From here it is apparent that the factual existence of a rule (the pre-requisite of the factual observation, identification and description of a rule) can *only* refer to the regularities (the law-like appearances) of *actual* conduct. Laws factually exist only where they are (at least almost) invariably obeyed. This must be the status of law(s) in

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which regulative commands (rules of *law*) emanate. The institutional origin of the rule, rather than any specific characteristics, serve to distinguish legal from non-legal rules.

a primitive or pre-legal society.<sup>110</sup> As Hart himself puts it “in the simpler form of society we must wait and see whether a rule gets accepted as a rule or not”.<sup>111</sup>

The move to an advanced, or *legal*, society – manifested through the appearance of a rule of recognition and consequently of a legal system – allows for the counter-factual existence of norms (the laws of the system). Hart continues this quotation thus: “in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition”. Validity then is something more than existence, or rather validity is a *different* form of existence, validity *is* counter-factual existence.<sup>112</sup> In an advanced system laws can exist by virtue of their pedigree (their *validity* in Kelsen’s sense<sup>113</sup>), regardless of whether or not conduct actually conforms to their demands.<sup>114</sup>

Put more precisely, in the Hartian system, the counter-factual existence of these laws is based on the *institutional recognition* of their pedigree. This institutional recognition is, of course, the source, the content, and indeed the very existence of the rule of recognition. The rule of recognition is (and must be) capable of being factually observed, and it is through that factual observation that the observation of counter-factually extant, valid, legal norms is facilitated. This means that legal norms – despite their admittedly counter-factual nature – remain capable of factual observation, but only because it is *not* the rules, but the *institutional behaviour*

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<sup>110</sup> *Concept* 2<sup>nd</sup> ed. Pp. 234-5.

<sup>111</sup> *Ibid* p. 234.

<sup>112</sup> This is confirmed by Hart *ibid* pp. 100-110, see esp. p. 103.

<sup>113</sup> Again, we must be careful here. Hart and Kelsen *do not* agree on the nature of validity for at least two reasons. Firstly, for Kelsen, validity is the *only* form of existence or ontology a norm can bear, whereas for Hart a norm can be said to exist from the simple presence of behavioural regularities. Secondly, for Kelsen, for a norm to be valid *as a legal norm* it requires certain formal merits (the connection to the *grundnorm* and to force), for Hart this is not true. See Gardner, *supra* note 1, p. 208.

<sup>114</sup> *Concept* 2<sup>nd</sup> ed. pp. 100-110; see also notes 24 and 102, and accompanying text, *supra*.



sustaining them, which is being observed. The key point is that *any* behaviour of authoritative institutions can be law-creative; this contrasts with the conceptual approach, which defines and delimits in advance those behaviours which are law-constitutive.

Therefore, the rule of recognition itself has (and must have) a *real existence*, it is supported by observation (not by logical hypothesis) it is a *datum* of natural reality because it must “represent an actual feature of the system”.<sup>115</sup> The rule of recognition exists only if it is “accepted and function[s] as such”.<sup>116</sup> This entails that the Rule of Recognition (though not the norms and other features of the legal system it identifies) must itself be susceptible to natural scientific methodologies of observation:

One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the *external statement of fact* that the system is generally efficacious.<sup>117</sup>

Moreover, it is this *real existence* (of the rule of recognition, and the centralised authority it presupposes) which in turn *creates and sustains* the counter-factual existence of legal norms; whether they are in fact obeyed or not; i.e. whether or not they retain factual existence (“are accepted and function as such”). Only if *officials* were to fail (*qua* officials) to enforce – i.e. to recognise and implement – a rule (or, more profoundly, a rule-making procedure) could the rule’s counter-factual existence (its claim to validity) be lost. The mere fact that the populace of any given advanced

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<sup>115</sup> *Concept* p. 231.

<sup>116</sup> *Ibid* p. 230.

<sup>117</sup> Hart, *supra* note 10, p. 104, emphasis added.

society do not obey *a particular* legal rule (of that society's legal system) does not deny that rule existence (as it would in a primitive society).

But, what this means in practice is that the data is in fact observed – as Fuller suspected and charged – on its *institutional* nature, and not on its *legal* nature at all. The sociological observation of the “internal point of view” is derivative of, and dependent upon, the natural scientific – empirical or “external” – observation of the factual existence of authority. It is this ‘fact’ of authority which identifies data *as legally relevant*.

Law is being defined as, and so must be confused with, “deference to constituted authority”. This leaves one central question, which is not directly addressed by Hart: what is the nature, or the empirical identifiers, of this institutional existence? Nor, more fundamentally and importantly, does Hart appear to engage with the underlying issue of which *type(s)* of institution is/are capable of conferring this institutional (i.e. counter-factual) existence. He is, however, clear that efficacy is a necessary criteria,<sup>118</sup> and implicitly, that it may even be a sufficient criteria.<sup>119</sup>

The rule of recognition, as an analytic tool, is a *general* concept; i.e. legal systems *must* contain rules for recognising valid norms. This general concept is equally compatible with either a purely counter-factual, or an institutional, understanding of law. However, for Hart – and as entailed by Hartian methodology – the rule of recognition is also (*inherently*) an *institutional* concept. From the Hartian perspective the very *existence* of the rule of recognition lies in its *empirical observability*, and this

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<sup>118</sup> *Ibid* p. 233.

in turn pre-supposes a dominant centralised (judicial) institution whose behaviour or *judgment construction* can be observed. Thus the Hartian rule of recognition can *only* focus on institutions, and never on forms of law alone.

However, Hart's observation is not, in this regard, a *pure observation*, but a mediated one. Although both direct their attention to the behaviour of actually extant (and actually socially central) institutions, the focus for Hart, and *contra* American Legal Realism, is on how judgments are constructed, how they are legitimated; that is, it is a focus on judicial rhetoric; *not* on the substance of the judicial decision, let alone its real world impact. It is in this judicial rhetoric that the counter-factual existence of the legal norms resides.

However, the important point is that the rule of recognition itself is a *product* of observation, because this in turn presupposes an *object* of observation, in this case the *actual* institutional behaviour. This means, logically, that the rule of recognition is an *effect* of a cause which must precede it. Therefore, the existence of the rule of recognition is not a cause (nor a signifier) of the birth or advent of a legal system, but rather an *effect*. Hart's is, quite simply, *not* a theory of law, but rather a theory of the institutional centralisation of adjudication and force:

The absence of an official monopoly of 'sanctions', may be serious ...  
however ... the lack of official agencies to determine authoritatively the fact  
of violation of the rules is a much more serious defect.<sup>120</sup>

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<sup>119</sup> *Ibid*, chapter 9 and pp. 213-4. See also p. 113 where Hart suggests "general obedience" and official commitment as the necessary *and sufficient* features of a legal system.

Judges [possess] ... the exclusive power to direct the application of penalties by other officials. These secondary rules provide the centralized official ‘sanctions’ of the system.<sup>121</sup>

It is a theory of *political power*, merely masquerading as a theory of law, and this is because the “legal system” is *defined* as the totality of “central social institutions: i.e. legal institutions”.

In this sense then, Hart’s theory is essentially Hobbesian, it is the legitimation of a perceived need to *impose order* – to substantivise<sup>122</sup> and determine the law. In fact, the Sovereign continues to haunt legal theory in its Hartian guise, because the Sovereign Command is the thing *recognised by* (and/or imposed upon) the judges. The sovereign command remains the *cause*, judicial recognition and sociological observation (which between them constitute the rule of recognition) being merely the *effect* and *explanation* of that underlying cause.

To *choose* to focus on the officials’ actions – their *consent* to this imposed order – is to fudge the issue, automatically to legitimate the institution whose actions are actually under observation (the Sovereign), whose *order* (or command) is recognised, with the signifier “law”. Of course, consent may seem *prima facie* an inaccurate, even an unfair, parody of the Hartian demand for a “critical reflective attitude”. However, this is not necessarily so. What must be constantly borne in mind is the nature and meaning of critical reflective attitude. This is *not* a critical reflection *on* the rules and

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<sup>120</sup> Hart, *supra* note 10, pp. 93-4.

<sup>121</sup> *Ibid* p. 98.

standards of the legal system; indeed it is incapable of being critical of these. This is because the critical reflective attitude, the internal point of view which judges and other officials must possess, is itself *constructed from* the rules and standards of the legal system. It is an *embodiment of* these rules and standards, as so cannot form a point of critique for them. The more fully this “critical reflective attitude” is developed, the more complete the officials’ *consent* to the established order becomes.

Nonetheless using the rule of recognition to signify law carries great rhetorical force, most especially in the Anglo-American legal academy. Moreover, the analytical device (the rule of recognition as power and duty) is very useful. Fortunately, the analytic tool *can* be separated from the methodology within which Hart constructed and deployed it.

The rule of recognition gives our observational focus a *purpose* – to identify “law”, or the “rules of the system” or changes thereto – but we must in turn give our focus *substance*, we must choose which data to observe as law. The rule of recognition – as an analytic concept – is a tool. Like a microscope it focuses and changes how we see, how we perceive, but it cannot choose, determine, or even condition *what* we observe, which phenomena we bring within its focus. Thus, the rule of recognition does not, and *cannot*, affect (let alone effect) how we *define* law. The act of definition (the *choice* of which data to put on the microscope’s slide) is presupposed by Hart, law *is* the actions of socially central institutions; however, this choice of data, this *definition* of law, remains totally unarticulated, undisclosed.

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<sup>122</sup> To make the law substantive, to add substance (content) to the law. I have adopted this form, the creation of a verb from a noun, from Kelsen’s translators, and thus it owes its etymology to the

Thus, Hart *chooses* to focus on institutional centrality – deference to constituted authority as Fuller might say – and Hart *chooses* to call this “law”. However, he then quickly *mediates* this choice by focussing on the judicial reception of the Sovereign Act. Hart simply presupposes – and so legitimates, by moving beyond or behind critique – the acts of the Power which imposes its will on the judges. Law then equals institutional control, not conceptually, not inherently, but *definitionally*.

Definitionally, because Hart has chosen institutional centrality as the data from which legal systems, and then law, are to be “elucidated”.

#### BUT, WHY *THAT* DATA (I)? THE DWORKINIAN CHALLENGE:

Hart gives an account of what the law is, a mediated realism structured through the notion of rule(s). When he encounters adjudication he observes rule determined decisions, rule conditioned decisions of varying degrees, and ‘arbitrary’ decisions, at the boundaries of law, the “margins of rules”.<sup>123</sup> He describes what he sees, and constructs the core/penumbra model to explain (i.e. thematise and structure) his observations. Hart refuses to give up on the dogma of rules, but this means his observation is admittedly mediated, and so cannot be justified by purely empirical referents. Law, for Hart, appears to be *definitionally* about rules. Apart from that point, however, legal theory in its Hartian form is descriptive, rather than normative – it is about what judges (legal officials) *do*; not about what they *ought to do*. This leaves open the question of how legal officials are to be defined or identified.

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Kelsenian concept of “concretisation”.

<sup>123</sup> Hart, *supra* note 10, at p. 135.

Dworkin fundamentally disagrees with the Hartian insistence on rules, arguing instead that all (correct) legal decisions are fully determined by law, but only once law is properly understood as containing rules and principles. As Gardner puts it:

If they [judges] did anything other than applying valid legal norms they would be part-time legislators, Dworkin said, and that would lay to waste the important doctrine of the separation of powers between the legislature and the judiciary.<sup>124</sup>

This means that any discretion judges *appear* to exercise is apparent only.<sup>125</sup> In other words, Dworkin charges Hart with the very error which Hart attributed to Austin, that he allowed his dogmatic definition of law (as a system of rules) to obscure the reality of the data, i.e. a judicial decision fully determined by law. Hart, Dworkin suggests, failed to see the reality of the law (i.e. his vision failed to correspond with Dworkin's 'true' observation of what law *is*) because his view was structured – or even fully constructed – by (part of) his own *definition* of law (as a body of rules). Dworkin radically challenges the accuracy of Hart's *descriptive sociology*, the very *foundation* of his (descriptive) legal theory. He challenges Hart's *observations* themselves. Raban summarises this charge perfectly:

Dworkin ... argues that these pervasive disagreements are legal disputes *par excellence* – that they are (as they claim to be) disagreements about what the law *is*, not about what it should be. Dworkin transforms what for the

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<sup>124</sup> Gardner, *supra* note 1, at p. 214.

<sup>125</sup> It should be noted that the positivists have in their various ways replied to, and in my view successfully refuted this point, see e.g. Gardner *ibid* pp. 214-8; Raz *The Concept of a Legal System* pp. 24-5 and 181-7; MacCormick, *supra* note 70, p. 233.

positivists is an unfortunate though perhaps inevitable *modus operandi* – the dirty little secret of legal practice which Austin has branded a ‘childish fiction’ (i.e. practitioners purporting to determine what the law *is* while making normative claims about the desirability of their own positions) into a fundamental aspect of legal argumentation and legal decision-making. There is nothing childish about purporting to ascertain what the law is while making normative claims – that is precisely what ascertaining the law is about! If the positivists see this as institutional deception, *it is only because their understanding of law is wrong.*<sup>126</sup>

The challenge is primarily directed at the very centre of the Hartian understanding of law, it disputes the fundamental presupposition that law is “determined by criteria shared among legal practitioners”. Dworkin challenges Hart’s choice of data (“the true”) and his evaluation of that data (“the important”), he asserts that there is no necessary truth to what Hart chooses to observe, in effect there *is* nothing which demands to be observed; but only a choice of data and focus. Dworkin disputes the very possibility of (truthfully) distilling a determinate rule of recognition from the observation of legal phenomena:

Legal practitioners, says Dworkin, habitually disagree about which rights and duties are legally valid and about why they are: there are no shared criteria to be found here.<sup>127</sup>

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<sup>126</sup> Raban O. “Dworkin’s ‘Best Light’ Requirement and the Proper Methodology of Legal Theory” 23 OJLS (2003) 243 at pp. 261-2, footnote omitted. Emphasis added.

<sup>127</sup> *Ibid* p. 244.



Therefore, law *must* be a question of interpretation, a question of preferences, and of perceiving law “in its best light”. Thus where (Hart as) a legal positivist claims “that the correct legal requirements are a matter of (non-controversial) conventional agreement”,<sup>128</sup> Dworkin and his followers perceive only controversy: “the commonness of such disagreements is undeniable (they exist in every case arriving before a court, for example)”.<sup>129</sup>

The most important issue for present purposes is to realise that Hart and Dworkin are *both* empirical theorists of law. Their disagreement does not concern *how* to theorise law, but on *what* to take as data (in Gardner’s terms: on what is “the true” (of law)) and how to interpret it (what is “the important”). From this perspective, both portray law as the ordered distillation of the acts of legal officials. The dispute arises in the identification of legal officials, and the interpretation and classification of their actions. Dworkin identifies Supreme Court judges as the *paradigm* case of legal officialdom, he then postulates normatively that other judges *ought* to behave as Supreme Court judges do. The only normative commitment apparent in Hart’s theory is to law as rules, beyond this he offers no justification for his identification of legal officials. His theory is not normative, but is content to describe what legal officials *actually* do; provided only that this can be achieved while maintaining the concept of legal *rules* in some form.

#### What Dworkin Reveals About Hart:

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<sup>128</sup> *Ibid* p. 261.

<sup>129</sup> *Ibid* pp. 261-2.

As Fuller notes in his “Reply to Critics” in the revised edition of *The Morality of Law*, a primary function of debate and critique is to “reveal more clearly the tacit presuppositions that each side brings to the debate”.<sup>130</sup> This is true of the debate between Hart and Dworkin. What does the Dworkinian challenge reveal about the Hartian perception of law?

Hart’s initial formulation of the Rule of Recognition, formulated in response to Austin,<sup>131</sup> actually appears to be little more than a description of the necessary conditions for the operation of (Hart’s sources based conception of) legal reasoning. If we assume that the immediate task of law is to provide authoritative answers to socially contested questions, then law must function by reducing complexity, by eliminating variables and argumentative techniques, by focussing the question. Thus the emphasis on sources, and their recognisability, is a description of some of the features which law must possess in order to facilitate legal reasoning. However, this initial formulation is *not* a definition of law; but an abstract claim about what the law does.

To discover the content of any given body of law we must discern the definition of a legal system,<sup>132</sup> and Hart’s final formulation of the Rule of Recognition provides this. This tells us how to identify the rules of the system (the substantive law) but, in doing so, relies on the existence of a legal system, and so must, implicitly, define that legal system. The criteria for a legal system would appear to be as follows:

1. The existence of a stable community

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<sup>130</sup> Fuller, *supra* note 95, p. 201.

<sup>131</sup> See note 81, *supra*, and accompanying text.

2. With dominant central institutions
3. Which apply rules
4. Which are generally obeyed, or give rise to centralised sanctions for disobedience

These four criteria define the idea of “general obedience” (*Concept* p. 113)

5. The rules must be identifiable
6. The criteria for identifying rules must be agreed (The truth of this is where Dworkin disagrees with Hart)
7. These criteria must be applied in practice (Again, Dworkin disagrees that this occurs)

These three criteria define the legal system as unified by its Rule of Recognition

8. The factual application of the shared criteria can be observed (The functioning of the Rule of Recognition)
9. The criteria can therefore be enumerated, and tested for correspondence against empirical data (The conclusion, and thus content, of the Rule of Recognition.)

These two criteria identify the *norms* of the legal system; the law.

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<sup>132</sup> See note 82, *supra*, and accompanying text.

None of this seems inherently problematic. Indeed the dispute can be clearly understood, and consequently become susceptible to objective resolution. This is because the data against which the dispute should be evaluated is identified. The dispute concerns only “the important”; not “the true”. The primary questions concern the existence of the indeterminacy Dworkin perceives in the upper echelons of legal reasoning. And their effect upon reasoning in the lower echelons. However, it is in the *agreement* on the data that the problem arises.

Because Hart and Dworkin focus on the disputed points (5) and (6), they focus on institutional behaviour. That is, they observe the *fact* of adjudicative processes and seek to identify the form and function of law from these. This is back to front: adjudication is the *application of law* to specific disputes. The form and function of law should determine (or at least condition) the structure of adjudication. As Fuller noted, and Dyzenhaus attempts to put into practice, attention should be directed to the law as such,<sup>133</sup> and how that should *affect* adjudicative practice. That is, we should focus on what adjudication *ought to be like*, if law is to live up to its own ideological claim, or legitimacy promise. But neither Hart nor Dworkin do this; and their debate paradoxically both disguises and illuminates this fact.

Ultimately, the key differences between Hart and Dworkin are not so much methodological as purposive. Both agree that law is subject to factual observation, and is to be found in the actions and rhetoric of legal officials. Their disagreement is over what this data comprises,<sup>134</sup> and how to describe and *classify* it. In particular they disagree over the relative strength of rules and principles in non-exceptional cases.

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<sup>133</sup> In chapter 2, I shall pursue this idea of the law as such, or the “thought object” of law, more fully.

Dworkin openly admits that some aspects of law *are* governed by convention,<sup>135</sup> Hart admits that others are not.<sup>136</sup> The question becomes one of degree, of focus, and of *telos*, of why we are doing legal theory, and why we are doing law. The question, in other words is how to identify and classify data, in simpler terms, what to look at, and how to describe it – what is “the true”, and what among “the true” is “important”.

No non-normative theory of law (except perhaps those premised on sociological methods, e.g. legal realism or even ethnomethodological approaches to data collection) can offer a non-recursive solution to these questions. Only by postulating a purpose for law (taking a normative stance on what law is for) can we construct a defensible definition of our data choice. It is only in deciding what law is for<sup>137</sup> that we can structure our understanding of *what is to count as law*, our understanding of what law is; our *definition* of “the true” of law. Even the sociological approaches can at best only stipulate what is to be considered a legal official or institution. Do we focus on the cases where law does not provide a uniquely (legally) correct answer so as to undermine the cases where such an answer *is* provided? If so, why, how, and when? Moreover, absent an initial definition, how do we identify a *legal* decision at all?

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<sup>134</sup> This is true only to the very limited extent that Dworkin perceives principles as part of (“the true” of) law and Hart does not.

<sup>135</sup> See, *Law’s Empire* at, e.g., pp. 3-5, 34-6, 39, and esp. 88.

<sup>136</sup> Hart, *supra* note 10, p. 135.

<sup>137</sup> This refers to the purpose of law as such; *not* to the purpose of the legal system, nor to the (substantive) purpose of (legal) regulation in any given society. A key difference between my approach and that espoused by Dworkin is this focus on the formal purpose of law – the definition of the ‘tool’, law – rather than the substantive purpose of legal regulation – the ‘best’ use of that tool, in Dworkin’s case the pursuit of liberal individualism. My understanding of purpose is directed toward what counts as law, Dworkin’s to how law should be interpreted. In Dworkinian terms, my focus is on the “preinterpretative stage”, in which, despite raising the issue, he has no apparent interest: “we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given”. (*Law’s Empire* p. 66). In other words, for all practical purposes, the law remains for

This, surely, is the key issue: is it, in any way, possible to identify a legal decision (or any other *datum* of “legal reality”) without first defining law? Even *if* it is enough to consider the actions of central social institutions to be the source of law, is it entailed that *everything* these institutions do be understood as law; be accommodated within the definition, the *concept*, of law? Moreover, without disputing either the necessity or sufficiency of socially central institutions to the identification of law, can we not fairly ask *why* the actions of these institutions are necessarily law? Gardner notes that “it is an objection to the explanation of the nature of law that according to it the laws of Sweden are not laws”,<sup>138</sup> but this fudge the issues; it presupposes that the laws of Sweden are laws.

This may not be an unfair presupposition, but it may also be eliding several distinct assumptions: that there is an independent country called Sweden; that that country has centralised social institutions; that these institutions seek to regulate the behaviour of Sweden’s citizens; that those citizens generally obey the institutions. The final assumption is that if the above assumptions are correct, then Sweden *necessarily* has a legal system. But what if that system relied *purely* on “Khadi justice”<sup>139</sup> in Weber’s sense? What if the system produced no rules, failed to treat like cases alike, or even denied the *idea* of “like cases”? Centralised order could be maintained, and we *could* call this legal order (or the order of a legal system), but there would seem to be no necessity that we do so. In other words, and this is the point that Gardner appears to me to fudge, it may *not* be “an objection to an explanation of the nature of law” that

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Dworkin what it is for Hart, a matter of *social fact*. The distinction between the two purposes, and the two levels of analysis to which they give rise, is more fully analysed in chapter 2.

<sup>138</sup> *Supra*, note 27, p. 168.

<sup>139</sup> Cf. *Max Weber on Law in Economy and Society*, Rheinstein M. (ed.), pp. 212-3.

according to it, the techniques adopted by the centralised authority regulating the populace of a given territory *are not considered to be law*.

History affords us a clear example of this: if law becomes, solely, the provision of the correct answer – rather than merely the legal one – does it remain law? This was the foundation of the question Carl Schmitt posed for German jurisprudence, when he challenged orthodox theory and demanded an end to the ‘evil’ of the *Rechtstaat* in favour of the (non-rule-bound) idealism of the total state.<sup>140</sup>

### CONCEPTUAL LEGAL POSITIVISM (II): KELSEN:

To answer this challenge, Kelsen sought to explain and defend the ideal of the *Rechtstaat*. Coming from the conceptual strand of legal positivism, Kelsen asks how we can tell what the law is, but to make this question intelligible, he also asks what it means to know what the law is. He starts with the foundational question “how can we know what law is?”. In this sense then, Kelsen’s project is both cognitive and epistemic<sup>141</sup>, but this is not all. Every epistemology presupposes an ontology – to understand something, we must first be able to identify its existence, and this also involves defining or stipulating that existence. This entailed that Kelsen provide an ontological status for law, or perhaps more accurately, for laws.

### A Refined Conceptual Legal Positivism? Hans Kelsen and a Small Step Forward:

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<sup>140</sup> See, e.g. *Political Theology* or *The Concept of the Political*.

<sup>141</sup> I use the term epistemic in a wide sense, to cover not only the procedure for verification of true knowledge, but also the processes through which sensory data are translated into perception, cognition, and understanding. This fits well with my overarching enquiry into how particularity, the stuff of sensory data, the ongoing stream of “spatio temporal event[s]”, is translated (or transformed) “reconstructed” into perception, understanding, and ultimately action. Because, although obviously the

For Kelsen, law is a normative order, a system of norms. The cognitive question toward which his attention is ultimately directed is: what is the law on  $x$  in  $y$ ? That is: which norm governs the proposed conduct in the stated place? As a legal positivist, Kelsen believed that such questions could be answered cognitively and without reference to morality. However, he also realised that the question was not purely factual or empirical – in the way a proposition of natural science, or the existence of a law in a Hartian pre-legal society, may be – but rather a question of identifying the “relevant” data, and finding a technique to organise it. The ontological status of law was neither empirical nor historical nor moral nor metaphysical, and yet law required empirical identifiers, if the project of legal positivism was to be maintained. Thus Kelsen’s methodology is resolutely Kantian, asking as its foundational question, under what circumstances (under which conditions) *can we know* what the law is? What are the necessary preconditions for cognising a law (or any other norm)?

Kelsen’s solution was to accept normativity as a separate epistemological system, i.e. one freed from both factual correspondence and metaphysical speculation. He argued that the specific ontological status of norms was *validity*. “By the word “validity” we designate the specific existence of a norm.”<sup>142</sup> For Kelsen, for a norm to be valid is for that norm to exist; for a norm to exist it *must* be valid; and so an invalid norm does not exist. This is true not only of law, but of all norms and all systems of norms: validity = existence.<sup>143</sup> The two are inseparable, in a sense they are synonyms. “That a norm is ‘valid’ means that it exists. A norm which is not ‘valid’ is not a norm since it

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law is implicated in this process, it must also be recognised that the very cognition of something like a legal system is also an *effect* of this process.

<sup>142</sup> *The Pure Theory of Law* p. 10

<sup>143</sup> *General Theory of Norms* chapter 1 V (p. 2).



is not an existing norm.”<sup>144</sup> Kelsen’s theory then demands that the science of law act like a natural science, it must show fidelity to the object of its observation; in the case of law, this means *accepting* and *accommodating* the counter-factual nature of the object of analysis (the law) itself; legality, conformity to law, which Kelsen terms the “objective meaning of an act” is a quality “that cannot be perceived by the senses”.<sup>145</sup>

This is where Kelsen and Hart so dramatically diverge from one another. For Kelsen, a simple recurrence or regularity of conduct is itself an *is*, however, a theory of norms deals not with *is*, but with *ought*. Thus, the regularity could be *either* evidence of the existence of a norm (itself *actually*, though counter-factually, extant because of its validity) *or* completely irrelevant to the normative sciences. Norms, having a counter-factual nature, are not subject to, or derived from natural scientific facts or rules. That a law exists does not mean that people *will* obey it; that people act in a particular manner need not mean that a norm exists. Thus Kelsen, to remain true to *both* the natural scientific method *and* the object of his observation, replaced the idea of causation with that of “normative imputation”.

Where natural science relies on a cause-effect (if-shall) relationship, normative science relies on imputation (if-ought). So, if I release a pencil it *shall* fall, should the pencil fail to fall (without adequate reason, e.g. it is already lying on a table or desk) the entire rule (the ‘law of gravity’) would be undermined. Such rules can be observed from actual reality, they reside within the “is” half of the is/ought dichotomy. Norms make up the other half of that dichotomy. So if I break a rule I ought to be punished; but if I am not punished (for whatever reason, barring that a court holds the rule

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<sup>144</sup> *Ibid* chapter 8 VI (p. 28).

<sup>145</sup> *Supra*, note 142, pp. 2-4, esp. p. 4.

invalid) this has no effect on the rule; the rule continues its (counter-factual) existence as if I had never acted:

For in the system of the Law, that is, owing to the law, punishment follows always and without exception from the delict, even if, in the system of nature [i.e. in real life], punishment may fail to materialise for some reason or another.<sup>146</sup>

My actions and the rule have *no ontological relationship* whatsoever. This means that rules cannot be distilled from actions any more than actions can be determined by rules. For Kelsen, legal rules bind officials, they do not emanate from officials. Kelsenian rules exist solely by virtue of their validity, which in turn is a systemic and normative, not a factual or observable, concept. Kelsenian observation is metaphorical, not conceptual, in nature. It observes data which is not physically extant, the counter-factual as it has been *defined* into reality (the ‘extra’ phenomenon created and ‘added’ to reality by the concept):

The legal meaning of an act, as an external fact, is not immediately perceptible to the senses – such as, for instance, the color, hardness, weight, or other physical properties of an object can be perceived.<sup>147</sup>

Nonetheless, it is this legal meaning which must be observed, and that requires that it be allocated empirical identifiers, or, to put it more simply, that we must define what data we are looking at, when we seek (metaphorically) to observe the counter-factual

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<sup>146</sup> *Supra*, note 142, p. 28.

<sup>147</sup> *Ibid* p. 2.

realm of norms. The observation is metaphorical because it does not concern the actual actions of the officials, but rather the effects of certain actions – the defined empirical identifiers of law-creation or alteration – manifested as *additions to reality*; the “counterfactual or *normative* interpretation” of those selected “factual occurrence” (the empirical identifiers of law).<sup>148</sup>

However, this ontology is only tangentially relevant to Kelsen’s enquiry, because the first real thrust of his work is epistemological.<sup>149</sup> The relevant question is not “what does it mean for a norm to exist?” but rather, “how do we know which norms exist?”; the former being relevant only to the extent that it impacts upon the latter. The ultimate question of which norm is applicable or determinate in *y* must await the exposition of, and an answer to, the epistemological enquiry: cognition (in the sense of recognising and *understanding* what is perceived) presupposes epistemology.

Law has to be empirically identified, and yet it is neither an empirical description, nor a moral claim: this is true of all rules, though of course moral rules are also moral claims. A norm exists when it is valid, and this must be true of all norms (all rules), yet norms differ, the concept “norm” is, for Kelsen, heterogeneous. In order to systematise norms, Kelsen divides validity into two separate streams: static and dynamic validity.<sup>150</sup> Statically valid norms exist by virtue of their content, dynamic norms by virtue of their pedigree. In both cases validity remains the ontological

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<sup>148</sup> Kletzer *The Mutual Inclusion of Law and Its Science: Reflections on Hans Kelsen’s Legal Positivism* PhD University of Cambridge, p. 92.

<sup>149</sup> *Supra*, note 142 p. 1.

<sup>150</sup> *Ibid* pp. 194-5.

status, and therefore also the epistemological presupposition. This is what allows Kelsen to claim that the Pure Theory is the precondition for all other legal theories.<sup>151</sup>

Natural law, according to Kelsen, recognises validity according to the static model. This means that a norm's validity depends on its content, or more precisely, the validity of a norm depends on a minimum congruence between the content of the norm and the content of the moral order to which law is subjugated. This procedure is scorned by Kelsen as begging abuse, and serving only as a disguise for the illegitimate insertion of contested moral claims into the legal order. It is definitionally a form of moral imperialism. Kelsen believed history supported him in this regard. Other theorists – notably Lauterpacht<sup>152</sup> directly, and Finnis<sup>153</sup> indirectly – dispute this assertion, and note that Kelsen rarely if ever looked at the *content* as opposed to the form of natural law. The essence of this claim is that while the structure of natural law may well be open to abuse<sup>154</sup> there is a sufficient continuity in content to advert to the existence of a “perennial philosophy” embodied in all ‘true’ natural law systems.

However, Kelsen does not appear to respond to these claims. Instead, he focuses on the nature of validity in an a-morally *defined* system of laws. Again, it must be emphasised that Kelsen's aims are epistemic. He is not claiming that law should be a-moral, nor even that law *could* be value free. Rather he is arguing that the validity, and so the *existence* of norms (including laws) is not itself dependent on their

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<sup>151</sup> *Ibid* pp. 217-221.

<sup>152</sup> Lauterpacht H., “Kelsen's Pure Science of Law” in *Collected Papers* Vol 2 p. 404.

<sup>153</sup> See, e.g. *Natural Law and Natural Rights*, generally.

<sup>154</sup> Indeed, following Ingo Muller, one could go further, stating that not only is the structure susceptible to abuse, but that the most evil legal system in history, the Nazi regime, was a natural law system, and was so precisely to get around the restrictions inherent in the positivist model. See Muller I. *Hitler's Justice*.

morality.<sup>155</sup> We can, and should be able to, cognise laws – identify and apply the applicable rule – without reference to their moral content, nor to our own, nor the regulated society’s, moral codes. This requires an a-moral source of validity. Kelsen postulates pedigree, which he terms “dynamic validity” to fulfil this role.

Dynamic validity is based on the proposition that the only thing which can validate a norm is another, higher order, norm. This draws, *inter alia*, on Hume’s proposition that it is illicit to derive an ought from an is.<sup>156</sup> Kelsen completes the separation, noting that it is illogical to derive an is from an ought, *sein* and *sollen* are radically separated in Kelsenian ontology:

Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa ... The behaviour as it actually takes place may or may not be equal to the behaviour as it ought to be. But equality is not identity.<sup>157</sup>

All validity for Kelsen is systemic in nature, and in a system operating on the basis of dynamic validity, each valid norm gains its validity from a higher norm which is authorised (or which authorises a system official) to validate lower order norms (and defines the actions, the empirical identifiers of law, by which he may signify this occurrence, or manifest this act of will). This entails that a norm is only valid to the extent that the norm validating it was (at the material time) *both* valid and capable of validating the lower order norm. Thus systems take on a pyramidal structure.

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<sup>155</sup> See, e.g. *Supra* note 142, chapter 28 (pp. 115-22, esp. at p. 116).

<sup>156</sup> *Ibid.*, chapter 20. See also Hume D. *A Treatise of Human Nature* III.i.1 (2<sup>nd</sup> ed. Selby-Bigge L. ed. OUP 1978) p. 469.

<sup>157</sup> *Supra*, note 142, p. 6.

The system is pyramidal because every new (valid) norm is part of the same legal system, though it may only apply to a small number of subjects, as few as two, or even one in some cases. That is, because dynamic validity authorises the creation of ever more precise norms, every contract, every (legally binding) promise, and every judicial decision is a (relatively) concrete norm of the same system. Hence the pyramid structure is directly related to the sheer proliferation of norms which gradual concretisation not only entails, but also unifies (systematises).

However, this chain of validity can only be taken so far, at one end it is terminated by norms not authorising (or not logically capable of supporting) further concretisation, but at the other it must be artificially terminated, as infinite regression would otherwise occur.<sup>158</sup> This leads Kelsen to *postulate* the *grundnorm*. The *grundnorm* is a logical hypothesis, it is not itself validated, but rather assumed to be valid, it functions as the foundation and apex of the normative order. Actually, Kelsen's view on the nature of the *grundnorm* evolved, but by the second edition of the *Pure Theory* he had settled on the opinion that it was a "transcendental-logical presupposition".<sup>159</sup> In *General Theory of Norms*, he notes "[i]t is a 'basic' norm, because nothing further can be asked about the reason for its validity. It is not a positive norm (i.e. posited by a real act of will) but a norm presupposed in the thinking of [subjects of the normative order] in other words it is a fictitious norm".<sup>160</sup>

This raises two important points, one is that law is positive because it is posited, i.e. it is the product of enactment. This enactment need not be intentional, it could come

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<sup>158</sup> This is stated clearly in *supra* note 142, p. 254

<sup>159</sup> See pp. 198-205, esp. p. 201.

about as a result of custom or by an act of will. However, this dichotomy should not be overemphasised, especially in relation to public international law, where customary law, and especially *opinio iuris* can be best perceived as normative *intent*, and therefore ultimately as the product of directed human endeavour.<sup>161</sup> The other point is that we are not free to simply choose a *grundnorm* but rather are logically constrained to selecting a norm which logically supports the hypothesis of a system which intelligibly interprets the data of reality.<sup>162</sup>

Dyzenhaus suggests<sup>163</sup> that the *grundnorm*'s status as foundation and apex is logically incoherent, and reflects a deeper fracture in Kelsen's entire system, viewed from a logical perspective. However, this criticism is unfair, and takes spatial *metaphors* far too seriously. The legal system is a logical hypothesis; it is a means of organising data (albeit a means with a specific purpose): it is not a real object. Only once reified would Kelsen's system need to obey the physical laws Dyzenhaus accuses it of breaching. Rather than pursue this criticism,<sup>164</sup> it is easier to point out that there is no reason, if we are adopting spatial metaphors at all, to assume that Kelsen's pyramidal normative structures are not supported by their apexes as each can easily be imagined to hang hypothetically from its *grundnorm* (which *is* then foundation and apex, with neither contradiction nor logical fallacy).

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<sup>160</sup> *Supra* note 142, p. 254

<sup>161</sup> On the best available theory of customary international law, see chapter 5, *infra*.

<sup>162</sup> See *supra*, note 142, pp. 201-5.

<sup>163</sup> *Legality and Legitimacy* p. 103, note 4.

<sup>164</sup> I do not wish to claim that none of Dyzenhaus' critiques of positivism, or even of Kelsen, should be pursued, as many are extremely important and well thought out, and indeed provide important points of focus for much of my thought and critique. Indeed, chapter 2 of the present thesis is essentially structured around an engagement with Dyzenhaus' critique of Hart; albeit with the aim of showing the capacity of *conceptual* legal positivism to meet that critique. In my opinion, Dyzenhaus is, all in all, probably *the* pre-eminent critic of positivism in contemporary legal theorising.

However, even dynamic systems have a “static aspect”<sup>165</sup> which is the fixed structure which identifies them as *specific* systems of norms. That is, the static aspect delineates the boundaries of each normative order, and determines the differences *between* normative orders. From this perspective, it becomes clear that law is a *particular type* of normative order and, for Kelsen, the distinguishing feature of a legal order (its “static aspect”) is the connection between norms and sanctions.<sup>166</sup>

Kelsen perceives law in an imperative model where duty forms the exclusive deontic operator. Thus laws, for Kelsen, define “delicts”, and a delict is defined as the “condition for a sanction”. Thus, to be a law, a norm must both define a delict and provide for a sanction in the event that the conduct identified as delictual occurs. One peculiar effect of this understanding is that law does not place obligations directly onto its subjects, but only on the system officials. This is because law only commands action in the event that a delict occurs, it does not prohibit the commission of delicts *per se*, but only by implication.<sup>167</sup> This attempt to avoid para-psychological definitions of obligation (which Kelsen views as a decisive advance on Austin<sup>168</sup>) serves to fundamentally alter the definition of efficacy against which a legal system should be evaluated. Kelsen demands no obedience from those ultimately subject to the system, but only from those applying the system, the Austinian “habit of obedience” is replaced as the empirical precondition of legality with the requirement that officials duly apply sanctions where delicts are discovered.

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<sup>165</sup> See *supra*, note 142 pp. 108-92.

<sup>166</sup> See, e.g. *ibid.*, p. 33; for the inverse point, that a norm without a sanction *cannot* be considered as law, see pp. 50-4. Kelsen makes it clear, p. 154, that he does *not* see the connection between law and sanction as an act of choice, but rather as a logical necessity; he does not, however, justify this claim.

<sup>167</sup> See, e.g. *supra* note 142 pp. 111-4.

<sup>168</sup> *General Theory of Law and State* pp. 130-7, esp. p. 135.



An advantage of Kelsen's model is that it need not perceive or portray failure to make a law as a sanction. This was an important weakness in Austinian legal positivism, and thus provides an excellent example of the advances Kelsen's system of gradually concretising norms brings over the Austinian command based model. For one thing, Kelsen can recognise commands as a particular (albeit important) subset of imperatives, that is of norms defined as ought statements (the definitions of delicts). Thus not every norm in a Kelsenian structure presupposes a commander. This point is particularly useful in relation to international law, as it overcomes a large part of Austin's refusal to see international law as law; Kelsen's system does not require a sovereign as such.<sup>169</sup>

However, it is in relation to contracts and other private rights that Kelsen makes his greatest advance beyond Austin. The doctrine of gradual concretisation denies any differences within laws, all law is understood on an imperative model. This is a direct rejection of the neo-Hohfeldian drive to individuate laws. For Kelsen, there is no distinction between law and obligation, between public and private law, or between duty and subjective right. The only question ever to be asked is what (legal) norm applies here. To answer this question, one ought to work one's way down from the *grundnorm*, applying the doctrine of "gradual concretisation". One looks for norms dynamically validated which apply to the case at hand. This is very similar to the

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<sup>169</sup> We could go much further here, and state that Kelsen's theory is *specifically designed* as a refutation of the claimed link between law and a Sovereign. Law, for Kelsen, existed to restrict and limit so-called sovereign power. From this perspective, Kelsen's theory is a direct response first to the personalisation (and totalisation) of the legal order as advocated by Schmitt; and second to the rise of Nazism itself an embodiment of that very personalisation. See Dyzenhaus, *supra* note 123, pp. 108-23. However, Kelsen himself would probably deny this, claiming his theory to be specifically "pure", scientific, a-political. This is, clearly, a nonsense; Kelsen's theory, like all other legal theories is normative in nature, it must be judged as one theory among many. Moreover, the very use of (the power and authority of) natural science is itself a political manoeuvre, though not necessarily an illicit one. Finally, as Dyzenhaus notes (*ibid* p. 109) "the presupposition that there is a distinction between politics and a science of law is itself political"; or, in my terms, it is an act of *choice*.

Razian notion of systemic or structural location.<sup>170</sup> Is there a norm on point? The answer to this question will always be “yes”, but this is in a sense formal, as it is an entailment of the necessary unity and universal coverage of the legal system.

For Kelsen, the real question is *which* norm is on point, that is, how specific a norm is there for the regulation of this specific area? A contract (or, in public international law, a treaty) would be an example of a specific norm. The potential problem, and the benefits of the Kelsenian over the Austinian model, become manifest when evaluating both the possibility and the effect of the concretised norm (treaty or contract) failing to provide a norm on point, or indeed being themselves invalid. For Austin, invalidity had to be (unrealistically) portrayed as a sanction, because although a contract was clearly a “law” it did not otherwise fit within Austin’s (dogmatic) definition of law as sovereign command.

Kelsen’s technique, gradual concretisation, simply states that an invalid contract *fails to create legal norms*. There is no question of a sanction; the law simply exists as it did before the attempt to create the contract. A sanction is only needed to identify a legal norm, but an invalid contract is not a norm at all, let alone a legal norm, hence it is actually the absence of a (connection to a) sanction which logically identifies an invalid contract as *not being part of the legal system*. This applies to both the constitutional and the contractual level. At the former Kelsen is most explicit:

Constitutional norms authorise the legislator to create norms – they do not command the creation of norms; and therefore the stipulation of sanctions do

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<sup>170</sup> *Supra*, note 121, p. 24-5.

not come into the question at all. If the provisions of the constitution are not observed valid legal norms do not come into existence.<sup>171</sup>

Thus, for Kelsen, contracts are in a sense mere fragments of law;<sup>172</sup> they rearrange duties, but duties (given Kelsen's imperative model) remain the exclusive *legal* deontic operator. This also affects the nature of legal analysis. For Kelsen, *non liquet* is a logical impossibility, and *lacunae* are merely undesirable freedoms from law (unwarranted privileges<sup>173</sup> would be a suitable analogy). Thus, in the absence of a (more) concrete norm on any given point, analysis re-focuses at a higher level. In essence, what legal analysis in Kelsen's cognitive theory does is to look for the most concrete norm on point, the last norm in the general area (i.e. the substantive portion of the instant legal system which logically includes the more delimited substantive issue on which a norm was not found) to be validated. Ultimately, however, freedom to act is the default position in the absence of any norm, and this is a simple entailment of maintaining duty as the sole deontic operator; if there are no norms there are no duties, and the absence of duty is freedom.

To take an example from public international law, a customary norm can only be valid if it manifests a symbiosis of state practice and *opinio iuris*. As Judge

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<sup>171</sup> *Supra*, note 142, p. 51

<sup>172</sup> Kelsen describes these as "dependent norms", see e.g. *ibid.* p. 51. This compares very favourably with Hart's attack on a 'straw man' of Austin, and his understanding that the legal nature of authorisation precluded the view that law had to have a definite relation to sanctions, see *Concept of Law* pp. 38-41. Moreover, Hart's dismissal of the idea that powers or contracts could be fragments of law is, at best, woefully unsupported and even irrelevant. To say simply "that is not how people think about them" is to avoid rather than engage argument; it is indeed tantamount to claiming that the Earth remained flat until people agreed otherwise.

<sup>173</sup> For the distinction between privileges and rights see Hohfeld W. N. *Some Fundamental Legal Concepts as Applied in Judicial Reasoning* esp. pp. 50-64.

Shahabudeen noted in the *Nuclear Weapons Advisory Opinion*,<sup>174</sup> this entails that an absence of (or conflict in ) *opinio iuris* precludes the creation of a customary norm. The putative norm is not validated, so not valid, and so does not exist. However, this does not mean there is no law on point, but rather that the law remains identical with that “momentary system” which existed before the putative norm was argued. There is no sanction in invalidity, just a failure to change the operative, imperative, duties of the system.

Thus disagreement does not prevent an area from being legally regulated, as the unconsidered use of the claim that the absence of prohibition equals permission might argue (which misplaced dogma Scobbie has termed an “unreconstructed *Lotus* position”, and, in my opinion, quite successfully refuted<sup>175</sup>). Instead, the effect of this type of disagreement is to prevent the legal regulation of an area from changing. This is of fundamental importance in regard to customary exceptions from generic legal prohibitions, as it explains why public international law cannot, and does not, endorse the simple proposition that the absence of a (direct) rule on point leads to a legal privilege. So, in the case of the proposed doctrine of Humanitarian Intervention, the split in *opinio iuris* precludes the crystallisation of a rule, and this means that legal duties are *unchanged*. This in turn entails not freedom to act, but a prohibition on the threat or use of force, as no exception to the prevailing norm (art. 2(4) UNC) has been validly created; i.e. no new norm *exists*.

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<sup>174</sup> *Nuclear Weapons Advisory Case* 1996 ICJ Reps. p. 225 Dissenting Opinion of Judge Shahabudeen, p. 375, at pp. 379-80.

<sup>175</sup> Scobbie I. “The Theorist as Judge: Hersch Lauterpacht’s Concept of the International Judicial Function” 2 EJIL (1997) 164 at p. 196

However, we do not generally *actually* work our way down from the *grundnorm* to the particular case, at least not in legal systems with which we are familiar. Rather, we start with the case, look for the norms which appear to be on point, and then check that these are valid according to the legal system. That is, we trace each norm *back* to the *grundnorm*, and then apply the most concrete norm(s) on point, *which are actually valid by systemic standards* to the case at issue. In effect, this is little different to the process under the rule of recognition, as understood by Hart. But what Kelsen's theory really emphasises is the systemic nature of legal analysis, and the systemic nature of the requirement that the law ultimately provides an answer to any given question of the legality of proposed conduct.

Moreover, Kelsen's theory makes clear the counter-factual nature of law, the fact that law is something which must be defined *before* being observed. This is the deep, divisive, methodological fracture running through legal positivism as a school. Despite apparent similarities, even equalities, in substantive conclusions this methodological divide serves to split legal positivism into two completely distinct schools. The schools may agree, in the end, on most things, but their reasons for coming to these conclusions diverge radically: and "equality is not identity".<sup>176</sup>

#### CONCLUSION: SIMILARITY, DIFFERENCE, HOPE:

Ultimately then, the debate between conceptual and empirical legal positivists remains as unresolved as that between hard and soft legal positivists. Empirical legal positivists offer no convincing support for their decision to classify certain things as

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<sup>176</sup> Kelsen, *supra* note 142, p. 6.

law, or certain people as legal officials. Instead they offer a circular definition of both, reliant on a smuggled-in common sense definition (that law must impose order, which entails that law *is* that which is enforced). This position can do little to defend itself against, or undermine the Dworkinian challenge, which smuggles in different common sense assumptions of the nature and purpose of law (that law is morally good, and politically coherent, etc.).

Conceptual legal positivism, sadly, fares little better here. At least conceptual legal positivists can defend their data choices and classification, but only by reference to a definition of law which is itself unsupported. What does appear clear, however, is that legal positivists of each strain predicate law on its institutional setting, rather than its intrinsically *legal* nature. This is borne out by the fact that the two paradigm conceptual theorists, Austin and Kelsen agree on enforcement as the specific quality of law, and enforcement is, itself, an institutional concept, reliant on a centralised monopoly of legitimate violence. Absent such an institutional setting – e.g. in the international political system – neither side can offer a convincing argument for identifying legal norms; nor, however, can either offer a convincing argument for declaring that international law is not law.

#### The View From the Margins: International Law:

Michel Foucault's work concerns the creation of the normal from the marginal,<sup>177</sup> and perhaps this perspective can provide an intelligible context for the arguments above. Inherent in Foucault's claim is, I think, an acceptance of Kierkegaard's point that "the

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<sup>177</sup> See, e.g. *Madness and Civilisation*, or *Discipline and Punish*.

exception ... thinks the general with intense passion”,<sup>178</sup> and its converse; that the paradigm case does not. The paradigm is *identified* by its banality, its regularity and commonness; it is hum-drum, and so, opposed to thinking. The paradigm case can *never* cause us to think about the paradigm itself; only the exception, or marginal case, can facilitate this.

The paradigm of legal theory is the institutional centrality of legitimate violence, the monopoly over legitimate violence which the municipal legal system claims, and by which the municipal legal system is identified. My claim is that this elision of law and the monopoly of institutional violence (the elision we call the Rule of Law<sup>179</sup>) is the product of human choice; and moreover, of a problematic human choice at that; the agreed baseline, the orthodox elision of law and centralised force is *wrong*. At the very least, this elision should be opened to critique, rather than transcendently posited and shielded. Paradigmatic reasoning is necessarily blind to its own contingency, as “central cases” – which anchor reasoning – are defined by the presence of the paradigmatic features of which the paradigm is constructed, thus they can never expose the contingency of those features. The effect is to move these features beyond critique.

If we accept the baseline of institutionalised coercion then we say – with some variation of mediation, e.g. between Hart, Dworkin, and the American Realists – that

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<sup>178</sup> Quoted in Schmitt C. *Political Theology* p. 22.

<sup>179</sup> There are two ways of understanding this elision, from a Hartian perspective, the important point is that law *rules*; the rule of law is a claim of legal sovereignty. Consequently, law is taken for granted in the sense that the expression of authority is law. From the opposite perspective, consider e.g. E. P. Thompson’s claims about the rule of law (see *Whigs and Hunters*), it is ‘rule’ and *not* law which is taken for granted; law becomes the evaluative variable. The question refocuses entirely: is it rule by *law*, or rule by something else, something other than law?

law is what is enforced; that central social institutions *are* legal institutions.<sup>180</sup> But this would seem to entail, as the Realists accepted, that what is not enforced is not law. To take a recent example from international law, this would indicate that the absence of enforcement, of Security Council condemnation, and of an armed or coercive reaction, *proved* that the Anglo-American invasion of Iraq was *lawful*. Yet this answer seems problematic, at the very least, when put so bluntly, it seems too glib. Perhaps then the simple absence of coercion is not dispositive of the claim to illegality.

But, *if* this is so, *if* that nagging doubt remains, then what does that fact (the continued existence of the doubt) tell us about law, or about our own attitudes to law? It is at least possible that this doubt (or “anxiety” as Heidegger might have it) begins to expose the methodological presumptions to light, to illuminate a hidden truth from the margin: we expect more from law than the imposition of order. I call this “more” the specifically legal. The specifically legal is that which the law has which other discourses and techniques do not; that which distinguishes, or *specifies*, the legal; that which makes it unique, and distinct from other concepts.

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

In other words, both sets of theories (the empirical as manifested in Raz, Hart, and possibly Gardner; and the conceptual as manifested in Austin and Kelsen) are wrong.

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<sup>180</sup> See note 21 and accompanying text *supra*.



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

In other words, although only one side of the debate (the empirical legal positivists) was methodologically precluded from focus on the specifically legal, the other (conceptual legal positivists) defined this badly. Accepting and understanding this point allows us to re-discover Fuller;<sup>181</sup> however, even Fuller expressly – though perhaps wrongly – acknowledged the link between law and sanction, defining the enterprise of law as that of “*subjecting* human conduct to the *governance* of rules”.<sup>182</sup> In doing so, Fuller implicitly acknowledged the baseline adopted by *both* streams of legal positivism; that law was, *definitionally*, enforced order. However, there is a critical difference, one which conceptual legal positivism is capable of analysing, and may do well to adopt.

From the Fullerian perspective, law is something to which power (force, or violence) is *ascribed*, the ideal must exist first,<sup>183</sup> and then be reified, and only then can force be

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<sup>181</sup> This task is taken up in chapter 2.

<sup>182</sup> Fuller, *supra* note 95, p. 106, emphasis added.

<sup>183</sup> Consider for example Fuller's eighth principle of law “congruence” between enacted rule and official action, which implies that the rule, the law, *precedes* official action.

ascribed to it. In other words, enforcement is an *effect* of law, and thus cannot be *either* a cause, nor a definition, of law. The mistake made by the conceptual legal positivists is to confuse law as such (the specifically legal, however this is defined) with its own effects (enforcement, obedience or sanction); however this mistake is identifiable, and rectifiable from within the methodological structures of conceptual legal positivism.

Things are bleaker for empirical legal positivism. By understanding law as having a real existence, and being capable of direct observation, empirical legal positivism limits itself to focus on the ascription of power itself. The object (law) to which power must be ascribed, is perfectly shielded from the focus of empirical legal positivism, which is so in thrall to centralised power that it is capable of perceiving nothing else. For this reason, Hart was in fact correct to claim<sup>184</sup> that public international law was not a legal system; but this tells us more about the methodological weaknesses of the Hartian model than it does about international law, or its status *as law*. That Hart's definition of law is anchored paradigmatically in municipal law is one, forgivable, thing; that it, while claiming to be a theory of law, overlooks even the *possibility* of the specifically legal is another matter altogether.

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<sup>184</sup> Hart, *supra* note 10, chapter 10.

## CHAPTER 2: LEGAL THEORY, A “STAGNANT” DISCOURSE?

### Introduction:

This chapter seeks to explore several intertwined themes relating to the existence, identification, and purpose of law. The central aim pursued here is to lay the foundations for the understanding of law – and especially PIL – as an independent normative discourse, a system of rules with its own (fixed) criteria for entry. This is in effect a defence of a legal positivist ideal, of law as a body of amorally identifiable and applicable norms. However, this defence also seeks to re-conceptualise the concept of law, and in particular to emancipate it from the demands of social centrality and authority, that is both from the demand that law be authoritative, *and* the demands that this social centrality in return makes of the law. The present thesis *denies* the classic legal positivist elision of law and centralised authority, but *refuses* to replace it – or mediate, or mitigate it – with an elision of law and morality.

To this end, the traditional assumptions of legal positivism, and the traditional critiques of these, having been briefly considered, a new understanding of the basic category “law” will be devised, presented and defended. The utility of this concept<sup>1</sup> of law is essentially implied here, but will be developed subsequently, as the instant aim is simply to show the feasibility of this approach.

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<sup>1</sup> Concept is used here in a quite deliberate distinction to conception of law, precisely because the core of the present argument is that so much attention has been paid to particular (domestic) conceptions of law, that these have become confused with the concept of law itself. However, this terminology will

## DISENGAGED ANALYSIS: LEGAL POSITIVISM'S BANAL ATTRACTION:

In his critical engagements David Dyzenhaus presents legal positivism, unjustifiably, as a unitary school of thought, while in reality emphasising the Hartian empirical perspective. From that perspective, Dyzenhaus has recently accused legal positivism of offering a “stagnant research proposal”.<sup>2</sup> This stagnancy is traced to legal positivism’s being caught in oscillation between practical irrelevance and non-evaluative description. Dyzenhaus’ charge is sure to re-invigorate the interminable legal positivist against natural law debates on the essence and identification of law. As I have already elaborated, I have my position within this debate. However, I hope now to begin the more radical, and indeed more urgent, task of recasting the debate’s very terms; that is of analysing not only the differences between the camps, but also, and more importantly, their shared assumptions.<sup>3</sup> In doing so, I shall also lay the ground for demonstrating conceptual legal positivism’s capacity to respond to Dyzenhaus’ critique.

The crux of Dyzenhaus’ charge is that legal positivism’s “separability thesis” (the belief that law and morality do not necessarily coincide<sup>4</sup>) cannot countenance the idea of a “prior moral obligation to obey the law”, and yet legal positivism remains

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rarely be re-used, and preference will be given to a three level schema of categorisation, drawn essentially from semantic analysis, on which see *infra*.

<sup>2</sup> Dyzenhaus D., ‘Positivism’s Stagnant research Proposal’ 2000 OJLS 703.

<sup>3</sup> Shared assumptions can in fact be the most difficult obstacles in the path of ‘truth’, or the evolution of thought. This is because the effects they exercise on perception and so on ‘reality’ and ‘possibilities’ are generally unrecognised. Such assumptions form a part of the very way in which we perceive the world and any part of it. This effect of background assumptions on perception gives rise to what Paul Feyerabend terms our “observation language”, and it is important to note that, while powerful, an observation language is contingent, and may therefore be wrong, inducing, in effect, delusions in the perception of those deploying it. See Feyerabend P. *Against Method* 66.

<sup>4</sup> According to Paulsen, in his “Introduction” to Kelsen’s *An Introduction to the Problems of Legal Theory*, the term “‘separability thesis’ is standard nomenclature” and can be traced, or at least is generally attributed, to Hart’s seminal article “Positivism and the Separation of Law and Morals” 71 *Harvard Law Review* (1957-8) 593.

predicated on an understanding of law as authoritative; as providing answers (syllogistically derived from legal norms) which must be obeyed, or give rise to sanctions for disobedience. Thus other reasons or motivations for obedience are sought by legal positivists, or else obedience is defined into law, and thus simply regarded as a characteristic, an identifying feature, in no more need of explanation than the wetness of liquids.<sup>5</sup> This, as noted in the previous chapter, can be seen clearly in the works of Austin and Kelsen, and lies latent, but necessary, in the assumptions structuring the “observations” of Hart, Raz, and Gardner.

This stagnant research project, the emphasis on non-evaluative description, is traced to legal positivism’s (Hart inspired) descriptive turn, its becoming an amalgam of “analytic jurisprudence” and “descriptive sociology”. Moreover, the stagnancy is exacerbated by changes in the focus of legal theory which have centralised the adjudicative process. The “data” for observation has been determined as adjudication, and legal positivist theories can be evaluated only by the correspondence of their description to that data. From the previous chapter, it should be apparent that the resources to answer this challenge lie latent in the conceptual strand of legal positivism, but also that Dyzenhaus’ charge emphasises the weaknesses of empirical legal positivism. In other words, we must choose sides within legal positivism before we can respond to Dyzenhaus’ charge.

Dyzenhaus claims that the Hartian changes of technique and focus have left legal positivism trapped in a futile choice between a strained analysis of a legal positivist stipulated ‘law’ or a descriptive report of the unconstrained exercise of judicial

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<sup>5</sup> Dyzenhaus, *supra* note 3, pp. 711-2.

discretion.<sup>6</sup> Natural Law escapes such troubled waters by retaining a purposive understanding of the practice of law, while legal positivism floats into them because it “has to some extent lost its substantive moorings”<sup>7</sup>. In other words, the legal positivist “claim that understandings of the point of law, which inform theories of adjudication, operate in a different conceptual space from theories of law”<sup>8</sup> is wrong – law cannot be understood in non-purposive terms.

This is an important criticism, but it is *not* an original one. In fact it is simply an eloquent recapitulation of Dworkin’s elision of law and adjudication, of the claim that legal philosophy is the “silent prologue” to adjudication. This entails that, if law *in the adjudicative setting* has a purpose, then law as such, the object of legal philosophy, must share that purpose; after all, the two – law and adjudication – are the same:

Jurisprudence is the general part of adjudication, silent prologue to any decision at law.<sup>9</sup>

Thus, the role of legal philosophy is to identify this “silent prologue”, through adjudication, and therefore according to the purposes and values of adjudication within the given legal system. Legal theory must then be substantively normative, because it, and the law with which it has now been elided, rely on an “understanding of the point of law”. In fact, their role is to explicate and further that “point” or purpose.

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<sup>6</sup> Dyzenhaus, *supra note 3*, p. 715. Ricouer eloquently denounces this strand of positivism as “the complicity between the juridical rigidity attached to the idea of a univocal rule and the decisionism that ends up increasing a judges discretionary power” see, ‘Interpretation and/or Argumentation’ in Ricouer P., *The Just* 109 at p. 114. Positivism’s potential to guide interpretation, using context to provide determinacy, will be considered in a later section.

<sup>7</sup> Dyzenhaus, *ibid* p. 709.

Thus Dyzenhaus' charge can be more clearly presented in its relation to Dworkin, and the adjudicative focus of legal theory. The irrelevance of which legal positivism is in danger is the arbitrary imposition of the criteria for the identification of law, the arbitrary content of any formulation of the Rule of Recognition derived from pure observation of adjudicative practice. To whatever extent Dworkin is correct about endemic controversy, the Rule of Recognition must take a stand and *enunciate* criteria. Absent a purposive understanding, this enunciation becomes arbitrary. However, the alternative (within Hartian theory) is a simple admission of relatively widespread "strong" judicial discretion, which entails admitting *both* an absence of criteria for (usefully) identifying legal rules, *and* the absence of a method for generating such criteria.

The truth of this charge can be perceived in Hart's paradigm legal system, the English legal system. Hart formulated the English rule of recognition as: "Whatever the Queen in Parliament enacts [is Law]".<sup>10</sup> Increasing judicial activism, membership of the EC/EU, the advent of "fundamental common law rights", and the domestic incorporation of the ECHR have served – individually and collectively – radically to undermine that simple formulation. Of course we *could* attempt a new formulation, but this is where the arbitrariness would come into relief.

Firstly, any 'accurate' (re)formulation would require so many variables as to be practically without content; and secondly, several senior judges (notably Woolf, Laws, and Steyn) have commented extra-judicially that some rights may not be

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<sup>8</sup> *Ibid.*

<sup>9</sup> Dworkin *Law's Empire* p. 90.

removed by Parliament, no matter how candid they may be in doing so. The example, however, is illustrative only, but the point remains: the rule of recognition as the product of factual observation *cannot* give adequate criteria for the accurate identification of law.

Thus, for Dyzenhaus, legal positivism, in perceiving law simply as an inadequately differentiated social phenomenon (the actions of legal officials) to be described, analysed, explained and critiqued, has lost its focus. It has indeed lost any basis from which to justify (or even structure) such analysis or critique, and in extreme cases, even to justify its identification of the phenomena described.<sup>11</sup> Only a re-engagement with the purposes of law – and presumably then with the justification or roots of the duty to obey the law – can remedy these shortcomings. This would involve (re)considering the relationship between substantive and methodological concerns generally, and between the separability and identification theses in particular.

These theses – that law and morality do not necessarily coincide, and that law should be identifiable and interpretable without direct recourse to moral argumentation – are believed by legal positivists to be independent of one another. However, Dyzenhaus claims that concessions in the identification thesis would lead inexorably to a slippage in the separability thesis, by re-introducing a moral compulsion to obey the law; i.e. the use of moral criteria to expand and elucidate the effects of legal rules inexorably re-introduces a moral compulsion to obey the law, the law's authority is bolstered by its moral force. Moreover, such re-introduction of moral criteria is a necessary entailment of legal positivist engagement with questions of adjudication.

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<sup>10</sup> Hart *The Concept of Law*, p. 102.

<sup>11</sup> Dyzenhaus, *supra* note 3, pp. 714-7.



This is an interesting, and superficially plausible argument. Nonetheless, it is both wrong on its terms, and often inapposite. The argument is irrelevant to the branch of soft positivism which declares (simply and solely) that the rule of recognition of any given legal system may refer to morality. This is because the reference must be understood as an allusion to a particular morality – be it an official religion, the judges’ inclinations, or the rationality of “the reasonable man” – rather than, as Dyzenhaus must imply, the morality of the person examining the law. From this, essentially external, perspective,<sup>12</sup> the moral element in the rule of recognition, has no (or possibly even a negative) bearing on the duty to obey the law. Only where the two moralities *happen to coincide* will the moral duty to obey the law be *reinforced*.

This is closely related to the failure of Dyzenhaus’ argument for the foundation of the moral authority of law, on its own terms. The duty to obey the law *cannot* be founded on the particular moral structure of a legal system in the way that Dyzenhaus, borrowing here from Dworkin, suggests. This becomes apparent when attention is focussed on the obligations of the *loser* in any adjudicative setting, as analysed by Dworkin. The side which lost *misunderstood* or *misidentified* or *misinterpreted* the moral structure of the law. In other words, their moral duty to obey the law was, before the Courts’ decision, founded on an error.<sup>13</sup> The key question then is why this

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<sup>12</sup> That is, it is a perspective which recognises an extant internal perspective, but one to which the observer does not personally subscribe.

<sup>13</sup> This is similar to, but more extreme than, the problem Thoreau long ago recognised in democracy, that the loser is bound against his will to the acts of the state, see *The Duty of Resistance to Civil Government*. However, Thoreau at least honestly admitted that this could be overcome only by positing an abstract commitment to democracy which was manifested and concretised *by the act of voting*, and so bound the voter – win or lose – to the final outcome. This does not hold for law. We do not necessarily choose to go to court, and only by means of elaborate fiction could it be argued that in going to court the participants commit themselves to the final decision. The bindingness of any decision *in the abstract* predates the parties presence in court. In other words, at the root of any fiction of participation binding the participants must be presupposed an *abstract moral commitment* to obey

error does not vitiate that duty. The answer in short is that the particular duty to obey the law was founded on a more abstract duty to obey the *law as such*. But this latter duty is simply presupposed:

We share a general, unspecific opinion about the force of law when ... special considerations of justice are not present, when people disagree about the justice or wisdom of legislation, for example, but no one really thinks the law wicked or its authors tyrants. Our different convictions about the force of law unite in such cases.<sup>14</sup>

In effect, this means that Dyzenhaus is caught by his own charge: the Dworkinian system can no better account for the authority of law than can legal positivism, it is just that Dworkin is (arguably) better at hiding this fact.

EFFECTS OF THE INSIGHTS TO BE DRAWN FROM DYZENHAUS'  
CHALLENGE, IN LIGHT OF ITS FAILURE:

Although Dyzenhaus contends that the “malaise in legal theory”<sup>15</sup> is a general one, he does not appear to acknowledge the radical implications of his own challenge. These include the possibility that the purposes of law do not justify its centrality as a social institution; that it is in fact a bad idea “to make ... the reach of legal authority co-extensive with the reach of law” as Dyzenhaus suggests we should.<sup>16</sup>

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the law. But this type of commitment was the very thing the theory set out to prove, it cannot therefore be a presupposition of that theory.

<sup>14</sup> Dworkin R., *Law's Empire* p. 111.

<sup>15</sup> Dyzenhaus, *supra* note 3, p. 719.

Much of Dyzenhaus' charge is, however, apposite. Contemporary legal positivism is far from being beyond reproach, and its assumption of self-evidence – supported only by its stipulative definitions of its object of analysis – is at best misguided. This is perfectly illustrated by Gardner's (persuasive) unifying thesis of legal positivism (LP\*):

In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).<sup>17</sup>

While this thesis is clear, and could easily be subscribed to by most legal positivists (myself, unfortunately excluded by the contents of the parenthetical ending) it displays two shortcomings, which from Dyzenhaus' perspective become key failings. First, (LP\*) lacks a *definition* of law, legal system, or legally valid. Secondly, and related, (LP\*) *a fortiori* lacks any defence or justification of its (non-existent) definition of law. (LP\*) is beyond challenge not because of its empirical accuracy, but because of its contentless, self-referential, and stipulative nature.

Nonetheless, legal positivism as a method of analysing and understanding law retains great value. This utility is increased (especially in PIL) by the absence of a quasi-universally accepted articulation of an ethico-political programme, or of the successful demonstration of the type of objective ethics presupposed by the

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<sup>16</sup> *Ibid* p. 717.

<sup>17</sup> Gardner J. "Legal Positivism: 5 ½ Myths" 46 *American Journal of Jurisprudence* (2001) p. 199 at p. 201.

Dworkinite project.<sup>18</sup> We can therefore acknowledge the accuracy of Dyzenhaus' observation that "the presupposition that there is a distinction between politics and a science of law is itself political",<sup>19</sup> and consequently reject Kelsen's claims for the a-political purity of the decision to adopt the *Pure Theory*, without also acknowledging that Dyzenhaus (or Dworkin, Finnis, Fuller, etc.) provides a preferable theory.

It does not matter that the adoption of a legal positivist theory is an act of choice, rather than an underlying natural or logical necessity, provided only that this choice can be justified. It is in this sense that Dyzenhaus claims – and I agree – that all legal theory is necessarily normative: we must explain why our chosen theory is better than the alternatives. A mere claim to greater descriptive accuracy (the foundation of the stagnant research proposal bequeathed by Hart) can never suffice, because the very data to be described must first be identified. But the move from the descriptive to the normative is *not*, in the least, inconsistent with the claim that positivism provides the best available theory of law. Indeed Dyzenhaus himself emphasises the normative ambitions of both Bentham and Hobbes' theories of legal positivism.<sup>20</sup>

Legal positivism as method essentially claims that law is (or at least should be) identifiable, interpretable, and capable of determinate application without recourse to direct moral evaluation. In other words, that law is best perceived as a body of rules, membership of which is independently ascertainable by reference to fixed criteria.<sup>21</sup>

However, this form of legal positivism is *not* inured from inquiries into the purpose of

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<sup>18</sup> On the necessity of such a demonstration to preclude an inexorable slip into infinitely regressive questions, see Simmonds N. 'Mundane Practices and Imperial Visions' 1987 CLJ 465, esp. at pp. 474-7.

<sup>19</sup> Dyzenhaus, *Legality and Legitimacy* p. 109

<sup>20</sup> Dyzenhaus, *supra* note 3, pp. 718-9.

law, and indeed legal positivism in its more sophisticated manifestations entails a dialectic between the purposes of law on one hand and its very existence and form (the objects of legal positivist analysis) on the other. In other words, Gardner's carefully preserved distinction between the source and the form of law<sup>22</sup> cannot obviate the need for a *definition* of law. A definition, as Fuller recognised, does entail formal merits, because only objects bearing certain characteristics, a certain *form*, can be accommodated within any given definition.

### The Nature of Law

Law is not a brute fact, it does not 'exist' to be described in the way a tree, or even a courtroom, does. It has, without doubt, physical consequences, and even physical manifestations, but these are ultimately constituted by belief in the law, and this belief cannot, initially, have been shaped (let alone caused) by the law. In other words, only a peculiar form of (now institutionalised) commitment to law differentiates the words of a statute, treaty, or case report, from those of a novel or a newspaper; and only this belief sustains law.

This raises the question of what this institutional commitment is, or rather of what it means to say that there is an institutional commitment to law, and, moreover, a commitment which provides the very basis for law's existence. Once more this confusion is brought about by an apparent agreement which masks a deep-seated disagreement, but is itself manifested in ambivalence. MacCormick exemplifies this ambivalence by describing law as an "institutional fact":

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<sup>21</sup> For an outline of the relative advantages of this understanding of public international law, see Beckett J. 'Behind Relative Normativity' 2001 EJIL 627

This idea, expounded at length by MacCormick and Weinberger as the Institutional Theory of Law,<sup>23</sup> is encapsulated by the former's insistence that law is a "thought object", and that these:

Exist by being believed in, rather than being believed in by virtue of their existence<sup>24</sup>

This understanding of law has profound ontological implications, but it is not necessarily as radical as it first appears. Belief is a slightly ambiguous term, but is far closer to acceptance than to commitment, and the necessary bearers of belief are not clearly specified. Nonetheless, one thing is clear: not everyone has to individually believe in law (or any given legal system) for it to exist. There is no individual veto over law – as law (once extant) has physical manifestations, and can act upon people, their beliefs notwithstanding. Nonetheless, both a belief and a commitment by system officials is necessary for law to exist, and this must (extreme cases of violence and oppression notwithstanding) be complemented by a general commitment to the legal system amongst the general populace under its jurisdiction.<sup>25</sup>

Already an ambivalence appears to be surfacing as, radical possibilities notwithstanding, the above analysis remains perfectly compatible with Hart's descriptive approach to legal theory. Indeed the definition of belief just offered could

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<sup>22</sup> Gardner, *supra* note 17, at p. 208.

<sup>23</sup> MacCormick N. and Weinberger O., *The Institutional Theory of Law*.

<sup>24</sup> MacCormick N., 'The Ethics of Legalism' 2 *Ratio Juris* (1989) 184 at p. 191.

<sup>25</sup> See e.g. Hart H. L. A. *The Concept of Law* ch. 6; MacCormick N. *Legal Reasoning and Legal Theory* Appendix: 'On the Internal Aspect of Rules' esp. pp. 277-8; 'The Concept of Law and the *Concept of Law*' 1994 OJLS 1 at p. 17.

come straight from the pages of the *Concept of Law*. The ambivalence is unresolved as we have not yet considered *what* is to be believed in: the law as such, or institutional behaviour as law.

The central focus of this work as a whole is on the question of what law is, on how we identify the raw data for legal theory. This is a second order question, a prologue to legal practice as Dworkin has put it, but it should *not* be understood as a “silent prologue” as Dworkin suggests. Thus the concern is not with what the law says, nor with what legal rules, ideas, or norms mean. These are first order questions, but they depend for intelligibility on the second order question, what makes the law law (what counts as law). From what data do we identify what the law says? How do we recognise legal rules, ideas, or norms? What is law?

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

My argument, adopted from Fuller, is that law is a particular form of the exercise of power. What this entails is that not all authoritative or central exercises of power are

law, and so that not every society need be regulated by law. Moreover, not every society purporting to have and apply a body of rules, or other form of authoritative dispute settlement, has a legal system; yet all societies have regulative codes and techniques of governance. Thus it is also entailed that not all such techniques and codes are law or legal systems. This is posited as an analytic, rather than an historic claim.

In considering the “beginnings”, or origin, of law Willem Witteveen has recently observed that:

The question of Law’s beginning is a complicated one. Logically speaking, there must be some origin, some moment in time when the law came into being. After a certain date it must have started functioning, and then law was socially recognised for what it is. But for no established legal culture can we say in retrospect exactly when this origin occurred, at what time it must be dated.<sup>26</sup>

Questions surrounding the beginnings, the coming into being of law, are questions beyond, and separate from, the discourses of legal history. They are questions which can only be answered logically, analytically, hypothetically, and so contingently. They are questions of theory, not of fact, empirical reality, or history; and it is *as questions of theory* that I propose to engage with them here.

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<sup>26</sup> Witteveen W. J., “Law’s Beginning” in Feldbrugge, F.J.M. (Ed.), *The Law’s Beginning*. 221 at p. 221.



The tale could also be told historically, and a synopsis of that perspective may make matters a little clearer. Historically it is likely that law grew out of (and in turn gradually gave birth to) certain institutions and institutional practices. Therefore law does have a real tie to institutional behaviour, but this tie need not be unmediated, nor uni-directional. That is, law is not solely the product of institutional behaviour, and cannot be discerned purely (or directly) from institutional behaviour; i.e. not all institutional behaviour is law.

We could then hypothesise the law's original role as a legitimatory one, not (at least at first) to speak right to might, not to provide justice against power, but to *legitimate* power. Law could be perceived as a set of practices through which the exercise of power is explained and legitimated. However, if this is the case, then it is also at least possible that over time this process of justification through law (treating like cases alike, providing rules, etc.) could, itself, solidify. At that point, the law could begin to break free of institutional constraint, to differentiate itself from other exercises of power, to become distinct, identifiable, and ultimately "socially recognised".

It is at this point, when law has become an analytically identifiable phenomenon, that it can *also* become a point of critique for institutions and institutional behaviour: that power is not being exercised lawfully. But for this to happen, law must provide its own standards, its own ideal type, separate from, and indeed opposable to institutional behaviour. This, I think, is why Dyzenhaus believes all legal theory must be normative, because it must be arguing toward that ideal type, seeking to articulate the ideal, not merely describe the actual.

At first glance this is not necessarily so, as noted above there is an ambivalence here; law *could* be perceived free of institutional behaviour, but it need not be. However, even at this point, Dyzenhaus remains correct. There is no external reason to elide law and institutional behaviour (there is no necessary nature of law) and thus the elision can only (ultimately) be an act of choice; that being so, even descriptive legal theory is based on a decision, and so is normative (in seeking to further that decision). But the decision itself remains. It is this decision which I believe MacCormick *both* makes and effaces.

The effacement is presented as an undeclared ambivalence, MacCormick notes that law is an “institutional fact” rather than a “brute fact”, but the phrase “institutional fact” could easily be adopted by Hart.

Nonetheless, the understanding of law as an “institutional fact”, rather than a “brute fact”, represents a decisive advance made by MacCormick over Hart; it may also display a fundamental, methodological, rift between MacCormick and Hart.

Alternatively, it may be that MacCormick simply offers a “line of flight”,<sup>27</sup> a way out of Hart, which he himself does not take, or certainly does not admit to taking. That is, MacCormick’s analysis has a radical potential, but equally retains an infatuation with Hart’s belief in the necessarily institutionalised nature of law, or at least legal system.

As noted, Hart also perceived law as an institutional fact; the existence of law is manifested in the institutional recognition and enforcement of law. In a sense then, the

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<sup>27</sup> See Deleuze G. and Guattari F. *A Thousand Plateaus* pp. 9-15. A line of flight is an opening in existing ideas, from which new ideas may grow or ‘take flight’; but it is a radical opening, intended, at least in part, to eliminate or rupture path dependence, and thus (to some extent) to free the new ideas from their own genealogical baggage. See also: [http://www.uta.edu/english/apt/d&g/alines\\_of\\_flight.html](http://www.uta.edu/english/apt/d&g/alines_of_flight.html)

*real* existence of law (and for Hart the existence of law *must* remain real) is both institutional *and* based on belief; the belief of the legal officials. Nonetheless, the *fact* of institutional belief can be observed in institutional rhetoric and behaviour, and these can provide the data for legal theory, which can therefore remain descriptive.

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

That is, we must *choose* whether to privilege the conceptualisation of law as a "thought object" *opposable to* institutional behaviour; *or* to privilege the institutional behaviour itself as identifying the institutional fact of law. This is the ambivalence: that an institutional fact could come from *either* the fact of institutional behaviour, *or* the potential institutionalisation of a "thought object".

I think that Dworkin also maps neatly onto this debate. In perceiving legal philosophy as the prologue to adjudication, Dworkin suggests the latter route: that we privilege the thought object, and our understanding of this determines our identification of legal rules (definition preceding description). *However*, in reducing this prologue to silence, Dworkin then makes the opposite move, privileging the actual institutional behaviour. In both cases, the thought object still exists, but in the former it speaks for itself while

in the latter it can only be identified through the institutional behaviour, hence its “silence”.

However, the move from institutional fact to thought object seems more likely to represent a move from the factual to the counter-factual – a move from Hart to Kelsen. This allows a fundamental reconsideration of the basic nature of law: if existence effects belief, *why did humanity choose to believe in law?* More basically, what was this thing, law, in which they chose to believe. Definition must precede existence, and thus existence must become counter-factual. However, the idea of law as thought object, is *also* a decisive advance on Kelsen, as it brings into relief the fact that there is *no necessary element* in the definition of law: the relationship between law and force is, conceptually, as contingent as that between law and morality. Understanding law as a “thought object” allows us free reign in deciding how to identify law, provided only that we can subsequently justify our definition.

Another important consequence of adopting the claim that belief effects law, is that the belief that created the law must have pre-dated law. Therefore, the belief cannot have been inspired by law. This belief must then have another source, and this (source) can be analytically reconstructed as follows: Law exists; therefore something must have inspired belief in it; this belief led to the conceptualisation of a legal system; the legal system must then have had a purpose; in turn this adverts to a perceived need, a reason to identify the absence of such a system; this would seem to imply a gap, a conceptual space which such a system could inhabit. This rational reconstruction can be hypothesised and presented in chronological order as follows.

First comes the awareness of a ‘gap’ and the need to fill it (or at least the desirability of filling it). This gap is the requirement for some form of regulation, or the need for a purposive/functional equivalent.<sup>28</sup> Temporally, it must first manifest itself as the presence of an unfulfilled purpose, and the absence of a means of fulfilling it.

Once the necessity of filling the gap thus identified has been brought into relief, a mechanism can be conceptualised to fulfil this purpose, one such mechanism is the concept of a legal system. However, this, or any other mechanism, can (analytically) only be conceived by reference to the need which exposed the gap it is being designed to fill. Thus the belief is in fact focussed on a purpose, with the aim of creating a means of achieving this. Therefore, the conceptualisation of a legal system (which is a prerequisite for that belief which brings law into existence) is absurd and impossible in the absence of a purposive understanding of the function of law. Therefore, not only is the understanding of a legal system teleologically conditioned by the understanding of a good legal system, but the understanding of a good legal system is itself determined by the understanding of the *purpose(s)* of the system.

It should probably be acknowledged at this point that the very idea of any pre-legal conceptualisation of a legal system is itself absurd, and that if this idea, *simpliciter*, were the claim then the institutional theory itself would be absurd; belief and existence would be mutually interdependent, so that neither could effect the other. Thus, the “thought object” of law is, itself, the product rather than the premise of an epistemological process. Although true, this serves simply to illustrate why the focus

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<sup>28</sup> I assume the gap would be brought into relief by the apparent arbitrariness of extant decision making processes. Indeed Hart’s *Concept of Law* may be read as the history of a gradual progression away from the defects of pre-legal decision-making; see Finnis J. *Natural Law and Natural Rights* p. 7.

of the initial belief must be displaced from the legal system to the gap it is to inhabit – the unfulfilled need for regulation.<sup>29</sup> Thus the system is envisaged at a remove:

1. Perceive gap
2. Identify need to be fulfilled (delimit gap)
3. Conceptualise a means of fulfilling it
4. Persuade ‘relevant’ others of efficacy of chosen means
5. Effect ‘existence’ of object of/created by belief (fill gap)

However, the effect, and indeed the very existence of this remove, becomes submerged and hidden from sight (and *a fortiori* from analysis) as attention is instead turned to refining the system adopted. This means that, as the mechanism evolves it gains control over the conditions of its own development and its central features become ‘given’, the parameters of analysis become set.<sup>30</sup> Put differently, history once again takes over from analytic reconstruction and the (brute) fact of “the law” as institutional behaviour (or coercively imposed order) resurfaces. Legal theory returns to the descriptive, and the concept of law stops being recognised as a product of the theory of law: the nature of law is set as the imposition of coercive order.<sup>31</sup> That is, point 5 in the analytic reconstruction is no longer recognised as the conclusion of a rational reconstruction, but is instead considered as if real – as if it were a brute fact – and, in the case of the legal system, as the natural ontology of law.

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<sup>29</sup> However, as Cover points out this is (in a sense) not really an absence of regulation, but rather a super-abundance, what is actually missing is the regulation of regulation - the “jurispathic” function of law. Arbitrariness comes from having too many factors to take into account, and no way of delimiting relevance. This is similar to a Hobbesian “State of Nature”, but is functionally equivalent to an absence of authoritative regulation. See Cover R. “*Nomos and Narrative*” 97 *Harvard Law Review* (1983)4 at p. 53; Hobbes T. *Leviathan* pp. 88-91.

<sup>30</sup> Searle J., *The Construction of Social Reality* 7-24

This is what is meant by the critical charge of *reification*, as the purposive creation of law (the analytic ideal giving rise to the thought object of law) is forgotten, what remains (the mechanism of the institutionalised legal system) is reified; it is epistemically reconstructed as the *thing*. This allows its (ultimately contingent) features to be understood as natural – i.e. *innate* – characteristics. It is in this sense that these ‘natural characteristics’ (the force and authority of law) are moved beyond critique, to an almost transcendental level, as they are taken as given. Not only is their status as *assumptions* – as the product of human choice – forgotten; but this very forgetting is in turn forgotten. The ontology of law is effectively transferred from the contingent realm of institutional fact, to the empirical realm of brute fact.

Thus, the law is no longer understood as a purposive creation, nor as a tool, but rather is perceived as a fixed element in social reality. Law is understood as coercive order (the common assumption of municipal legal theorising) and the reasons for this are ignored. Analysis and critique move to the first order questions of content and meaning, and the second order issues of what makes law law are submerged, no longer to be engaged with. From here on, the only valid critique of law is that which seeks to expand, restrict, or refine the effects of the system; analysis is completely displaced to the conditions for the validity (however defined) of the norms of the system – in Dyzenhaus’ terms to make legal authority co-extensive with legal reach *and* justify this. The reach of law itself is presupposed as total, as law is understood as coercive order; *as if* this were a natural and necessary feature of law.

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<sup>31</sup> I think this is similar to Marxist claims about the fetishisation of law. Once law and coercive order are elided, it becomes difficult to think of an ordered society without law, and the nature of law

This is where legal theories in general, and legal positivism in particular, find themselves today. Law is totalising (has an answer to all questions)<sup>32</sup> and authoritative; this cannot be helped, and therefore attention must focus on making the law substantively ‘better’. This, in effect, is the limit point of the controversy between legal positivism and natural law. The question is reduced to a description in the case of legal positivism, and to a set of substantive claims in the case of natural law. That is, *both* schools (and indeed the critical and realist movements) *accept* the fixed characteristics of law, and divide only over how to deal with them. Natural law asks, purposively, how to direct the authority of law, while legal positivism remains content merely to describe what is there; the data of law as *organised* (i.e. identified and classified) around these fixed characteristics.<sup>33</sup>

#### The Reach of Law:

The real dispute between legal positivism and natural law is *not* over the ontology of law; it is not over what law *is*, as *that* has been loosely, but sufficiently agreed as some form of centralised coercive order. Instead, the underlying disagreement is over how, and *whether*, to limit or regulate this socially central regulative order; over how to *substantivise* law. In both schools of thought (natural law and legal positivism, which may, for these purposes be taken as unified entities, because the assumption of the necessary centrality of law, is adopted by all major proponents of both schools), law is presented as a centralised, authoritative, rule-bound discourse. The focus of

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becomes not only set, but also necessary.

<sup>32</sup> This is essentially an epistemic claim, law is a method of (or grid for) perceiving the world, therefore its reach is ‘total’, it covers all eventualities and nothing escapes legal regulation (in its wide sense, which includes permission, and is therefore distinct from interference).



disagreement is how we should form the rules; how to identify the rules; and whether to circumscribe the content of any putative rules.

The inevitable, and total, reach of legal solutions to problems is inherent in any sources theory<sup>34</sup> of law, as is well illustrated by both Hohfeld and Raz. The ‘closing principle’ (to which I shall return) provides an answer to those questions unregulated by specific norms of the system, and thus the law cannot help but have an answer. As Raz explains it, in any sources based system, one source will occur always (and only) in the absence of all the others - generally, following Hohfeld, this will mean that the absence of prohibition equals permission. In Raz’s terms:

Intuitively, the negation of a legal reason is nothing more than the absence of a legal reason. It does not make sense to look for the source of an absence of a reason, legal or otherwise.<sup>35</sup>

Thus the “sourceless reason” is entailed by the absence of any other reason, and closure rules become “analytic truths” in sources based legal systems.<sup>36</sup>

However, this area can be re-opened, and Hohfeld and Raz’s claims problematised (indeed their conclusions undermined), by a demonstration that law’s totalising tendencies are epistemic in nature. The law perceives the world only in terms of its own legal/illegal code, thus conduct can *be* only legal or illegal. However, the

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<sup>33</sup> Of course, the more precise point being made by Dyzenhaus is that legal positivism does not, and cannot accomplish even that task; this point is effectively conceded by MacCormick, see ch. 3, notes 9-20 and accompanying text, *infra*.

<sup>34</sup> A sources theory is one that makes law identifiable by virtue of its pedigree (source), it is therefore a necessary corollary of the positivist identification thesis.

<sup>35</sup> Raz J., *The Authority of Law* p. 67.

connection between this epistemic claim, and the normative-pragmatic claim to obedience is not entailed by the former. That is, the conclusion reached by law *need not* be considered authoritative or compulsory.

One way of limiting this is to condition the translation of the epistemic claim to the pragmatic claim by making a second epistemic claim that the legal/illegal code is itself conditioned by law's rule-bound internal structure. This claim, which will be expanded subsequently, shows the limits of the *effective* use of the legal worldview, and therefore gives indicators as to when law's claims to authority are valid, or even worthy of consideration, and thus of when they should be considered irrelevant. In other words, if law is a standard against which conduct can be evaluated, the limitations inherent in the rule structure give an indication of when a premium should be placed on conformity.<sup>37</sup>

It should, however, be noted that the distinction drawn here between normative and epistemic claims is not hard and fast. There are very few (if any) epistemic claims that do not have normative overtones, especially within the institutional theory of law, where belief, and thus understanding, create and condition existence. However, the claim that law is a rule bound discourse is staked as a factual<sup>38</sup> one, but is not

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<sup>36</sup> *Ibid* p. 74.

<sup>37</sup> However, this type of evaluation is *necessarily arbitrary* at least in the ultimate point. Law is most likely to be good at the things it has traditionally done, but only because it has traditionally done these things. In other words, after a certain point, it becomes inevitable that the mere *fact* of legal regulation becomes the evaluative *standard* against which successful regulation is evaluated. Law is good at what it is good at, because the law has defined the good.

<sup>38</sup> However, the very idea of factual is problematic here. The rule bound internal structure of law is entailed by the purpose of law postulated here. But this purpose, in turn determines what is to count as law; what can be perceived or observed as law, or as the functioning of law. The claim is thus factual in a counter-intuitive sense; it is by perceiving (*inter alia*) such a rule bound reasoning process that we can understand ourselves as perceiving law. Definition controls perception, and thus implicitly definition controls factuality. This is the "reality" of life within an institutional understanding of a given phenomenon, in this case law.

synonymous with the claim that individual (complexes of) norms determine any given decision. Rather the claim is that law's reasoning structure - its method of applying the legal/illegal distinction to construct its reality – is rule-bound: law 'thinks' in terms of rules; considerations are not *ad hoc* but are examples of rules, exceptions to rules, or counter rules.<sup>39</sup> Law *formulates* – frames or *constructs* – disputes in terms of rules. Of course the claim that legal theory should take this into account is normative, and may even have the normative effect of emphasising or supporting law's rule-orientation, but this does not make the factual 'observation' (of a rule structure) itself into a normative claim.

The purpose of this section of the chapter is simply to demonstrate that law is *not* a brute fact (even when it appears to be so, this is only as a result of an unarticulated consensus, that is, it is an act of human choice; which still requires justification), and therefore that reconsideration of law (and its purpose) can alter its very nature; structural limitations, restrictions, and effects can only be analysed and combated through consideration of the structure, and the social-structural location, of law itself.

#### The Authoritative Centrality of Law Reconsidered, and Problematised.

Dyzenhaus' charge can now be more fully developed, as challenging legal positivism (although it is really applicable to all of legal theory) to re-engage with the question of the purpose of law, and then (by implication) with the notion of an automatic and absolute (i.e. non-contingent, non-arguable) obligation to obey the law (or suffer the consequences) as an assumed constituent trait of a legal system. Legal positivism, in

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<sup>39</sup> This will be developed subsequently.

this analysis, sees the authoritative nature of law as a condition of law's very existence rather than a contingent feature of a given understanding of its purpose.

In perceiving law as an identifiable phenomenon, with authoritativeness as a defining characteristic, legal positivism also has the effect of radically relocating the debates surrounding the legitimacy of law, as consideration of the structural location or hierarchic superiority of law is precluded; law is authoritative by definition, by virtue merely of being law. The corollary of this is that, whichever order, whichever commands or "norms" are enforced is designated as the law (in that territory, area, etc.). Legitimacy then can only be considered in terms of the efficacy, the content and the content forming procedures of the substantive rules, and any limitations that can or should be placed upon these. There is no question of illegitimacy through a structural or formal over-reach by the law. This is what conditions the terms of the legal positivist/natural law debate. The key point is that only through a re-examination, or rather an evaluative analytic reconstruction, of the origins and purposes of law can the terms of the debate itself be redefined, and circular insularity avoided.

Shklar offers a similar challenge, albeit rhetorically and as part of a different polemic, when she observes, and disputes:

The ... belief that law is not only separate from political life but that it is a mode of social action superior to mere politics.<sup>40</sup>

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<sup>40</sup> Shklar J., *Legalism* p. 8;

Shklar's strictures on legalism are not, however, restricted to legal positivism, but rather focus on the ethical attitude of rule following; the endorsement of the particular rationality that makes all traditional legal theory possible. Nonetheless, her charge is most damaging to legal positivism, as natural law does possess certain resources for response. While, of course, natural law is no more a unitary school than legal positivism, and the different strands of natural law will provide different resources for response, the important point here is simply the commonality: that each has resources of some type with which to respond. In a slightly different setting, D'Entreves captures this idea perfectly:

We are no longer concerned with what divided their authors. We are concerned with what they had in common.<sup>41</sup>

In Shklar's view an entailment of legalism is the fact that law creates (and/or circumscribes) the conceptual space within which other discourses can function, and therefore law alone can determine transgression of these conceptual spaces; i.e. law is always already hierarchically superior to all other discourses. The simple question then asked is why this is so. For natural law, this rule structure is authoritative by virtue of its substantive value, which in turn is drawn from, and defended in terms of, its purpose and the necessity of this for the human *telos*. For legal positivism on the other hand the situation is somewhat bleaker, and the possibilities for response impoverished; the rules are authoritative by simple virtue of their being legal rules (or rather, they are designated as legal rules by simple virtue of their being generally enforced): if they were not authoritative, they would not be legal; if they were not

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<sup>41</sup> D'Entreves A. P. *Natural Law*, p. 79.

legal they would not be authoritative.<sup>42</sup> This circularity becomes obvious only when the question is so bluntly posed that it cannot be avoided.

In other words, while natural law theory continues (at some level) to struggle with the question “why should law be obeyed?”, legal positivism has become inured to this enquiry. However, both have adopted or inherited a focus which precludes consideration of the equally vital question “should law be obeyed?”. It may be this that explains the awkward (and individuating) approach each school takes to the corollary question “when should a law be (dis)obeyed?”

The ‘blind spots’ of normative analysis are systemic or structural, they are caused by the (temporally) belated focus of analytic jurisprudence – both positivist legal theory and legal dogmatics.<sup>43</sup> The idea of authoritativeness as a criterion of positive law, explicitly formulated in the legal positivist requirement of efficacy, must be predicated on one of two assumptions: either the law is (always) good, or the law should be enforced anyway. Rules (individual norms) can be unjust in this analysis, but these are anomalies, which can, and should, be corrected by the system, within the system, for systemic ends; the system itself remains beyond reproach.<sup>44</sup> These assumptions are meta-analytical in the sense that they form the preconditions for

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<sup>42</sup> Legal here is used in a slightly broad sense of ‘not illegal’, thus a non-legal decision remains legal so long as it is not illegal; i.e. as long as it does not transgress the conceptual space which law has allocated to the discourse it inhabits.

<sup>43</sup> The focus is temporally belated because it concentrates on legal norms which are themselves *conclusions*, the products of competing legal theories, but which are presented and analysed as ‘fact’, as the premises of debate. This accusation initially appears unjustified in relation to positivism’s dogmatic manifestation, but this appearance is illusory. Although the purpose of this form of positivism is simply to identify valid (individual) rules (and their inter-relations and effects) it does so by setting or acknowledging criteria of validity predicated on membership of an extant legal system. This in turn presupposes a valid system to which rules can belong. System validity remains defined by efficacy, and therefore, although the relationship is mediated, valid rules are always determined by criteria of (systemic) efficacy.

<sup>44</sup> See, e.g. Schlag P. ‘Normative and Nowhere To Go’ 43 *Stanford Law Review* (1990) 167.

analytic study, and therefore are not themselves open to analysis; hence the necessity of the orthodox legal positivist blind spot inhabited by questions of the purpose of law.

Therefore the question “why should law be authoritative” is not so much irrelevant to legal positivism as perfectly hidden from its analysis. Laws can be good or bad, but to be laws at all they must be (indeed, are) authoritative. This does open the possibility - especially in the terms of Hartian theory - of a disjunction between obedience and obligation, but even this potential space is always already filled by enforcement mechanisms. Thus, although only officials need accept obligations *as obligations of the system* (i.e. must have a commitment to the system such that a coincidence between *legal* and *actual* obligations is created and maintained, while the population need only display the ‘fact’ of habitual obedience) subjects of the legal system remain faced with the prospect of obedience or sanction.<sup>45</sup> Thus the idea of obligation is displaced, and efficacy is linked directly to enforcement; i.e. efficacy can now be measured in “breach = sanction” terms. In short, the subjects’ choice of obedience or enforcement (which Austin termed obligation) remains definitional to law.<sup>46</sup> Purposive analysis is once more precluded, or at best displaced to the characterisation and differentiation of “good” and “bad” legal systems, as that is determined by the degree of the observer’s sympathy towards the substantive rules or rule creation procedures.

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<sup>45</sup> But, as observed earlier, this is inevitable given the origins of the rule of recognition in observation of the practices of these very legal officials.

<sup>46</sup> Indeed it is not even impossible that Hart does in fact relate *legal* obligation directly to the probability of physical coercion (sanctions in Austin’s terms) in the event of transgression; see *Concept* p. 84.

Olivecrona, in his historical analysis of legal positivist doctrine,<sup>47</sup> presented the most direct engagement with this issue. In assessing legal positivism's implicit assumption of a duty of obedience for its subjects – or perhaps more accurately a right to, or expectation of, that obedience by the legal system – Olivecrona plots the history of legal positivism within the context of its being an off-shoot of natural law. His position is that the duty of obedience to civil (positive) law flows from a natural law obligation to keep promises,<sup>48</sup> an obligation sanctified by the construction of social contract analysis. From this perspective, the difference between legal positivism (proper) and the 'positive' civil law of natural law theory (human regulation of areas untouched by the law of nature) is radically reduced to one of recognising and observing limitations on civil law maker's powers, or refusing to do so. There is no difference in kind between the two branches of law.

The point here is that natural law theorists were not explaining the essence of law, but the basis of its claim to authority; it is for this reason that Dyzenhaus can use this position – and emphasise Fuller – to attack legal positivism's failure to acknowledge and rationalise its radical break from its roots. In other words, where the purpose of law is to fulfil a divine or natural project, and law is defined as doing so, there is little need to defend *either* the purpose, or the obligatoriness of law. So, for Grotius, civil (positive) law was binding by virtue of a natural law dictum of *pacta sunt servanda* and both positive and natural law were obligatory as a duty to God (or later human

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<sup>47</sup> Olivecrona K. *Law as Fact* (2<sup>nd</sup> Ed. 1971) pp. 50-62.

<sup>48</sup> However, an entirely converse argument is offered by Hume, who shows with some force the illogicality of perceiving promise as a "natural virtue" as the idea simply does not seem to make sense outside a societal context, but rather is manifestly an "artificial virtue", but a good nonetheless. See *Treatise on Human Nature* Book III Part II Ch. V. In terms of the positivist fallacy however, this does not seem to offer any support of the idea that the obligation to obey is an inherent characteristic of law.



nature) *as a result* of our being given free will.<sup>49</sup> Grotius buttressed this argument with an appeal to reason: short term gain through breach of the law undermined the system through which gain could be measured, attained, and secured. Such breaches were, therefore, futile. For Hobbes it is a little different; law is no longer the fruition of a natural or divine plan, and the purpose is therefore redefined as the preservation of order. This is underpinned by the twin arguments that order is vital and only law can provide it. Therefore the law is *entitled* to demand obedience and presumptively obliged to sanction disobedience.

However, legal positivism – from Bentham to Kramer – perceives obedience as a fact, a necessary characteristic of law, law’s identifying mark. As obedience is linked to purpose, analysis of the latter becomes unnecessary when the former is presumed. This leads to the analysis of law, of the legal system as such (as opposed to the *contents* of the legal system) as an a-contextual ‘fact’.<sup>50</sup> *But* law cannot be identified without reference to its purpose (end) and techniques (means). In other words, legal positivism can give no defence of the phenomena it perceives as representing or reflecting law; rather it is reduced to the assertion “law is this which I describe”. That is, any centrally enforced, ostensibly authoritative, rule or command is taken to be law.

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<sup>49</sup> All of the analyses given here are drawn from Olivecrona (*supra* note 47). However, of more direct interest to PIL is Hersch Lauterpacht, whose attempts to add natural law content to Kelsen’s positivist project also root the authoritativeness of law in free will sanctified by *pacta sunt servanda*; see e.g. *The Function of Law in the International Community*.

<sup>50</sup> Hart was deeply concerned with context in his analysis of the meanings of legal terms and legal concepts. However, this context was provided by the legal system itself (see “Definition and Rule in Legal Theory”). Thus, the legal system served as the objective domain of analysis – it provided the standards by which truth or correspondence could be measured. *But*, that means that the system itself must be presupposed, or located in another objective domain of analysis. As there is no evidence of Hart’s having taken the latter course, it seems fair to assume he took the former. This would also resonate with his descriptive methodology, and with Raz’s Hartian claim that the concept of law resides outside legal theory; see “Two Views of the Nature of the Theory of Law: A Partial Comparison” in Coleman J. (ed.) *Hart’s Postscript* 1 at p. 36.

It is this – now forgotten – assumption, of a purpose necessitating enforcement and obligation, which causes the disengagement of legal positivism, and reduces it, in Laski’s terms, to “an exercise in logic, not in life”; it is this, also, which leaves legal positivism open to Dyzenhaus’ charges of “stagnancy” and irrelevance. I have sought so far to lay the foundations for a refutation of these charges through a reconceptualisation of law predicated on a redefinition both of its purpose, and of its (necessary) relationship thereto. The contention implicit here, is that PIL as a ‘naked legal system’ (one unclothed by political privilege; indeed without a centralised political system at all) provides the natural focus for a re-examination of the existence, functioning, and role of legal phenomena.<sup>51</sup>

#### Re-considering Dyzenhaus, Again.

However, the fact that “law” as much as the content of any given “legal system” (i.e. any particular substantivised body of norms understood as a system) must have a purpose – i.e. that each can only be properly or fully understood in terms of a purpose – does not in any way imply that these two purposes must be identical. They are, however, intimately related.

Dyzenhaus is correct that law *as such* must be understood purposively. Absent a purpose we have no way of justifying our choice of the phenomena we will observe under the name of law. Mere “empirical accuracy” cannot be a mark of success if the theory itself can define the relevant empirical data against which the accuracy of

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<sup>51</sup> Moreover, PIL as a system lacking in centralised force and authoritative decision-making, is also most in need of this form of clear, almost self-applying, rule-bound legal system.

description is to be evaluated. This would leave legal positivism in danger of irrelevance, pursuing a strained analysis of its own stipulated (but unjustified) objects of observation. Only by engagement with purpose – with the reason for having law at all – can we justify the choice of phenomena to be observed, and justify unifying this observation under the name of law or legal system. Law must be defined to be observed, and purpose is required to bring determinacy and justification to the definition offered.

Moreover, Dyzenhaus *may* also be correct that any coherent theory of adjudication must attribute an overall purpose to the legal system being theorised. That is, the application of law *also* presupposes that law have a purpose. Naturally, this is disputed by the hard positivists, for them judicial discretion alone structures the decision;<sup>52</sup> such discretion performs the function Dworkin allocated to the overall purpose of a legal system. This, as Dyzenhaus disparagingly notes, would leave legal theory with the task of merely describing the exercise of an unconstrained judicial discretion, rather than structuring or evaluating, or even predicting judicial application of the law. Thus any theory of adjudication seeking to constrain judges must posit an overall purpose for the legal system within which those judges operate. This is the concession soft positivists offer to the identification thesis, that the identification of (the content of) norms in moments of relative indeterminacy may be subject to moral criteria.

Thus the understanding of law as such must be purposive, *and* the identification of legal norms (at least in hard cases) requires a purposive understanding of the legal

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<sup>52</sup> Gardner, *supra* note 17, p. 201.

system. So, Dyzenhaus concludes, if the identification of law is a purposive practice and the definition of law is also a purposive practice, then the concession in the identification thesis must inexorably create a like concession in the separability thesis. This means that the separability thesis can no longer be maintained, and the moral nature of law must be conceded.

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

In other words, the legal positivist “claim that understandings of the point of law, which inform theories of adjudication, operate in a different conceptual space from theories of law”<sup>53</sup> derided by Dyzenhaus,<sup>54</sup> is in fact perfectly *correct*. What the law *is*, and what it is being deployed for in a particular setting, *are* two different things. That we need a purpose to determine the content of some norms does not mean that this purpose also determines the form of law as such. The form of law as such may vary, but moreover and more importantly a single form for law (e.g. Fuller’s definition, drawn from purpose, and encapsulated in the eight principles) can sustain a variety of different purposes to be pursued by different legal systems.

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<sup>53</sup> Dyzenhaus, *supra* note 3, p. 709.

<sup>54</sup> *Ibid.*

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

However, Dyzenhaus is correct in so far as he can be interpreted as claiming simply that this fact does not obviate the need for a purposive understanding of law as well as a purposive understanding of any given system of norms. This is because in understanding law non-purposively, but legal systems purposively, legal positivism effectively says to socio-political systems “Here is your (regulatory) tool. Now use it as you wish”.

In other words, the stipulated, and unjustified, legal positivist definition of law lacks utility. It completely overlooks the possibility that the tool (law as thus defined) is unfit for the purpose to which a given society wishes to put it (one of many critiques of legal positivism and of law generally, is that it fails to do what it claims it can). It also overlooks the point (made repeatedly by Fuller<sup>55</sup>) that law is but one item in the regulatory toolbox, and the corollary point that to use the tool we must first examine

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<sup>55</sup> See, e.g. “The Forms and Limits of Adjudication” 92 *Harvard Law Review* (1978) 353.

what it is, and what it is good at. Finally, the very definition of the tool is left indeterminate, as is the question of the tool's utility (and any limits on this), and even its internal functioning. No reasons are given for the nature of the tool, nor of why it (and it alone) must be used, nor how it can be altered. When the definition of law is stipulated it cannot be altered, but where it is deduced from purpose the tool itself (law) can be examined, evaluated, corrected, disputed, and given space to evolve to fulfil its purpose (which can, in turn, also, always, be problematised itself).

Thus Dyzenhaus, although correct to emphasise the necessarily purposive understanding of *both* law and legal system, errs in eliding these purposes. The understanding that the point of a legal order can be separated from the existence of law is correct. What law is, and what a particular legal order attempts to achieve (with law) are conceptually separate. The tool does not define the task, but nor does the task define the tool. What the tool is does not determine what it may be used for, though it may indicate that the tool should be modified, or that another tool should be used, or another purpose pursued. The two purposes are related because only certain objectives can be efficaciously pursued through law. However, what these objectives are depends on how law is defined, and this in turn depends on the purpose law is understood to fulfil.

The purpose of "law" as such is very abstract, perhaps social-engineering of some form, or the delimitation and evaluation of society. But how this will be substantivised requires focus on a second (itself more substantive) purpose, namely the (political) purpose pursued through the legal system. Thus the purpose of law does not determine how the law should be substantivised. It does not posit (deep enough)

presumptions about the nature or good of man, such as would be necessary to substantivise the purpose of law as such. Yet this is exactly what Dyzenhaus is suggesting purpose does. The key is the necessity for two purposes, one to define law ontologically,<sup>56</sup> and another to substantivise it deontologically.

### Dyzenhaus and Fuller, a Different Natural Law?

Dyzenhaus suggests that Fuller offers a new direction for legal theory, and a new *type* of natural law.<sup>57</sup> In positing an *inner* morality of law, Fuller is said to move away from the classic natural law position which subordinates law to a chosen moral order. Simultaneously, Dyzenhaus seeks to emphasise the *difference* between Fuller and Dworkin. As “antipositivists” each “must make an argument about moral choices which inhere in law, whatever the contingencies of political choice.”<sup>58</sup> However, the arguments each offer are in entirely different registers. Due to his focus on adjudication, Dworkin contends that such constraints arise because “[j]udges ... find themselves compelled to offer a principled justification for their decisions in “hard cases””. However, “[t]hese principles are not freestanding” but must be located within the substantive content of the legal order in question.<sup>59</sup> Nonetheless:

Dworkin argues further that such a principled justification is intrinsically a moral one and that the core of this morality is a liberal principle of equal concern and respect for all individuals”<sup>60</sup>

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<sup>56</sup> However, this purpose is also based on a series of assumptions about the nature of people, their amenability to regulation, and the ‘parts’ available from which the legal system in question can be constructed.

<sup>57</sup> See “Fuller’s Novelty” in Witteveen and van der Burg (ed.s) *Rediscovering Fuller*, p. 78,

<sup>58</sup> *Ibid.* 88.

Consequently:

“[Dworkin] commits himself ... to the odd claim that every legal order must instantiate that particular political ideology”.<sup>61</sup>

In short, Dworkin offers a classic *external* morality, a version of the very classic natural law which Fuller abandoned. By then turning to Fuller, Dyzenhaus implicitly admits the impossibility of this aspect of Dworkin’s project. Unlike Dworkin, Fuller offers a *structural* relationship between law and liberalism. This relationship is *necessary* and not contingent, as the relationship between law – and especially adjudication – and an *external* morality would be. Dyzenhaus then seeks to *develop* this aspect of Fuller’s thought, to ‘flesh out’ the internal morality, and more particularly its impact upon the *substance* of law. Dyzenhaus adopts, and seeks to extrapolate, Fuller’s purposive understanding of law.

However, Fuller does not really provide a purpose, but rather a *definition* of law. The purpose he offers is so formal that it entails nothing outside the formal characteristics of legal regulation, of what it means to govern conduct according to rules. Rather, Fuller provides a technique for *identifying* law in action, and distinguishing it from non-legal normative orders. This is why Fuller talks of providing an *inner* morality of law. Fuller’s theory is schematic; the purpose pursued – the subjection of human conduct to the governance of rules – is both formal and *assumed*. Fuller simply *defines* law; he stipulates the essence of law as a concretisation of a particular purpose which he attributes to law, but this is the purpose of law as such, not the purpose of

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<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*



any particular legal system.<sup>62</sup> It is a definition of law as a tool, not a delimitation of the function that tool is to perform.

Fuller's enquiry does not, in the first instance, concern good law and bad law, but law and not law. Thus, when Hart points out that carpentry is neither inherently good nor bad<sup>63</sup> – that a carpenter could equally deploy his skills in creating a hospital bed or a torturer's rack – he fundamentally misses the point Fuller is making. The analogy does not concern good and bad uses of carpentry, but the existence of carpentry as an autonomous field of human endeavour. A hospital bed or a torture rack could be made from wood; this has nothing whatever to do with any "morality" internal to carpentry. The key point is rather that a hospital bed or torture rack could equally well be constructed from metal, plastic, or stone. In these latter eventualities, the objects would remain a bed or a rack, but no *carpentry* would be involved. The internal morality is the bringing out of the "good" inherent in carpentry (the skilled manipulation of wood) not of the "good" to which carpentry can be turned.

Fuller's theory is not merely one of efficiency as the legal positivists suggested, but truly a morality because, for Fuller, any system displaying fidelity to the eight principles must pursue good ends. This is probably an overstatement; a legal order could pursue 'bad' ends, but it would have to do so openly, and in awareness of the restrictions brought to bear on its subjects' loyalty by the candour demanded by Fuller's principles.<sup>64</sup> The question is not, as the legal positivists in an intuitively

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<sup>61</sup> *Ibid.* 90-1.

<sup>62</sup> *Ibid.* 91-2

<sup>63</sup> Hart H. *Essays in Jurisprudence and Philosophy* p. 347.

<sup>64</sup> This is very similar to Dyzenhaus' arguments about the South African *apartheid* system, and the role of courts (ignoring the law, displaying no fidelity to the eight principles) in maintaining this. See "With

Hobbesian fashion seem to assume, about the maintenance of order or political control, but about the definition, and *then* the imposition, of law as such.

The nature of this misunderstanding is brought clearly into relief in Gardner's adoption of Hart's arguments against Fuller:

To hold a norm legally valid according to its formal merits rather than according to the merits of its content is still to hold it valid according to its merits, and this puts one on a collision course with (LP\*) ... Thus, as Hart had correctly explained in his earlier engagements with Fuller, a legal norm that is retroactive, radically uncertain, and devoid of all generality, and hence dramatically deficient relative to the ideal of the rule of law, is no less valid *qua* legal, than one which is prospective, admirably certain, and perfectly general.<sup>65</sup>

Fuller does not claim that such norms are not norms, nor does he necessarily claim that even an entire system constructed of such norms would be inefficacious. What Fuller claims is that such norms are not *laws*, and so a system comprising such norms cannot be a legal system. The key is in Fuller's vital distinction between "fidelity to the law" and "deference to constituted authority". The claim is not that constituted authority could not (successfully) wield power in such a fashion. Rather, the claim is that in doing so it abandons law for other forms of governance (or the imposition of 'order'). The question is not one of the merits, but of the *definition* of legal norms:

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the Benefit of Hindsight" in *Lethe's Law* Christodilidou E. and Veitch S. (Eds.). See also Craig P. 'Ultra Vires and the Foundations of Judicial Review' 1998 CLJ 63.

One thing is, however, clear. A mere respect for constituted authority must not be confused with fidelity to law. Rex's subjects, for example, remained faithful to him as king throughout his long and inept reign. They were not faithful to his law, for he never made any.<sup>66</sup>

Fuller merely defined what law is and then assumed that its content, or content forming procedures, or perhaps its origin, but never (merely) its enforcement or efficacy, brought the duty to obey law into relief. Despite this, Fuller instinctively, and spuriously, distinguished those regimes he disliked (*apartheid* South Africa and Nazi Germany) and denied them the label of legal systems. From these denials he universalised a theory that the internal morality of law *did* provide certain substantive restrictions on the content of law. That is, Fuller believed he had discovered substantive limitations *within* his formal definition of law.

These limitations were either contingent – e.g. the Nazi non-publication of many rules – or falsely universalised – e.g. flawed Nazi and *apartheid* efforts to define race satisfactorily. From this latter observation, Fuller deduced that certain so-called evils could not be accurately defined, and therefore could not form the object of regulation within a system showing fidelity to the eight principles of legality.<sup>67</sup> This is simply untrue. Fuller's error was to assume that law must be rational in some kind of absolute, as opposed to merely internal, sense. An absolute rationality of this type would be required only when the purposes of law and legal order, as the manifestation of a socio-political project, are conflated. The possibility that race cannot be rationally

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<sup>65</sup> Gardner, *supra* note 17, pp. 208-9 Paragraph breaks suppressed, footnotes omitted.

<sup>66</sup> *The Morality of Law* p. 41.

<sup>67</sup> *Ibid* 159-62.

defined with a satisfactory degree of determinacy, does not preclude the fact that it can be arbitrarily defined with great precision. Moreover, that a legal system could not subjugate an ethnic group easily scarcely excuses the fact that it could subjugate women with impunity.<sup>68</sup>

Fuller's theory that the internal morality provides substantive constraints through its emphasis on the determinate exposition of rules is in reality unfounded. There is no reason for law to be accurate, rational, or true to the nuances of any given political project; rather the content of law can be arbitrary, and – in *inter alia* the Fullerian model – in order simply to *be* law need be only determinate, unambiguous, and impartially applied. That said, the idea that certain 'real world' projects could not be (successfully and *truthfully*) pursued through law – i.e. that law is not good for all purposes – is true, both of the Fullerian approach and generally in any approach that perceives law as a system of impartially applied (or at least impartially applicable) rules.

Nonetheless, Dyzenhaus relies upon, and seeks to extrapolate, this implicit prohibition on certain norms. He attempts to substantivise and expand the internal morality of law; in doing so, he unwittingly develops an *external* morality, and *destroys* any "novelty" Fuller's theories may have had. Dyzenhaus *reveals* the 'classic' natural lawyer in Fuller. Fuller assumes law to be good,<sup>69</sup> hence the use of *morality*, however, he does *not* provide a mechanism to ensure this. Fuller does not provide a purpose

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<sup>68</sup> The feminist critique of the substance of PIL (and of both the form and substance of law generally) is very important, and – along with the critical claim that "laws hunt in contradictory pairs" – deserves far more attention than can be allotted to it in the present project. However, the critique of substance also presupposes agreement on the definition of law and the identification of substantive norms and so in a sense conceptually follows the present work.

capable of determining the *content* of the legal rules, in the way that Dyzenhaus suggests it should. This, in fact, is Dyzenhaus' advance on Fuller; he *substantivises* the purpose of law. In doing so, he alters *both* the role played by purpose, and the time (the temporal location) at which purpose performs this role. However, purpose as understood (or at least portrayed) by Fuller did not – or at least was not acknowledged to – play this role.

It may be that the key variable in Fuller's purposive understanding of law is not the limitations inherent in the rule form as such,<sup>70</sup> but rather their application to "human" conduct. One could argue that Fuller uses "human" as an evaluative rather than a merely descriptive term. The assumption which Fuller makes, and Dyzenhaus emphasises, is the natural correctness of liberal individualism. This assumption is so fundamental, so constitutive of his own world view, that Fuller fails to recognise it as an assumption. But it is this very assumption which provides, for Fuller, the guarantee of the goodness of law; in the sense, both, of the good end toward which the good means of law must be directed, and therefore of the duty to obey law.<sup>71</sup>

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<sup>69</sup> See, e.g. his response to the idea of a "morality of poisoning"; *The Morality of Law* (2<sup>nd</sup> ed.) ch. 5 "A Reply to Critics" esp. pp. 201-8

<sup>70</sup> Though this does of course play a role in determining the scope, the coverage, of legal regulation.

<sup>71</sup> However, as Dyzenhaus attempts to explain, and perhaps also prove, there *may* be a truly immanent link between liberalism and certain understandings of the *form*, the structure, and the formal purpose of law, namely law understood as a determinate and coherent system of rules. This becomes particularly clear in relation to the morality of aspiration, the desire to make law ever clearer. After all, what is a merely determinate law (as opposed to a morally correct one) but a manifestation of the liberal individualist denial of absolute truth. Furthermore, the desire for a clear, determinate, and neutrally applied law, does appear to assume a rational and free legal subject to be regulated. Perhaps then, the restrictions on the manifestation of the collective intentionality of law speak to a deeper issue of embeddedness within the liberal world view. However, even if all this is so, it need not tie law to as substantive a vision of liberalism as Dyzenhaus suggests. See, e.g. "Baker: The Unity of Public Law?" in Dyzenhaus (ed.) *The Unity of Public Law*, 1.

Fuller must, dogmatically, see all humans as equal, and all law as impartially applied.<sup>72</sup> Although he cannot guarantee impartial rules (no-one can), nor even impartial or just rule creating procedures, the impartial recognition and application of rules is inherent in Fuller's description of law. *Because* he perceives law as universal, as governing *human* conduct as such, all humans within the jurisdiction of any given legal system are subject to the same rules.<sup>73</sup> It is, therefore, apparent that the demand of congruence entails a value free technique for the identification and application of legal rules, that is until one realises what Dyzenhaus has brought into relief: Fuller actually depends on elements of an undisclosed *external* morality of law. This external morality is surreptitiously defined into the purpose of law, and thence into the very definition of law itself; this is why Dyzenhaus describes Fuller's theory as "morally partisan".<sup>74</sup> The external morality determines the definition (elaboration) of the internal morality, and it is therefore unsurprising that faithfully following the internal morality leads to a legal system which manifests the limitations of the external morality (liberal individualism).

In deploying the "internal morality" to create substantive limitations on the *content* and coverage of law, Fuller unintentionally adverts to its true status as an *external* morality. However, it is important to realise that these two restrictions are not intertwined, let alone synonymous. To the extent that it limits only the *coverage* of law,<sup>75</sup> the morality remains internal. It is only when used to restrict or determine the *content* of legal norms that the purpose becomes an external morality. Consequently, this latter move can be either purged or developed. Dyzenhaus seeks to develop it.

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<sup>72</sup> *Ibid.*, e.g. p. 39, pp. 162-8.

<sup>73</sup> Once Fuller is transposed into the international sphere, it becomes clear that the key is subject rather than human. All subjects of a legal order must be treated equally by that order.

<sup>74</sup> *Supra* note 57, p. 92.

It is arguable that Fuller did not necessarily assume a duty to obey law as such, and he most certainly did not endorse a duty of obedience to anything which superficially appears like law.<sup>76</sup> Instead, Fuller offers a means to identify and evaluate legal systems; a technique for identifying the legal system and its rules as a prerequisite to the assessment of the content of those legal rules, the duties imposed by law. He does not necessarily identify, or require a means to identify, any duty to obey the law as such, although congruence presumably has a coercive element; after all the purpose of law is the “*subjection* of human conduct to the *governance* of rules”, and the rules are to be applied as stated. He does assume, however, that whatever this duty (to obey law as such) is, it recedes as the system in question displays less and less fidelity to the eight principles of legality.

This means that at some point the duty can disappear at the formal or definitional level if deviance from the eight principles (the definition of law) becomes too great. There is no longer a legal system, and so can be no duty to obey the law. But Fuller also hints at the possibility that the duty could also lapse as a result of the substantive content of the legal system. Dyzenhaus seeks to expand this possibility, to develop the kind of substantive purpose which could determine rule content and identification, by eliding the identification and separability theses.

Purpose, in Dyzenhaus’ *extension* of Fullerian theory determines the content of rules. The collapse of the two legal positivist theses, entailed by Dyzenhaus’ elision of the two purposes, of law and of legal system, *works both ways*. The abstract purpose of

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<sup>75</sup> See, “The Forms and Limits of Adjudication”, 92 *Harvard Law Review* (1978) 353

<sup>76</sup> Fuller L. *The Morality of Law*, pp. 38-41

law restricts (and even determines) the content of norms which can (and must) appear in all legal systems in order that those normative orders be legal systems at all. The substantivised purpose underwrites both the content of the law and the duty of obedience to the law. Dyzenhaus substantivises the purpose of law as such by eliding it with the substantive purpose (purportedly) pursued by legal systems of which he approves. This is almost inevitable, as Dyzenhaus is not merely defining the law as such, but justifying the Rule of Law.<sup>77</sup>

In substantivising the purpose of law in this manner Dyzenhaus has done two things: first, he has moved purpose *beyond* the role allocated to it by Fuller; and second, he has vastly reduced the difference between Fuller and Dworkin in legal theoretical terms. Dyzenhaus has undermined the special – structural – role Fuller allocated to purpose, and thus revealed the contingency of this particular purpose. This may simply reveal flaws inherent in Fuller’s project, or it may attribute new flaws to it. In either event, Dyzenhaus’ ‘extrapolation’ *destroys* Fuller’s “novelty”.

Dyzenhaus does not simply extrapolate, but actually reverses, Fuller’s theory. For Fuller, the relationship between form and purpose delimited the coverage of law: law could only be used to regulate conduct where that conduct could be subjected to the demands of determinate rules. Dyzenhaus, effectively attempting to blend Fuller and Dworkin, allows for ‘legal regulation’ even in the absence of a reduction to determinate rules. Dyzenhaus *assumes* the authority of law. Consequently, instead of the authority of law being made contingent on its substance, the substance of law becomes contingent upon the need to justify its assumed authority.

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<sup>77</sup> See, e.g. Dyzenhaus D., “Form and Substance in the Rule of Law” in Forsyth C. (ed) *Judicial Review and the Constitution* 141.



This is permissible only to the extent that the rules can be made ‘clear’ by reference to the ‘purpose’ (the *external morality*) of law as such, and *not* by reference to judicial discretion. Such a move is necessary to preserve the “reach of law”, but it entails a collapse into neo-Dworkinianism. This collapse was *implicit* in Fuller’s own theory, and Dyzenhaus simply brought it into relief. Alternatively, Fuller’s true ‘novelty’ lay in his claim that law could regulate only a limited domain; that law was *not* necessarily authoritative; and that the Rule of Law as a claim of legal sovereignty was misguided. This is a claim Dyzenhaus abandons.

This is important, because the indiscriminate destructiveness of Dyzenhaus’ critique of the authority of law – perceived as a dialectical corollary to the purpose of law, namely the (natural) promotion of liberal individualism within (procedural) democracy – was entailed by his choice of Fuller as his theoretical foundation.

Having, in effect, conceded the Dworkinian argument,<sup>78</sup> Dyzenhaus had to make explicit what Fuller had left implicit, namely the neo-Dworkinian basis of the duty to obey the law,<sup>79</sup> which lies in the *contingency* of the duty to obey law upon the substantive content of law (the collapse of the identification and separability theses). Moreover, and more important, is the existence and effect of the entailed corollary; that the abstract purpose of law determines (or at least conditions) the purpose (and so *content*) of each (true) legal system.

Consequently, this substantive content (of law) had to be shielded and entrenched, but this is the role of an external morality. Thus Dyzenhaus had to find in Fuller that

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<sup>78</sup> See note 61 *supra*.

which he had conceded in Dworkin, a viable external morality on which the very definition of law could be founded. Dyzenhaus implicitly set himself the task of formalising this external morality, in order to locate it in the purpose, and so the definition, of law.<sup>80</sup> In order for the defence to work, the purpose had to be formal, the duty internal to law as such. But, in order for the defence to have any meaning, any role or effect, the purpose required substance. This is patently paradoxical.

The means employed by Dyzenhaus subvert the end to which they were aimed. His critique became a critique of all legal theories, including his own and Fuller's. Once the authority of law is brought into question, the stagnant, self-referential, contingency of *all* contemporary legal theory comes clearly into relief. Dyzenhaus overlooks this because he simply *assumes* the goodness of the ends on which he bases his purposive critique; yet the critique must also constitute a critique of those ends, even if this is a merely defensive sympathetic critique designed to elucidate and defend those ends.<sup>81</sup> This, of course, does imply that Dyzenhaus' theory may still be the best available theory, but this is true only for those who endorse his substantive purpose, which possesses a merely contingent relationship to law (as such).

Dyzenhaus cannot concede the contingency of all but one external moralities without breaching the methodological commitment to universality. It is the fact that his theory is founded on this unrecognised contradiction which entails that his critique of legal

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<sup>79</sup> Another recent attempt at substantivising Fuller, but one more explicitly indebted to Dworkin, is Allen T. R. S. *Constitutional Justice: A Liberal Theory of the Rule of Law*, esp. at pp. 52-6.

<sup>80</sup> In fact Dyzenhaus begins this task in the postscript to his paper in *Lethe's Law*, *supra* note 60, and more fully develops his substantivised purpose of law (the institutional embodiment of liberal democracy); see note 77 *supra*.

<sup>81</sup> On the socially reinforcing role of sympathetic critique see Deleuze G. *Nietzsche and Philosophy* pp. 1-3. Deleuze accuses Kant of privileging the values inherent in particular systems. As a result, critique is limited to perfecting the system in terms of those values. It cannot then offer any avenue for radical

positivism has an equal, albeit slightly different, effect on natural law theories as well. Purpose, without more, does not sanction the collapse of the identification and separability theses, nor does it alter the content of rules or the identification and role of law. Because each level is based on a different, albeit related, purpose, the legal positivist distinction – between the separability thesis (law) and the identification thesis (adjudication) – remains valid. This does not alter the fact that the stipulative legal positivist definition, which allows only one understanding of law, is wrong.

Finally, while Fuller is correct to draw attention to the necessarily purposive understanding of law, he offers no reason that his purpose should be perceived as the correct (let alone the only *possible*) one for law. Fuller is correct to maintain that law must be defined before it can be observed, and that the definition itself must draw on the idea of purpose and essence as a concretisation of the features necessary to fulfil purpose. It is surely too much to leap from this methodological point to the substantive claim that his purpose and essence are the only available options for the understanding of law.

Law could well be about subjecting human conduct to the governance of rules, but equally it could be merely about evaluating human conduct in light of rules, or legitimating human conduct in accordance with rules, or even simply observing human conduct from the perspective of a certain form of rules. Moreover, law (at least at the formal methodological level) could equally well be about the imposition of a morality, or even the *Fuhrer Prinzip* to which Fuller himself was so opposed. Law

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re-evaluation. On a similar note, see Goodrich P., “The Critics Love of the Law: Intimate Observations on an Insular Jurisdiction” 10 *Law and Critique* (1999) 343 at p. 344.

could be about the realisation of reason, or of principle and particularity over the generality of rules.<sup>82</sup> Law could be about process rather than about rules at all.

There is no more reason to perceive law as definitionally being about the subjection of conduct to rules than there is to see it as being, definitionally, a recognition of all enforced order. Fuller's task is uncompleted. He tells us *how* to perceive law based on his purposive definition. He gives a large indication as to why we *must* perceive law purposively. He does not, however, tell us why we should (let alone must) accept his definition of the purpose of law. He does not look at other possible candidates for this purpose. He does not engage with the possibility of other purposive understandings of law, let alone with the options of other purposively understood definitions of law. Nor, finally and most vitally, can he engage with the possibility of multiple, incommensurable, purposes, essences, and definitions of law. Fuller makes huge strides in the correct direction, but cannot, ultimately, break free of either central dogma of legal theory: the necessarily unitary ontology of law (that there can be only one form of, and therefore only one purpose for, law); or the necessarily authoritative nature of law (that law must *subject* human conduct to the *governance* of rules).

Purpose *is* important, both to law as such and to (meta) legal theory, but not in the way in which Dyzenhaus assumes.

#### The Purpose of Law and the Evaluation of Legal Theory:

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<sup>82</sup> As, I think, is suggested by Detmold, c.f. Detmold M. J. "Law as Practical Reason" 48 CLJ (1989) 436 at p. 457

The five stage conceptualisation of a legal system developed above<sup>83</sup> is a logical hypothesis, a reconstruction designed to explain, rather than to describe the genesis of law as *both* an ideal and a regulative system. It serves a function similar to that of the social contract in Kantian theory. It cannot be devalued by “proof” that it did not actually occur, as the claim is conceptual not historical. Moreover, the system is not to be fixed by reference to a postulated original purpose, any more than a political system should be frozen by reference to the detailed contents of a mythical original contract.

Rather, the purposive reconstruction of law, like the social contract and indeed like Rawls’ “original position”, is a thought experiment, an evaluative technique or strategy. It may serve to legitimate the legal system, but only by first problematising that very system. The social contract does not tell us what the law must (historically) be, it tells us how to evaluate particular laws in light of reason. Similarly, the purposive reconstruction of law recentres purpose as such, but it does not privilege any particular purpose as that to be pursued by law as such (i.e. by all legal systems at all times). It simply provides a perspective from which different theories of law, and their particular manifestations in existing legal systems can be evaluated. The link to legitimacy is thus attenuated at best. If we consider law purposively, then we must consider the purposes to which we direct particular legal theories (or systems), and only those which can successfully implement acceptable purposes can be understood as legitimate theories or systems. But what amounts to the successful realisation of acceptable purposes is a matter of interpersonal debate and decision.

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<sup>83</sup> See notes 28-31, and accompanying text, *supra*.

Purpose and empirical assumptions form the two key variables in the analysis of the working and preferability of legal theories (or systems) in their socio-political environment. They also, therefore, provide the key evaluative criteria (purpose), and objects of evaluation (assumptions) which facilitate internal critique. External critique is, however, more complex, more important, more uncertain, and indeed, ultimately, not susceptible to objective analysis. However, the same key variables (purpose and empirical assumptions) appear at this level. The difference is that *both* are now reduced solely to the *objects* of analysis and evaluation.

The evaluative perspective must be located externally, perhaps in (some substantivised vision of) reason or morality, epistemology or socio-political theory. These in turn may be evaluated in many ways. The perception of particularity is always already mediated (ideologised) by our categories of thought,<sup>84</sup> our observational language,<sup>85</sup> and our constitutive pre-judgements,<sup>86</sup> and this leads all chains of reasoning into infinite regress. Such chains must therefore be terminated artificially and arbitrarily. At its most profound level, this implies, *inter alia*, that no epistemology is necessarily better than any other, let alone best. Truth is self-referential, and therefore both contingent and necessarily blind to its own contingency. Value, and preference (the value of values) become the key evaluative criteria of legal meta-theory.<sup>87</sup>

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<sup>84</sup> Darnton R., "Pruning the Tree of Knowledge: The Epistemological Strategy of the *Encyclopedie*" in *The Great Cat Massacre, and Other Episodes in French Cultural History* 191 at 192.

<sup>85</sup> *Supra*, note 3.

<sup>86</sup> C.f. MacIntyre A. 'Epistemological Crises, Dramatic Narrative and the Philosophy of Science' 60 *The Monist* (1977) 453, at pp. 462-3.

<sup>87</sup> This is at least in part drawn from the insights of Giles Deleuze and Friedrich Nietzsche, see esp. *Nietzsche on Philosophy*; my understanding, construction, and deployment of such an evaluative system forms the focus of much of the remaining chapters. It is, however, fundamentally distinct from the Dworkinian methodological tenet of seeing the law (only) "in its best light". While Dworkin uses this to determine what the law 'really' is or says, I seek only to provide grounds on which we may base

The purpose of law need not underwrite the duty to obey law, and even where it does so this is contingent on our particular and continued commitment to that purpose. The only necessary relationship is that between the purpose, the definition, and the identification of law. The relationship between purpose and law – which is, as Dyzenhaus recognised, a fundamental one – is ontological in nature, rather than deontological as Dyzenhaus assumes.

#### CONCLUSION AND SUMMARY:

Contemporary legal theory is a deeply fractured discourse. As well as the classic dichotomy between “legal positivists” and “natural lawyers”, there are dichotomies between normative and descriptive theories and between conceptual and empirical theorists. These last dichotomies permeate both sides of the classic dichotomy, making even an accurate mapping of the discipline a prodigious task. Nonetheless, the discipline must be mapped, schema for the identification, elucidation, and, perhaps, resolution, of the ongoing debates must be formulated.

From the perspective of this requirement, Lon Fuller is perhaps the most novel, and the most important legal theorist. Nonetheless, Fuller’s theory is incomplete, and inattentive to its own radical potential. The strengths and the weaknesses – the novelty and limitations – of Fuller’s project can best be understood through the lens of MacCormick and Weinberger’s Institutional Theory of Law.

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the identification, analysis, and evaluation of law as such, and *then* of the norms of particular legal orders.

The principal strength of Fuller's work is his realisation, and insistence, that law be viewed as a "purposive enterprise" and *not* as a "manifested fact of social power". This methodological advance entailed, as Dyzenhaus emphasised, the *necessarily normative* nature of legal theory, and the ontological link between the purpose and the form of law. Legal positivism could respond to this advance, but only by differentiating itself from empiricism. In other words, legal positivism had to return to its normative roots. Legal positivism too had to postulate a purpose for law and a mechanism for fulfilling that purpose. It is only once this ideal is in place that the actual practice of law can be identified as such.

Fuller's model was incomplete. Having demonstrated the necessarily purposive nature of law (and legal theory), Fuller dogmatically pursued a single purpose, as that true of law *as such*; a purpose "good for all times and places". Moreover, he did not justify that choice of purpose, but in effect, posited it as a transcendental hypothesis; a value against which all theories of law would be evaluated. There is, consequently, a groundlessness and circularity to Fuller's work. That law is necessarily purposive *does not entail* that any specific purpose should be pursued, but only that *a* purpose must be pursued.

There is another important absence in Fuller's work. Fuller, understood methodologically, and rescued from the dogma of a unitary purpose, postulates two variables in legal theory: the purpose of law *and* the form of law as a mechanism for the realisation of that purpose. However, a third variable is both required and presupposed by Fuller's work, *viz* the empirical reality in which the legal system is to operate. Fuller *assumes* a stable political structure with centralised institutions. The



question he pursues is not how to maintain – let alone establish – this order, but rather how to exercise its powers through the medium of law.

A single fact, I believe, both links and disguises these weaknesses in Fuller's theory – his commitment to liberal democracy as a normative ideal. This commitment is *both* a fact in the sense of an empirical presupposition that law *must* treat people as agents by respecting the *reciprocal* relationship between obedience and protection, *and* a normative ideal or purpose of law. Thus the commitment links the two deficiencies in Fullerian theory. However, the commitment also serves to disguise these deficiencies simply through the fact that it represents contemporary political orthodoxy. The “truth” of liberal democracy is understood, as Fukayama triumphantly proclaims, as the “End of History”,<sup>88</sup> the final stage of man's quest for self-understanding and self-realisation. This is no more objectively “true” than was the existence of God and the truth of Roman Catholicism in the middle ages.

Moreover, despite rejecting the crude (Hartian) claim of authority *as* law, Fuller and Dyzenhaus remain committed to the dogma of the necessary authority *of* law. Again, this commitment is ungrounded, and again it is validated and disguised through the commitment to liberal democracy. The “truth” of the authority of law is mitigated and legitimated through the necessary liberalism of law. The engagement with purpose, therefore, is incomplete in several distinct ways: the purpose of law is presupposed; but that is because the form of law is (in part) also presupposed (law as authoritative). Consequently, the purpose of law must concretise the remainder of the form of law

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<sup>88</sup> Fukayama F., *The End of History and the Last Man*; see also Marks S., “The End of History? Reflections on Some International Legal Theses”, 8 *EJIL* (1997) 449

(law as rules) in a manner capable of justifying the fixed characteristic of authority, within an orthodox political commitment to liberalism

Thus Fuller's theory, although a significant step in the right direction, is posited in furtherance of a particular political agenda. In itself, this is not necessarily a bad thing, but it does undermine the utility of the Fullerian project as an elucidatory or evaluative schema for the discourse of legal theory as a whole. Ultimately, Fuller's theory, like its contemporaries, is a specific truth claim; a normative proposition to be evaluated alongside other normative stances.

This leaves open the critical question of *how* such normative stances are to be evaluated. *If* it is true that legal theory is necessarily normative (or, at least, is best understood as normative), *then* empirical accuracy cannot be an adequate ground for the evaluation of competing theories. Instead, a topography must be formulated within which competing theories could be elucidated and comparatively evaluated. Fuller opens a path to the formulation of such an evaluative schema, but neither he nor Dyzenhaus deign to travel down it.

However, as noted, when Fuller's theory is analysed methodologically, the outlines of such an evaluative schema do come into relief. If law is to be understood as a purposive enterprise, at least three separate, but related, criteria must be postulated; criteria according to which legal theories (and the legal systems they create) can be both elucidated and evaluated. However, this schema can only clarify – or, as I shall insist, *disaggregate* – theoretical presuppositions and disagreements; it cannot resolve them. Ultimately, the issues posed by normative legal theory can only be solved

normatively. Rationality being limited to the *exposition* of the underlying disagreements, these can only be resolved by political choice or epistemological commitments.

Normative legal theory, by denying that law is a “brute fact”, must conclude that law is an “institutional fact”, but must also conclude that law is a tool or mechanism for the achievement of specific societal ends in specific ways. From this normative perspective, the three variables of elucidation and evaluation become apparent:

1. The empirical reality in which the legal system is presupposed to operate.
2. The purpose to be pursued by the legal system. *Contra* Fuller, this purpose must be pluralized not unitary. The ‘correct’ purpose for law is a matter for debate and dispute, not definitional *fiat*.
3. The ontology of the legal system itself, as a mechanism for linking 1. and 2. above. That is, law as a *tool* for the realisation of the chosen purpose from the empirical reality of the given society.

The elaboration of this schema, first as a grid for elucidating legal theories, and then as a perspective for evaluating competing theories, shall be the task of the next chapter. In the meantime, a final *caveat* must be introduced: the limited coverage of this evaluative schema. Although, at least to some degree, the understanding of legal theory as necessarily normative can be imposed on “empirical legal positivists”,

because their categorisation of certain ‘facts’ as “the true” of law can be challenged and problematised, the same is not true of what we might term “empirical natural lawyers”.

By that term, I have in mind specifically the neo-Thomists,<sup>89</sup> but possibly also neo-Platonists,<sup>90</sup> Hegelians, and perhaps Dworkinians. For these theorists, the law is a “brute fact” in a quite different manner. From a neo-Thomist perspective in particular the (ideal) law *does* actually exist. Law is analogous to a badly charted area of land, the charts may be the subject of dispute, but the existence and geography of the land itself is not.

Here we have a genuinely ontological disagreement, a *differend* which cannot be converted to *litage*. In attempting to transform arguments not susceptible to resolution by reference to a common standard (what Lyotard would term “*differend*”<sup>91</sup>) into *litage* (arguments which may be resolved by reference to a common standard<sup>92</sup>) it may instead simply obliterate the *differend* by privileging one side over the other, under the *guise* of offering a neutral evaluative grid. For the sake of clarity, the problem here is not necessarily the privileging of one side over the other, but rather the *pretence of neutrality* behind which this can be (and often is) hidden.

To argue that the purpose of law effects its ontology makes no sense from a neo-Thomist perspective; it is tantamount to arguing that God does not exist. For this

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<sup>89</sup> John Finnis would form the most obvious example, see e.g. *Natural Law and Natural Rights* 389-403.

<sup>90</sup> Perhaps St Thomas Aquinas himself would be the most important of the neo-Platonists, see e.g. *Summa Theologica* I-II Questions 90-7; see also Finnis, *ibid*, 398-403.

<sup>91</sup> See J-F Lyotard, *The Differend* at p. 12; see also Teubner G, “Regulatory Law: Chronicle of a Death Foretold” 1 *Social & Legal Studies* (1992) 451 at 456.

argument to succeed, we must abandon religious faith and we must put reason at the pinnacle of human understanding. If that were the case, then even those who *chose* to believe in God, would not really believe in God, but only in reason. To truly believe is not an act of choice, it is a way of being.

This is also true of belief in God's law. To argue that we would be better to understand law differently would be analogous to arguing that the world would be more fun without gravity. The argument may prove true, but it is also utterly pointless. We have no choice over the existence of gravity, we cannot legislate it out of existence, nor can we otherwise 'solve' the 'problem' of gravity. Gravity, the badly charted landmass, and God's law are all *facts*. As such, our desires have no influence over, or relevance to them.

These theories can be accommodated within the elucidatory schema to be expanded subsequently, however, they cannot be made amenable to the evaluative schema which follows. A choice between "empirical natural law" theories and any form of normative legal theory is *not*, under any circumstances, a choice which can be made rationally. It is, rather, a fundamental disagreement as to the nature of existence, an irreconcilable clash of dogmas or worldviews.

#### The Normative Claim:

The purpose of the present chapter was essentially to demonstrate the feasibility of a non-authoritative definition of law. This leaves open major issues revolving around

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<sup>92</sup> *Ibid.*

the identification, role, and utility of law so defined. The question of a non-authoritative understanding of law derives essentially from a belief that PIL, although not ostensibly authoritative or centralised, is nonetheless law. This led to a feeling that there is more to law than authoritative command, that law must have somehow ‘earned’ its position of superiority – or at least convinced itself of having done so – and so must have been identifiable *before* this characteristic was claimed.

Pursuit and clarification of these intuitions was made more urgent by a belief that not only is there a demand for the social centrality of law (the *rule* of law), but that the claim of social centrality makes further demands of its own, and these can undermine the very nature of law, and thus, paradoxically, of its claim to social centrality.

Moreover, this claim of centrality has been factually challenged – even at the domestic level – on a number of grounds by both social and political theorists, and their concerns and observations ought to be considered important data for legal theory.

As Shklar implies, there are many ways to perceive, and thus to regulate, social phenomena; law provides one of these, a good one, but not the only one. We should not pretend that any answer labelled ‘law’ (or backed by ‘legitimate’ force) is a legal solution. The law has a role to play, and a method of doing so and these should be examined and critiqued in their own right, rather than amended and changed *ad hoc*.

#### Concluding Thoughts: A Recapitulation:

My purpose so far has been to demonstrate the superiority of legal positivism as a theory and as a “description” of law, but also to acknowledge its weakness regarding adjudication, and therefore its inability (perhaps) to live up to its own ideological justification. From this it becomes apparent that legal positivism must become normative and engage with purpose to structure legal reasoning and decision-making. Ultimately, the theory must be made normative; legal positivism must re-engage with the why rather than the what of law. Purpose is needed both to identify law (the what to be observed) and to structure adjudication<sup>93</sup> (the why of the what observed).

This is because legal positivism is mediated; it is *legal*, and obeys specific category matrices and pursues specific tasks. It is not a sociological positivism of self-deluding empirical observation. Legal positivism provides answers on the basis of norms posited, not on the basis of (Comtean) positivist observation; there is after all no brute fact to be observed. The legal answers are merely determinate, not necessarily right. “Wrong decisions” are unfavourable conclusions not anomalies. The system is Kelsenian, not Poundian.<sup>94</sup> This is why focus on norm-creation and the diffusion of power becomes so important; this is the only counterpoint I have to the personalism and capture predicted by Schmitt.

However, engagement with purpose undermines notions of centrality, authority, and enforcement. This is problematic because all theories agree on a disembodied “essence” of law based on enforcement. Therefore, their (and notably Dyzenhaus’) engagement with purpose is predetermined in structure; it is circumscribed to an

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<sup>93</sup> Understood in a wide sense, as the identification of the relevant ‘rules’ for the legal evaluation of a postulated course of conduct.

enquiry into how (why) law as a (definitionally) coercive order is to be justified.

There cannot be a disembodied essence of law; essence *is* a concretisation of purpose, and therefore is symbiotically linked to purpose.

This is why the ‘critical’ engagement with purpose proposed by Dyzenhaus is insufficient, the engagement is not even close to total. While it is good that Dyzenhaus so forcefully reminds us that not all coercive orders are legal orders, he fails to follow this insight through to contemplate the possibility that not all legal orders are coercive orders. Although he rejects authority as law, he continues to assume the authority *of* law, and the absolute necessity for a unitary understanding of the form (and so for him some of the content) of law, “good for all times and all places”.

However, in Dyzenhaus’ defence, this disembodied essence is common ground; it is law’s identifying feature in observational language; it is legal common-sense. Hence the (pluralist) “politics of definition” is given prominence over a normativist “politics of decision”. This (preferred focus) manifests itself awkwardly in PIL, as the authority of law is less apparent, therefore theorists struggle to redefine “law” (away from clear rules) to preserve its “essence” (enforcement) and its definitional (paradigmatic) centrality. Despite all of this, the “essence” imputed to law by common agreement is itself ungrounded, and that is why PIL theorising runs so frequently into trouble, or is dispersed as the fractured remnants of a discourse rendered fatally indeterminate by its own lack of theoretical cohesion: it is the singular point of (definitional) agreement which is itself inaccurate and misguided.

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<sup>94</sup> This is important because much of the danger threatened to any normative order by the exception is confined to situations where the order pursues absolute correctness as a defence against its own



### CHAPTER 3: PICKING UP THE PIECES, A FIXED POINT IN A FLUID

#### DISCOURSE:

The debates analysed in the preceding chapters are not purely academic. They have a determining effect on the practice of law, and of PIL especially. The power of the CLS/NAIL attack resides in the non-disclosure and non-resolution of these debates. Our theoretical commitments determine what we perceive as law; they determine *how* we recognise legal rules or norms. A refusal to engage with this fact leaves legal discourse wide open to charges of indeterminacy and political manipulation. It is only when these debates have been resolved that we can even *identify* legal rules as such. That, surely, is a prerequisite for *either* the application *or* the critique of those legal rules.

This returns us to the central concern; the need to re-engage fully and openly, without prejudice or dogmatic definition with the purpose of PIL, and the role or function that PIL must perform – within an international society however defined – in order to fulfil this purpose. It is only once this has been achieved that one can engage meaningfully with Koskenniemi and show that (ideal) PIL is capable of neutral rule formation (legal norms as agreed manifestations of commonality). This provides a perspective from which *both* PIL itself (the substantive body of norms actually accepted or argued as PIL) can be identified, *and* the actions of states vis-à-vis PIL can be consistently evaluated. As this ideal is also the *justification for* PIL (for the

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contingency; the exception is precisely the manifestation of that contingency.

imposition of PIL as a coercive, or authoritative, order) it carries a normative force within itself.

PIL must strive to live up to its ideal in order to be justified, and it is legitimate to the extent – and only to the extent – that it achieves this task. Consequently, the ideal must provide a critical perspective from which to evaluate the potential *and* (more importantly) the actual functioning of PIL and the actions of states.

### INTRODUCTION AND OVERVIEW:

Once it is realised that law is *necessarily*<sup>1</sup> an institutional, rather than a brute, fact, it becomes apparent that there cannot be a (descriptively or empirically) ‘correct’ theory of law. Instead argument must centre on the *best* available theory of law.

Consequently, the overarching purpose of this chapter is to identify the best available theory. In order to do so, we must first identify and acknowledge the co-existence of competing legal theories, and develop a schema of understanding within which these are rendered commensurate; it is only under these circumstances that a ‘best’ theory can be selected.

However, it must also be acknowledged that law has neither necessary features, nor a necessary purpose. Law is formed, and continues to exist only as an act of “collective intentionality”.<sup>2</sup> This remains true even when it is argued that law is a social practice, because the data which *constitutes* that social practice must, itself, ultimately be

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<sup>1</sup> Of course, this ignores the neo-Thomist perspective, on which see ch. 2, notes 89-90 and accompanying text, *supra*.

<sup>2</sup> Searle J. *The Construction of Social Reality*, pp. 23-6.

determined by reference to purpose; by reference to the purpose that law is postulated as fulfilling.

Consequently, analysis must focus, in the first instance, on the purpose of law, on the *function* law is to fulfil. However, that purpose is itself undetermined. Purposive analysis has been ‘out of fashion’ for some time and, as a result, little has been written about the purpose of law, *per se*. Moreover, as I have argued already – and shall demonstrate conceptually – the one ‘necessary feature’ commonly attributed to law, its authority, has in fact pathologised legal theory. Consequently, that characteristic must be modified or abandoned, or the discourse of law and legal theory itself radically re-imagined. The authority of law cannot be presumed, and so must instead be evaluated and justified or abandoned.

However, if law has *neither* a fixed form, nor even a fixed purpose, the very idea of a functioning discourse of legal theory itself comes under threat. Consequently, an alternative foundation for legal theory must be ‘identified’. As I have shown in the previous chapter, although neither the form nor the function of law can be determinately proven, the *relationship* between these two variables is itself a fixed point. Consequently, this relationship can be deployed to provide the foundation for a new understanding of the project of legal theory.

Because the form of law is contingent on the postulated function of law, there is a *necessary* relationship between these variables. This relationship always exists, and always functions, even if it is not always, or often, acknowledged. Accordingly, the relationship itself can function as the basis of a schema of understanding, a

perspective from which all legal theories can be elucidated, ultimately evaluated, and chosen between. This fixed point of cognition serves the purpose of the inevitably absent Archimedean point in the identification and evaluation of competing theories of law. It forms an ‘artificial outside’, a recursively stabilised ‘somewhere’ or a defined vantage point. As opposed to a “view from nowhere”, this perspective manifests a very stipulated and exposed *somewhere*, a fixed point; I call it the ‘form-purpose dialectic’.

### THE FORM-PURPOSE DIALECTIC:

Each legal theory, and thus each and every legal norm, is a manifestation of the form-purpose dialectic. Consequently, any understanding of the ‘legal system’ or the ‘social practice’ of law is *also* a manifestation of the form-purpose dialectic. The cognition of law is *only* possible as a mediated cognition of the manifestations of this dialectic. This is an entailment of the necessarily normative nature of legal theory: the act of ‘cognition’ *constitutes* the data cognised (the law).

The dialectic operates by postulating a purpose of law, by formulating a set of empirical assumptions about the society to be regulated, and then by postulating a mechanism (law) to realise that purpose under those conditions. Only once this has occurred can that mechanism be deployed to identify the ‘rules’ of the legal system.

This means that neither ‘legal norms’ nor ‘legal systems’ can be considered as the atomic units of legal theory; rather each must be understood as a composite: the conclusion rather than the premise of debate. The purpose of the dialectic then is to

elucidate the manner in which competing commitments to the purpose of law and the ‘nature’ of the society to be regulated interact to form competing commitments as to the form law takes (or should take). Moreover, the dialectic also explains how these competing commitments give rise to competing understandings of what constitutes a legal norm, and which legal norms exist in any given legal system.

The purpose of the dialectic is to disaggregate each of these complexes of competing commitments. In this way, the commitments themselves can be identified and debated, and the scene can be set for choosing between these commitments, based on something more consistent than the substantive preferability of the norms they produce in any given case, or at least on the *acknowledged* adoption of ‘substantive preferability’ as the identifying feature of legal norms.

The dialectic operates by bringing to light the necessary commitments shared by each legal theory, and thus by presenting each theory within the same schema of intelligibility. In this way, it makes the theories commensurate, though acknowledges that they will remain incompatible. The dialectic makes the choice between theories more rational.

In short, the dialectic serves four purposes simultaneously:

1. Facilitating the cognition of law
2. The elucidation of legal theories

3. The identification of *competing* legal theories within each normative order or ‘legal system’
  
4. Structuring the choice between these competing theories

THE FUNCTION OF THE DIALECTIC IN THE CONSTRUCTION OF ‘THE PRESENT’ OF LAW:

The first, the most important, and yet the least visible function of the form-purpose dialectic is to construct an intelligible understanding of law; to ‘identify’ ‘the present’ (“the true”) of law. This is simply a corollary of the claim that law is not a brute fact, but rather an institutional fact, a product of belief or “collective intentionality”. Legal theories do not function merely to ‘describe’ or to ‘evaluate’ the law; rather they function to *constitute* ‘the law’ as an intelligible object of observation. Even theories which are *presented* as empirical, or descriptive, must in fact first constitute the data they will go on to ‘describe’. There is *no* empirical fact of law, but only law as constituted and understood by legal theory.

Both Hartian and Dworkinian theories perceive and portray law as a social practice. In that sense, both are empirical theories of legal phenomena. In each case, the empirical phenomena claimed to underpin and structure the theories *do actually exist*. There are – in most municipal legal orders at least – centralised adjudicative bodies (Courts) hearing cases and reaching decisions. There is dispute – indeed this is the primary dispute between Hartians and Dworkinians – over the extent to which these cases are

consistently resolved; that is, over the extent to which *consistent criteria* for case resolution (and/or norm recognition) can be formulated.<sup>3</sup> But this dispute cannot serve to disguise the underlying consensus: law's existence (and ontology) is a matter of empirical fact. Legal theory is presented as a descriptive discourse,<sup>4</sup> but that is simply an inaccurate presentation. Legal theory remains normative because the consensus is *itself* a product of normative agreement; *it* is not an empirical, or brute, fact.<sup>5</sup>

Although the existence of the phenomena under discussion (between Hartians and Dworkinians) is itself a matter of empirical fact, the *decision* to classify these phenomena (as law at all, and indeed as the totality – the necessary and sufficient condition – of law) is *not* a matter of empirical fact, but of normative choice.

It is by this move that they *disguise* the normative nature of their theories behind the existence of empirical facts *they have chosen to classify as law*. Their theories are no more *necessary* (or neutral, observational, or true) than anyone else's. All legal theory is necessarily normative; because even an 'empirical' theory in claiming to identify, must in fact *define*, the data it will describe, and against which it shall be measured. In other words, Hart and Dworkin *displace* definition from legal theory to the methodology of legal theory; but they do not thereby evade the need for definition.

Even the claim that law 'must be' authoritative, or enforced, presupposes a purpose; it presupposes that it is only through these characteristics that law can serve its function properly. The *point* of law is to impose order. This claim is legal common-sense, but

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<sup>3</sup> See ch. 1, *supra*, esp. footnotes 119-131 and accompanying text.

<sup>4</sup> At first glance, this may seem untrue for Dworkin, but first glances can be deceptive. Dworkin's theory relies on *fit* as much as substance, indeed the role of substance is largely to identify the data an interpretation must "fit"; *that* data then forms the descriptive justification of Dworkinian analysis.

<sup>5</sup> While Dyzenhaus' and Fuller's theories also, *at one level*, perceive law as a social practice, they *also* contain an idealising element. Nonetheless, this ideal is necessarily *compromised* by their commitment

it remains contingent; and in all probability grew from the initial function of law, to legitimate power's imposition of order. What the form-purpose dialectic brings into relief is the non-necessity of the link between law and enforcement; however, the dialectic in no way precludes this link, but only exposes it as an act of choice. This opens the primary question: was this a 'good' choice?

Hart, Dyzenhaus, and Dworkin, in 'acknowledging' the authority of law – i.e. in treating the contingent relationship between law and enforcement as necessary – commit themselves to some form of social practice theorising. This is an entailment of the commitment to law as enforced: the law can be found in the decisions of the courts. Consequently, their 'decision' to understand law in this way, is manifested in their focus on adjudication. Law becomes what the courts declare law to be, because it is only the courts which can make such authoritative decisions. Understanding law as authoritative *necessarily* leads to social practice theorising.

THE PATHOLOGY OF THE CONSTRUCTION OF AN AUTHORITATIVE LAW;  
FROM SOCIAL PRACTICE TO RATIONAL RECONSTRUCTION:

Social practice theorising simply does not work. This is the crux of Dyzenhaus' charge against contemporary, or "descriptive" legal positivism. The impossibility of social practice theorising is equally true for both positivist and natural law approaches to this practice. The key difference is that natural law retains the resources to deal with this failure, while positivism has abandoned these along with its normative project.

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to the necessity of the presence of certain features. Even to recognise that these features must be mitigated or utilised, is also to recognise that they must exist.



Very briefly, social practice methodology cannot identify coherent chains of legal decisions, nor determinate legal norms or rules. As a result, social practice methodology *cannot* constitute an intelligible, determinate, and internally coherent, legal order. Instead this order must be *imposed* onto the ‘social practice’. The key point, at least according to Dyzenhaus’ critique, is that natural law has the capacity to do this in a coherent (and, perhaps, justifiable) manner, while (descriptive) legal positivism does not. Before we can respond to this critique, the nature of the problem itself must be more fully elaborated.

#### Law Understood as a Social practice Does Not Adequately Reduce Complexity:

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

From this perspective, the ontology of the norm is almost empirical. The norm is, in effect, a speech act, it comes into being at the point of its articulation; it can then be

treated as a fact. The legal system is the composite of these facts, these legal norms manifested as legal decisions. The legal decision does not merely reflect, or even embody, the legal norm; it *becomes* the legal norm. Moreover, the arguments which led to the ‘recognition’ of this legal norm, having been recognised by the judge,<sup>6</sup> become (or are confirmed as) licit legal arguments, valid argumentative techniques, constituent parts of the “grammar” of (that) legal practice.<sup>7</sup>

Subsequent legal arguments are then constructed by applying a choice of these legal argumentative techniques to a choice of extant legal norms; to produce a logically entailed ‘chain’ of decisions pointing to the applicability of a particular ‘norm’ to the instant case. The judge then chooses from amongst these norms, based I would argue (alongside Legal Realism and CLS) upon nothing more than personal preference, even if the judges themselves remain ignorant of that fact. This is analogous to MacIntyre’s refinement of the emotivist claim, whereby emotivism is transposed from a theory of meaning into a theory of *use*, and where:

Meaning and use would be at odds in such a way that meaning would tend to conceal use. ... Moreover the agent himself might well be among those for whom use was concealed by meaning. He might well, precisely because he was self-conscious about the meaning of the words that he used, be assured

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<sup>6</sup> This refers, specifically, to the judge in the institutional sense (and location) of the word: the authorised decision-maker *cum* law cognisor; the institutional privileged *locus* of decision. It does not refer to the abstract paradigm of the judge, as the embodiment of the legal ought. Nonetheless, the implicit and underlying argument of this thesis, is that the decisions of the ‘actual’ judge, are legally legitimate only to the extent that they correspond with those of the abstract paradigm. But that, of course, presupposes a full articulation of the relevant abstract paradigm. On the two available understandings of ‘the judge’ – as institutional figure and as abstract paradigm – see, pp. 13-4, *infra*.

<sup>7</sup> Koskenniemi, *From Apology to Utopia*, “Epilogue”, at p. 2; and see ch. 5 of the present work, *infra*.

that he was appealing to independent impersonal criteria, when all that he was in fact doing was expressing his feelings to others in a manipulative way.<sup>8</sup>

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

There *is* no self-evident core of reason unifying and systematising legal systems understood as brute facts. Judicial discretion is *not* limited by previous judicial decisions, but is rather a *result of* the multiplicity of previous judgments. This can be demonstrated by a comparing Unger’s call for a process of “mapping and critique” of the legal order, with MacCormick’s claim that legal theory is (or should be) engaged in a process of “rational reconstruction”:

Give the name *mapping* to the suitably revised version of the low-level, spiritless analogical activity, the form of legal analysis that leaves the law an untransformed heap ... a requirement for the accomplishment of this task is that we resist the impulse to rationalise or idealise the institutions and the laws we actually have.<sup>9</sup>

This would appear to be the logical conclusion, or perhaps the *reductio ad absurdum*, of the Hartian project of descriptive legal theory: a non-evaluative description of legal

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<sup>8</sup> MacIntyre A., *After Virtue*, p. 14.

<sup>9</sup> Unger R. *What Should Legal Analysis Become?* pp. 130-1.

practice. However, such a process would illustrate confusion and contradiction, not rational order:

Legal doctrine produced in this way degenerates into mere casuistry where it purports to reconcile and work in every single case and statute in some grand scheme; there has to be some discrimination between the parts that belong in the coherent whole and the mistakes or anomalies that do not fit and ought to be discarded.<sup>10</sup>

Instead of this, the work of rational reconstruction:

Calls for the exercise of creative intelligence and disciplined imagination to master the large and always changing bodies of material involved, to grasp them all together [presumably with the ‘necessary’ excisions already having taken place], and to reconstruct them altogether [except the excised pieces] into systematized and coherent wholes.<sup>11</sup>

In short:

Normative order as order is not a natural datum of human society but a hard won production of organizing intelligence ... the raw materials don’t bear any one clear scheme on their face. Of course they don’t. The juristic task has always been to establish intelligibility, not merely to discover it.<sup>12</sup>

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<sup>10</sup> MacCormick N. “Reconstruction After Deconstruction: A Response to CLS” 1990 OJLS 539 at p. 556.

<sup>11</sup> *Ibid* p. 557.

<sup>12</sup> *Ibid* pp. 557-8.

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

In a modern state, the continuing intelligibility and operability of law depends crucially on its continuing servicing by academic commentators as well as by practitioners and judges.<sup>13</sup>

Yet, by MacCormick’s own admission, such a process must be arbitrary: it cannot take all available data into account, and yet can admit of no informing values by which the choice of which material to excise could possibly be justified. This is *precisely* the charge Dyzenhaus levels against contemporary legal positivism.<sup>14</sup> MacCormick has in effect *conceded* the impossibility of the Hartian descriptive project. The rationalising process is indeed “mere casuistry”, and *ex post facto* casuistry at that. But that fact is disguised and denied “by academic commentators as well as by practitioners and judges”; and that *denial* constitutes the “continuing intelligibility and operability of law”.

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<sup>13</sup> *Ibid* p. 558.

<sup>14</sup> Dyzenhaus D., ‘Positivism’s Stagnant research Proposal’ 2000 OJLS 703, at p. 711-2; see also, ch. 2 *supra*. esp. note 1 and accompanying text.

Consequently, the dynamics of perception must be resolutely reductionist in function.

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

Instead, we require *three* consecutive processes of data reduction, identification, and ordering, which operate cumulatively to make the rational ordering, the rational reconstruction, of law as a social practice appear *possible*. *First* cognition is limited to the actions of those who constitute "authoritative decision-makers"; this delimits the social practice. *Second* a distinction is drawn between winning and losing arguments; this purifies the data (in a manner analogous to what Cover has termed the "jurispathic" function<sup>15</sup>). *Third* a final set of exclusions are enacted *amongst the winning arguments*, in order to create the impression that these can be understood as a coherent whole. Only then can we 'identify' 'chains' of cases giving rise to 'recognised rules'.

In Koskenniemi's terms, the overwhelmingly complex 'social practice' can justify any decision, and so becomes apologetic; the rational reconstruction must be founded on a political project, and so becomes utopian; and finally, because the utopia is constructed within the apology, the data of the apology can overwhelm the utopia, and that leads to the inexorability of oscillation between the two poles.<sup>16</sup> The 'social

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<sup>15</sup> Cover R., "Nomos and Narrative" 97 Harvard Law Review (1983) 4 at p. 40.

<sup>16</sup> Koskenniemi M., "The Politics of International Law" 1 EJIL (1990) 4 at p. 8.

practice' of law is a creation of the imagination; it is brought into being by the imposition of a particular reason upon 'reality'.<sup>17</sup> This can be captured schematically in the following four movements:

1. Assume existence of Legal System as a Fact (social practice)
2. Acknowledge overbearing complexity of that fact.
3. Reduce that complexity by imposing order and excluding 'contradictory' (i.e. minority, aberrational, cases) data. Reconstruct another, simplified and rational, version of the system.
4. Describe product 3. as the "rational reconstruction" or "best available understanding" of product 1.

Consequently, the 'social practice' of the legal system as such is never actually engaged, and therefore cannot provide an empirical justification for the theory presented. There is no social practice theorising, because there is no accessible and intelligible social practice to theorise. However, this fact is not acknowledged, because the *function* of stage 2 is to *disguise* the denial/abandonment of stage 1, and to allow us to believe we are still operating within the empirical realm of 'social practice'.

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<sup>17</sup> This is where the distinction between the two forms of "institutional fact" (see ch. 2 notes 23-8 and accompanying text, *supra*) becomes vital. Where the institutional fact relies on the existence and practice of real institutions it cannot adequately limit complexity. However, when the institutional fact

Unger captures this move, and its disguise behind banality, when he recognises legal analysis as a “spiritless analogical activity”.<sup>18</sup> He then seeks to expose its true nature to light. The radical banality of Unger’s ideal of “mapping” is to *directly link* tasks 1 and 4, and thus to highlight the process of task *evasion* inherent in rational reconstruction or paradigm case methodology. The banal radicality of the process is to bring to light the full impact of a task normally considered banal, the doctrinal analysis of legal systems, the imposition of order through exclusion, the nature of “reconstruction” as *creation*. That is the utter impossibility of empirical analysis, and the delusion which disguises value imposition behind a claim to describe what “is”.

A Problem Denied is a Problem Perpetuated:

This process of reduction is not acknowledged, and indeed the very *existence* of the indeterminacy it causes, is hidden behind two *other* empirical facts:

1. The authority of the judicial decision
2. Academic, judicial, and practitioner efforts to reconcile conflicting judgments behind ever more complex syntheses and rationalisations

Following MacCormick’s imprimatur, we attempt to *impose* consistency, *ex post facto*, on inconsistent legal demands. This disguises, but it does not eliminate the existence, and causes, of indeterminacy. This ongoing process of *ex post facto*

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is understood as a thought object, analysis of the underlying thought object itself, can facilitate a justifiable and consistent reduction of complexity.

<sup>18</sup> *Supra*, note 9.



rationalisation<sup>19</sup> is itself hidden behind a deployment (or perversion) of the Socratic ideal of reasoned logic, whereby *ad hoc* and untenable distinctions are presented as natural, inevitable, and as mechanically explaining and syllogistically determining the necessarily correct decision. In reality, we choose our 'preferred' norms and then *pretend* (often even to ourselves) that these are the logical product of the consistent implementation of *the* specific theory which structures and explains the legal system. But, as Mark Kelman has observed, this simply doesn't work:

Most of the arguments that law professors make are not only nonsensical according to some obscure and unreachable criteria of Universal Validity but they are also patently unstable babble. The shakiness of the argumentative structure is, quite remarkably, readily elucidated. All the fundamental, rhetorically necessary distinctions collapse at a feather's touch—distinctions between substance and process, voluntary and involuntary action, public and private, legislative and adjudicative. Those who routinely use these distinctions "know" of their vulnerability, at least in the limited sense of being able to recognize it without being forced to look at the world in radically different ways.<sup>20</sup>

The decisions *cannot be reconciled*. Law, understood as a social practice does not deliver determinate legal judgments. Yet surely it is the promise of such determinate legal judgments which justifies law's social centrality – its *existence as a social practice* – in the first place. The promise is false, but the promise must be maintained:

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<sup>19</sup> A similar process, albeit at a more avowedly theoretical level, is taking place in the domain of CIL, and has been mapped, and condemned, by Tony Carty. See *The Decay of International Law*.

Nevertheless ... the law's apologists present these outcomes as if they issued from a procedure that was as determinate as it was impersonal.<sup>21</sup>

Consequently, from a CLS perspective, but also from the perspective of the legitimacy promise of orthodox legal analysis:

The inability of legal doctrine to generate logically consistent outcomes from rules and distinctions that have a clear formal basis means that the entire process is at once empty and insidious. The process is empty because its results are entirely ad hoc – lacking firm definitions or borders, the concepts of doctrine can be manipulated at will and in any direction one pleases – and the process is insidious because these wholly ad hoc determinations are presented to us as if they had been produced by an abstract and godly machine.<sup>22</sup>

The limitations of this form of critique are well documented by Fish:

By stigmatizing the law's rhetorical content, [CLS] makes [itself] indistinguishable from [its] opponents for, like them, [it] measures the law by a standard of rational determinacy; it is just that while they give the law high marks, [CLS] finds it everywhere failing.<sup>23</sup>

However, as noted above, when the two aspects of the Rule of Law (as claim to sovereignty and as recognisory technique) diverge, empirical theorists privilege the

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<sup>20</sup> Kelman M., "Trashing" 1984 *Stanford Law Review* 293 at p. 322.

<sup>21</sup> Fish S "The Law Wishes to Have a Formal Existence" in *There's No Such Thing as Free Speech* 141 at p. 169.

<sup>22</sup> *Ibid*, at p. 168.

former. Authority is privileged, and the *reasons for* that authority are deferred to the realm of Utopian ideal:

a legal norm that is retroactive, radically uncertain, and devoid of all generality, and hence dramatically deficient relative to the ideal of the rule of law [the recognisory technique], is no less valid *qua* legal [i.e. it will still be enforced], than one that is prospective, admirably certain, and perfectly general.<sup>24</sup>

The law remains whatever the particular judge decides it to be in the particular case; *but* we have no way of telling in advance what this will be. This is because there is no orthodox or dominant theory, by reference to which the judge is compelled to recognise, *or* deny the existence of, the legal norm. Gardner, following faithfully in the Hartian tradition, adopts “what the judge will decide” as his *definition* of “*qua* legal”; that choice is *inevitable* in empirical legal theorising, because it is *constitutive* of the social practice to be observed. Nonetheless, it is a choice which fails to reduce complexity to an adequate degree.

In short the Hartian response to this inherent indeterminacy is *denial*; but that denial serves simply to perpetuate the problem.

#### Another Response: Moralisation

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<sup>23</sup> *Ibid* p. 169.

<sup>24</sup> Gardner “Legal Positivism 5½ Myths” p. 209.

Dyzenhaus offers an alternative response: he suggests that we accept the indeterminacy of law as a social practice (the impossibility of adequately reducing complexity at this level), and focus instead on how the judge ought to choose the ‘correct’ answer in each case. Dyzenhaus’ retains the focus on previous adjudication (as data), but acknowledges that this, alone, cannot determine the outcome of future adjudication: there is no empirically cognisable rule of recognition.

This is where natural law’s ‘retention’ of its “substantive moorings” comes into play. It is this substantive commitment which will structure, *and justify*, the further reduction in data necessary to the functioning of the social practice method; the final reduction in complexity, manifested in the choice between (and exclusion of certain) *winning arguments*. In short, Dyzenhaus accepts *legal* indeterminacy, but seeks to negate its importance, by deferring to another system (substantive morality) to produce determinacy, and to justify an authority law is simply *assumed* to possess. This approach may work – assuming that the substantive morality is, itself, sufficiently determinate – but it can no longer be empirically justified. Consequently, its legitimacy is dependent on a demonstration of the legitimacy of *imposing* the particular external moral order.

#### Interim Conclusion:

From the Hartian perspective, MacCormick in effect *concedes* the failure of the social practice understanding of law. That is the burden borne by the theory of rational reconstruction. Dyzenhaus’ does not make a like concession, however, his defence of

the project is, at best, contingent and incomplete; it remains reliant on a *further defence*, a defence of the particular morality lending determinacy to his theory.

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

It may be that MacCormick offers a way out of this dilemma; albeit one he does not take, nor even adequately develop. MacCormick is, undoubtedly, correct that the key is to further reduce the data; it stands to reason that this should be done rationally rather than irrationally. However, this merely poses the key question, it does not resolve it. That question is: how ought we to *substantivise* the rationality structuring the rational reconstruction? What I am developing is a specific technique to accomplish this legitimately; a technique to 'operationalise' MacCormick's theory.

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

## THE PROBLEM RE-PRESENTED: PRE-ADJUDICATIVE EXISTENCE OF LEGAL NORMS

There is an necessary relationship between accepting law's authority, in either sense, and understanding law as a social practice. The social practice *is* the manifestation of the collection of authoritative (i.e. legal) decisions. To understand law *as* authority entails understanding the legal system as the mass of these authoritative decisions. To accept, merely, the authority *of* law likewise entails understanding the social practice as the mass of decisions, but additionally entails attempting to *justify* law's authority in each individual case. This is why attention is refocused onto the substantive outcome; that outcome must justify law's authority. This does allow for a structured reduction in the complexity of the practice, but only to the extent that the substantive choice itself is adequately determined by the chosen morality. Even then, the question of *justifying* the imposition of that (specific) morality remains open.

Neither variant of the social practice methodology can be justified, the first leads to judicial decisionism. The second leads to *either* moral imperialism (if the imposed morality structuring substantive choice is sufficiently determinate, and consistently deployed); *or* itself degenerates into judicial decisionism (if either of these criteria are not met). To avoid both judicial decisionism and moral imperialism, the data which is currently understood as constituting the social practice must itself be reconstructed, reduced, re-imagined.

The assumption that law is authoritative command, and even the weaker natural law corollary that the command of law is authoritative, must be abandoned or at least

suspended (“bracketed”). This is because these commitments ‘artificially’ arrest the form-purpose dialectic; they disguise alternative ways of understanding (and so, of constituting) the law (as an intelligible object of cognition). Moreover, their analytic focus is temporally belated.

Because the social practice methodology focuses on judicial decisions, it accepts conclusions as premises. Instead, the question must turn to the data which constitutes the *options* for judicial choice. The judicial task is to choose one norm over the alternatives. At present, this is done in an unstructured manner, based on the substantive preferability of each norm in the instant case.

Nonetheless, the overwhelming complexity of the ‘social practice’ of law must be further reduced, and this can only be done either:

1. Randomly<sup>25</sup> (oscillation between apology and utopia); or
2. By reference to morality (modern natural law theories); or
3. By substantivising rational reconstruction (by reference to the competing theories between which the judge must choose.)

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<sup>25</sup> This does not mean that each individual choice will be random, as if based on the throw of a die. Instead, the claim is that, when viewed as a totality the decisions will be random. Each individual act of judicial discretion will be constrained (by the skill of the advocates, and the judge’s ‘biography’), but overall, there will be no guiding principles through which this discretion is constrained. Each judge will retain a strong discretion in each case, and the ‘system’ as a whole will lack coherence.

The form-purpose dialectic offers a different perspective from which the law may be viewed. This brings into relief the *reason* for the incoherence of the ‘legal system’. Understood as a ‘social practice’, the legal system is in reality a *melange* of different norms, each manifesting a different theory of law. This opens up the possibility of a different kind of solution: a choice between the competing theories, based on something other than substantive preference as to outcome. This is a choice which focuses on the theories themselves, rather than their substantive outcomes in any given case. This is a choice which had been hidden from sight by social practice methodology.

#### The Nature of Judicial Choice: Competing Theories, Competing Norms:

Legal decision making is inherently indeterminate, and this is, primarily, because there is no agreement on what constitutes a legal norm, nor *a fortiori*, on how legal norms should be identified. The law is a specific way of viewing the world, a technique whereby events are reconstructed and evaluated from a particular perspective, the legal perspective. Consequently, law operates by highlighting certain features of reality as ‘legally relevant’; the rest being discarded or excised from analysis as *not* ‘legally relevant’. In theory (or at least according to the dominant ideology of law) this distinction between the relevant and the irrelevant can be made by reference to legal ‘norms’ – rules, standards, and legal argumentative techniques.

This brings to light an important point of focus, and indeed a methodological commitment, of my legal theory: I adopt the judge as the abstract paradigm of legal theory. In other words, I take ‘the judge’ to be more than a mere institutional figure;



the judge is also an idea, or a perspective. Legal theory should be focussed, in my opinion, on what the judge ought to decide; the purpose of legal analysis, or legal theory, is to identify the correct *legal* outcome. This contrasts with an alternative function on the advocate as the abstract paradigm of legal theory. From that perspective, there would be no correct legal answer, but only acceptable and unacceptable, plausible, and implausible legal arguments: arguments likely to succeed, and arguments likely to fail.

It must be emphasised that focus on the judge as abstract paradigm – focus on legal analysis as the provision of the correct answer, not merely of a persuasive argument – becomes, paradoxically, more important in the absence of the institutional figure of the judge. The more the institutional role of the judge is limited (the more access to court is reduced), the more important it becomes that legal analysis focus on the judicial perspective; the perspective of the *law itself*.

However, it is vital to recognise and emphasise that law is *also* a product of complexity reduction. Kletzer, from an avowedly Kelsenian perspective, describes the issue thus: “laws are ... themselves merely the legal meanings of factual occurrences”. “Positive norms *descriptively* select facts for which they offer a counterfactual or *normative* interpretation”.<sup>26</sup> The critical question then is which “factual occurrences”, which “descriptively select[ed] facts” should count as legal occurrences? How do we know – how do we tell or *perceive* – that laws exist, or what their content is. We can ‘know’ this only by reference to a postulated privileging of

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<sup>26</sup> Kletzer *The Mutual Inclusion of Law and Its Science: Reflections on Hans Kelsen’s Legal Positivism* PhD University of Cambridge, p. 92.

certain factual occurrences *as legally relevant*. The question then is: which factual occurrences are relevant to the cognition of law?

The two views of the judge are also closely linked, at least ideologically. The heteronomy of the law is *justified* by its capacity to provide determinate answers. This justifies the authority of the judicial decision: the law must *decide*; and *that* is its unique specificity or function.<sup>27</sup> However, this ideological function is not realised, the link between the two views is broken: the *nature* of the judicial choice (abstract paradigm) is hidden by the *fact* of judicial choice (institutional figure). Consequently, because the fact of indeterminacy, contradiction, and *ad hoc* decision-making is often hidden behind the ‘fact’ of an authoritative decision, it becomes more noticeable in a ‘legal’ arena *absent* authoritative legal institutions. Public, and more particularly customary, international law offer precisely such an arena.

For example, take this question: Was the recent invasion of Iraq illegal? There have been many and varied responses to this, my favourite was the potentially contradictory Yes, the invasion was illegal, *but* the doctrine of precautionary self-defence is part of PIL. But, of course, it is the status of that doctrine as valid law which would frame the whole question of legality; especially at the point when it was (at least tenuously) arguable that Iraq did possess “Weapons of Mass Destruction”. It is the existence, or not, of a norm permitting “precautionary self defence” (or another permitting “humanitarian intervention” for that matter) which is at the crux of the question of legality.

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<sup>27</sup> See, MacCormick N., 'The Concept of Law and "The Concept of Law"', 14 *Oxford Journal of Legal Studies* (1994) 1 at p. 6

But, are these doctrines part of customary international law (CIL)? *That* is the question which I contend cannot be answered, *until* we can sort out the *theoretical arguments* over the nature of CIL. In other words, because the form we ascribe to CIL dictates the empirical identifiers we seek in the identification, or recognition, of the individual norms of CIL, we need a theory to determine what *constitutes a norm of CIL* in the first place.

The question of what it means for a norm to exist is generally disguised behind a barrage of apparently technical legal analysis. However, this merely begs the question of what counts as technical legal analysis, and of what technical legal analysis truly is, does, or amounts to. That, in turn, depends on our understanding of the legal system which must facilitate this analysis.

#### Two Views of the Legal System:

As noted already, there is no necessary reason to understand law as enforced, nor as socially central, nor indeed as a social practice or a social institution; the choice of definition of “*qua legal*” which Gardner endorses above can be rejected. These commitments may well combine to form the orthodox perspective within legal theorising, but that in itself grants them no virtue, as it offers them no support beyond the “staying power” of orthodoxy. Social practice theorising precludes law from meeting the standard of rational determinacy. There may be good reasons for accepting that outcome, but definitional fiat does not rank among their number.

Law can be understood differently, as an ideal idea<sup>28</sup> structuring, justifying, but imperfectly reflected within, a social practice: law as the *reason for* judicial decisions, not merely the *fact of* judicial decisions. Consequently, there are (at least) two possible understandings of law, and these give rise to two quite different views of (what constitutes) ‘the legal system’.

1. Law as a social practice.

2. Law as an Ideal Idea.

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

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<sup>28</sup> The ideal idea is a concept which I have adopted from Jörg Kammerhofer (see Kammerhofer J., “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems 15 EJIL (2004) 523 at 544) however, we deploy this term in slightly different senses. His is more Platonic, relying on an abstract realm of the ideal, and in particular on the ideal ontology of norms; whereas my use of the term refers to the *human construction* of ideals, which can then form essences, or categories in the semantic sense.

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

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

As there are no “agreed criteria” for legal decision-making, it is delusional to assume that judges apply such criteria. Instead they must, implicitly, choose between different, contesting, and irreconcilable visions, or *theories*, of law in order to reach their decisions. However, such theories are merely implicit in the legal arguments

actually offered; hence the *silence* of the “prologue”, the unarticulated nature of the theoretical assumptions driving the argument.

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

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

Constructing the Data of Law: Structuring Technical Legal Analysis and the  
“Grammar” of Legal Practice:

It must once more be emphasised that the primary role of legal theories is in the *construction* of the practice of law. Legal theories tell us what is to count as law, or as a legal norm; they define the empirical identifiers of law. In this way even ‘descriptive’ theories *construct* the data they claim merely to describe, and against which the accuracy of their ‘descriptions’ should be evaluated. Consequently, the role of the theory is to construct the reality of law, and then to explain that construction.

MacCormick, for example, does not ‘observe’ the data of the (social practice of) law as a whole. Instead, he ‘observes’ that part of the social practice, the rational reconstruction, which has been defined and deemed as relevant. The theory constructs reality as an intelligible entity. Similarly, Kelsen attempted to impose order onto international life using his model of law. This could be envisaged only because of perceived similarities between his ideal idea and the ‘reality’ of international life; there were enough similar phenomena to construct the idea of an international legal system intelligibly. In fact the resemblance did not suffice, and that left Kelsen desperately scrambling around seeking phenomena which sufficiently resembled sanctions.

To make the data of international life ‘sufficiently’ proximate to the ideal of law, Kelsen required sanctions. His ideal determined his construction and interpretation of reality. D’Amato exemplifies this process in his article “Is International Law Really “Law”?”<sup>29</sup> There are two independent movements in his argument: first he seeks to demonstrate the extent of ‘permissible’ distance from the ideal. This is accomplished

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<sup>29</sup> “Is International Law Really “Law”?” 79 NwLR 1293 (1985), available at: <http://anthonydamato.law.northwestern.edu/Adobefiles/A853.pdf>

by a demonstration of the limited role of enforcement in municipal law. The second movement demonstrates the existence of this minimum in the actuality of PIL; the sufficiency of congruence between reality and ideal (category). The conclusion then is that PIL is sufficiently proximate to the ideal of law (as enforced order) to be understood as law.

It is only then that legal critique may take place, but even that critique is limited to seeking greater congruence with the postulated ideal. This critique is implied in the works of both Kelsen and D'Amato. However, it is vital to recognise that in the specific ordering of the tasks, the observational has lexical priority. It is only once the 'social practice', law, has been established as an intelligible object of observation that critique may commence. Consequently, the primary role of the ideal is to construct reality, and *that* is why analysis must focus primarily on the ideal itself: on why the ideal is postulated as it is, and why proximity to that ideal should signify the 'existence' of a legal system.

Only when we have constructed ideals, or categories, can we begin to make sense of (to impose order upon) the complexity of reality. Thus 'all descriptions leave an infinite amount unsaid' simply because of the infinite routes that can be taken through categories.<sup>30</sup> The structure and content of the observer's conceptual matrix determines *both* what can be perceived and how it will be recognised or identified:

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<sup>30</sup> Social systems, as epistemic grids, are precisely socially constructed chains of categories, which make (particular) sense of the world through (particular) constructions of reality. They are designed to replace personal chains of categories to allow consistency and collective understanding (and therefore predictability and regulation). That law is merely one among many such social systems is the central theme which (I hope) unifies the present work.



Where Stendhal describes, in one phrase, Lucien Leuwen's entrance into a room, the realistic artist ought, logically, to fill several volumes with descriptions of characters and settings, still without succeeding in exhausting every detail. Realism is indefinite enumeration ... Realistic novels select their material, despite themselves, from reality, because the choice and the conquest of reality are absolute conditions of thought and expression. To write is already to choose.<sup>31</sup>

In the end, "[realism] is born of a mutilation and of a voluntary mutilation performed on reality."<sup>32</sup>

Paradoxically, these obstructions are also necessary to facilitate the very possibility of cognition in the first place:

We, at one glance, can perceive three glasses on a table; Funes, all the leaves and tendrils and fruit that make up a grape vine ... A circle drawn on a blackboard, a right triangle, lozenge – all these forms we can fully and intuitively grasp; Ireneo could do the same with the stormy mane of a pony, with a herd of cattle on a hill, with the changing fire and its innumerable ashes .... [This] permit[s] us to glimpse or infer the nature of Funes vertiginous world. He was, let us not forget, almost incapable of ideas of a general, Platonic sort. Not only was it difficult for him to comprehend that the generic symbol *dog* embraces so many unlike individuals of diverse size and form; it bothered him that the dog at three fourteen (seen from the side) should have

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<sup>31</sup> Camus A., *The Rebel* p. 235. see also, pp. 230-1.

<sup>32</sup> *Ibid.* p. 230.

the same name as the dog at three fifteen (seen from the front). ... He was the solitary and lucid spectator of a multiform, instantaneous and almost intolerably precise world. ... I suspect, however, that he was not very capable of thought. To think is to forget differences, generalize, make abstractions. In the teeming world of Funes, there were only details, almost immediate in their presence.<sup>33</sup>

In response to this overwhelming complexity, to aid us in de-differentiating, in generalising, we turn to categories:

We order the World according to categories that we take for granted just because they are given. They occupy an epistemological space that is prior to thought, and so they have extraordinary staying power.<sup>34</sup>

Law is a category in this sense. *However*, different theories manifest different categories, and so will construct the reality of law differently. The role of the form-purpose dialectic is to identify these differences. It is only in this way that we can identify the endemic disagreements disguised behind the ‘authority’ of law.

Finally, the dialectic provides the grounds on which we can choose between competing theories, it reduces each set of theories to responses to the same generic questions. In doing so, it allows us to evaluate competing techniques for reducing and ordering the data identified (stipulated as relevant) by each competing theory.

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<sup>33</sup> J. L. Borges “Funes the Memorious”, in *Borges Labyrinths* 87, at pp. 92-4 (paragraph breaks suppressed).

<sup>34</sup> Darnton R., “Pruning the Tree of Knowledge: The Epistemological Strategy of the *Encyclopedie*” in *The Great Cat Massacre, and Other Episodes in French Cultural History* 191 at p. 192.

There continues to exist a multiplicity of legal theories, producing an incoherent multiplicity of legal norms. Taken together, as the social practice of law, this data is too vast, too overwhelming to be made intelligible. Consequently, the data requires further reduction. As noted, this can be done randomly (whether acknowledged or not), as advocated by the Hartian tradition. Alternatively, the final reduction can be grounded in the adoption of an external morality, as advocated by, *inter alia*, Dyzenhaus and Dworkin. Finally, we could attempt to develop a matrix within which the competing theories *themselves* could be evaluated; i.e. the thought objects constituting (and constituted as) legal norms, the data of technical legal analysis, could be identified and elucidated. In this way, we could structure the reduction of complexity by reference to the desirability of the legal theories themselves, and not merely the norms they produce in any given case.

This would amount to a ‘rational reconstruction’ of the legal system, but not, perhaps, as MacCormick might have imagined or desired. To understand law as a thought object, we must abandon the understanding of law as a social practice; the judicial decision merely reflects, it does not embody, the law. An ‘empirically supported’ rational reconstruction would have to accommodate the majority of the ‘actual data’ of the social practice, the inclusions would have to vastly outweigh the exclusions; this appears to be the tenor of MacCormick’s suggestions, that a rational reconstruction cannot accommodate “every single case”,<sup>35</sup> which does suggest that the vast majority of cases will be accommodated.

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<sup>35</sup> See note 10 and accompanying text, *supra*.

This becomes more important in relation to PIL as the institutional figure of the judge is replaced by the ‘authoritative decision-maker’. The idea of the authoritative decision-maker, which is vital to all empirically validated (realist) theories of PIL, incorporates any policy-maker, or executive or other governmental figure, whose decisions are, or are likely to be, implemented in practice. This would include Heads of State, Foreign Office officials, ministers, the UN, the Security Council, but also any others with a decisive input into the process of ‘law application’.<sup>36</sup> Given this diffusion of authoritative decision-making, any attempt to incorporate the majority of the ‘data’ produced would prove impossible within even a minimally coherent system.<sup>37</sup>

Understanding law as a thought object is quite different, as it posits an entirely different relationship between law, legal norm, judicial decision, and legal system. We must alter our understanding of “the large and always changing bodies of material involved”; and reconsider which data should be included, and why. The masquerade of the empirical must be abandoned, and the project reconceptualised so that it is no longer a task of ‘describing’ (i.e. reducing) an ‘empirical fact’. It is the legal system itself which is being *constructed*, the rational reconstruction is simply the description of that coherent legal system. Thus the focus on the law as thought object attenuates the empirical, and displaces the requirement to accommodate the majority of the data previously understood as constituting the social practice. What counts instead is the utility and desirability of the competing theories themselves; not the happenstance of an empirical development.

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<sup>36</sup> See Higgins R *Problems and Process: International Law and How We Use It* pp. 1-16, esp. pp. 9-11

<sup>37</sup> See chapter 5, *infra*.

## DIALECTIC AS METHODOLOGY: ARTICULATING THEORIES

Indeterminacy would be greatly reduced, if not eradicated completely, if each legal system were to ‘authoritatively adopt’ a *single* legal theory as orthodox. In this way, we would be able to identify what counts as a legal demand according to that system, and so we would be able, impartially, to identify the legal demands of that system.

In order to choose the ‘correct’ or ‘applicable’ legal norm, we must first determine the correct or applicable legal theory. It is only in this way that we can adequately reduce the complexity of the social practice of law, in order to determinately identify legal norms. At present, this process occurs randomly. I contend that it can be structured by identifying the competing visions of law underlying the norms which currently constitute the social practice of law, and then choosing one amongst these as orthodox.

The inherently normative nature of legal theory – the move away from the empirical toward the ideal or counter-factual, the claim that law is an institutional rather than a brute fact – raises an obvious apparent paradox: if law is not real, how can we observe it? How can we perceive what is not there, what is not tangible to our senses?

In Kelsen’s terms, and within the peculiarity of his theory, the problem is presented thus:

The legal meaning of an act, as an external fact, is not immediately perceptible to the senses – such as, for instance, the colour, hardness, weight, or other physical properties of an object can be perceived.<sup>38</sup>

This problem of perception must be understood as opening an enquiry into legal epistemology. Not in the sense of the epistemology deployed by law – after all, that can only be determined from within the protocols of a specific theory of law – but rather the epistemological structures within which law itself can be recognised as a specific, differentiated, phenomenon.

Thus, the critical question can be stated simply:

How do we cognise “the law”?

What is the epistemology of law? How and why do we separate out specific phenomena (specific empirical, moral, political, normative, etc. phenomena) as the identifying features of law? Under what conditions can we think law at all?

This is, as should be apparent, a critical issue for *both* legal theory and the practice of law: there is no agreement on what constitutes law! There is no agreement on what law is, does, or strives toward. Consequently, there is no agreement on which phenomena *count, or should count, as legal phenomena.*

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<sup>38</sup> *Pure Theory* p. 2.

It must be emphasised that these questions have to be resolved *before* we can identify, interpret, and apply ‘legal norms’ (or ‘rules’, ‘standards’, ‘principles’, etc.). These problems are analytically and lexically *prior to* the problems, questions, issues of legal reasoning or legal practice.

In other words, if law is understood ‘empirically’ as that which is enforced, namely those arguments and norms recognised and endorsed by courts or “authoritative decision-makers”, then the underlying lack of analysis and agreement as to what counts as law, or as a legal argument, leads to too many different types of argument, too many different sources of legal norms, being accepted. These different norms and ‘licit arguments’ are then allowed to co-exist as the basic resources of the legal system. Consequently, the system becomes radically indeterminate as there is no formal technique by which the arguments can be hierarchised, and between them the norms, principles, and argumentative techniques can justify any outcome.

Instead, we need to accept the existence of this co-existence of a plurality of legal norms and licit argumentative techniques. Only once this is accepted can it be elucidated, analysed, evaluated, and if necessary counteracted. We must acknowledge the manifestation before we can look to the cause, and we must elucidate the cause before we can turn to any postulated ‘solution’. But that, of course, presupposes that this indeterminacy is itself a problem, that it is a bad thing.

Consequently, the vital question is how judges *ought* to make their choices between competing legal arguments and ‘norms’. These choices, these decision-making techniques, can only be elucidated by reference to the *causes* of indeterminacy.

Attention must focus on the processes by which putative norms are formed, and then on the products of these processes, the putative norms themselves. These are the *candidates* for judicial ‘recognition’ as legal norms and arguments, and it is only by focussing on the procedures by which they were formed that we can rationally choose amongst them.<sup>39</sup>

To facilitate this choice, the theories must be articulated in such a way that they become subject to rational comparison. We must avoid the dangers of ineffability and irrationalism; the aim is to make a ‘rational’ (or at least structured and consistent) choice between competing theories. We must neither fear, nor uncritically embrace, ‘postmodernism’; as Rasulov has noted, the dichotomy between ‘modernism’ and ‘postmodernism’ is largely a figment of the Rationalist imagination:

Orthodox theory ... is essentially grounded in an ethical rejection of postmodernity ... [which] derives from a mistaken conception of the postmodern condition. The essence of the postmodern experience, as the anxious Moderns perceive it, is all about destruction. Postmodernism disbelieves everything that Modernism cherishes. It questions ... the great projects of progress and conquest ... In the Postmodernist view, the Moderns declare, reality is absurd. It is fragmented and can never be fully explained or verified. The few random glimpses of it that can be captured here and there unfailingly imply that it is either totally devoid of meaning or that it constantly overflows with it. ... Reason thus gets deposed from the divine throne. ... The

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<sup>39</sup> However, it is also important to stress the limited ambition of the present project. I am not engaging intra-norm indeterminacy, except to the extent of emphasising its (perhaps necessary) connection to an omnipotent and omnipresent (i.e. a sovereign) legal system. Intra-norm indeterminacy can be avoided,



[orthodoxists] are right insofar as they recognise that the idea of a totally fluid discourse is a contradiction in terms. Without meaning fixation there can be no discursive experience: any sustained transfer of knowledge presupposes the common grasp of the exchanged terms. But they are also wrong insofar as they assume that meaning can be fixed in only one way ... The[y are] right in establishing the link between postmodernisation and the undoing of all eternal verities. [But] wrong in assuming that the latter is nihilism.<sup>40</sup>

Although methodology cannot replace ‘natural reason’, it must nonetheless strive to function as if it did so. Methodology must strive to become the self-aware, self-critical, constitution of an artificial outside; a functional equivalent of the inevitably, and irretrievably, absent Archimedean point. The key here is to make the competing theories commensurate: to turn them into answers to the same generic set of questions and, consequently, to build them from the same atomic units. The form-purpose dialectic provides both these questions, and those units.

#### Articulating Complete Visions of Law:

As Dyzenhaus observed, “the presupposition that there is a distinction between politics and a science of law is itself political”.<sup>41</sup> This means that *any* theory of law is a political theory, a political claim. The role of the concept here is not to classify reality, but rather to *create* an aspect of reality. A concept is *more* than a claim of difference (or indeed similarity); a concept is also a claim about the value or utility of

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but only if we are willing to make the choices which must be evaded or compromised in the pursuit of legal sovereignty.

<sup>40</sup> Rasulov A., “The Double Impossibility of International Law: Navigating the Practical Philosophy of the International Legal Project” [unpublished manuscript, on file with author] p. 18.

‘recognising’ or *imposing* that difference. For present purposes a simple thesis may be stated:

The concept of law is no more (or less) than a claim that law is different to other discourses (e.g. politics, morality, economics), supplemented with a claim that recognising this difference increases human utility.

In other words, the concept of law is a manifestation of, and a shorthand expression for, the claim that it is to our advantage to perceive law as something unique and differentiated. It is no more than this, because it makes no claims as to the nature of that difference, nor the nature of the utility it produces. It is no less, because it is irreducibly a claim of difference, a claim that law cannot be reduced to, or elided completely with, any other discourse. Even the slogan “law is politics” posits – paradoxically and despite itself – an essential separation of law and politics.

To summarise, perceiving law as authoritative proved pathological, it deprived law of content; consequently, if we want to justify a role for law at all, we must return anew to the foundational question: what is law. We must examine the competing theories of law and select an orthodox theory. The alternative is to perpetuate the decisionism of Dworkinian Juris-Proconsuls, hidden behind a wavering illusion of the Rule of Law. To some extent this relies on an old dichotomy, much cherished by thinkers from Aristotle to Dicey, that is, the dichotomy between the Rule of Law and the Rule of Man.

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<sup>41</sup> Dyzenhaus D., *Legality and Legitimacy* p. 109.

Very simply, the Rule of Man (pejorative connotations of naked power and usurpation notwithstanding) is functionally equivalent to Weber's notion of "*Khadi Justice*", decision without reference to rules. This is contrasted to the rule (or *logo*) centrism of regulation under the rule of law. However, this dichotomy must quickly unravel, if not collapse completely, when it is recognised that legal judgments are based on fundamentally indeterminate normative structures. The rules do not determine decisions, but are referred to only *ex post facto* as sources of justification for decisions already made.<sup>42</sup>

The CLS slogan "law is politics" is true at the most fundamental level possible. Consequently, the claim that law *should* be something distinguishable from 'pure' or 'unrestricted' politics must be accepted as the basis of all law and legal theory. Subsequently this claim, which must be made for legal analysis to begin, must be *justified*. This justification should not take the form of necessity (an empirical claim of difference) but of utility (a normative claim as to the *advantages* of difference). As law is a tool, it must be presupposed to have utility.

However, this immediately opens the critical question: utility for what? Or, in a guise by now more familiar: what is law for? *Why* should law be separated from politics? What is it that law provides which politics does not? There are many and varied answers to these questions, but it is crucial to realise that each will tend toward a different manifestation, or *form* of law. Consequently, the first stage in the process of articulation comes into relief:

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<sup>42</sup> This charge is identical to that motivating American Legal Realism, and particularly Hutcheson's idea of the "Judicial hunch"; Joseph C. Hutcheson, Jr., "The Judgment Intuitive: The Function of the

1. Postulate and defend a specific purpose of law: e.g. to impose order; to provide determinate answers; to impose a morality, or a political vision; to reflect the wishes of its subjects.

The subsequent questions concern two issues; first, maximising the utility of law, maximising its ability to deliver the proposed purpose. Second, refining that purpose in relation to the specific political community under consideration. Logically then, the second stage of the process must be:

2. Propose a mechanism for pursuing this purpose: e.g. law as judicial decision; law as determinate rules.

At this stage, we have established the essence of law most appropriate to (our understanding of) the legal regulation of the community in question. Now that essence must be further concretised into a conception of law, into the ideal template for a specific legal system. Thus, stage 3:

3. Concretise mechanism: e.g. define ‘judges’; identify the processes by which legal rules may be recognised.

At this point, we have articulated a theory of law. We have developed the ideal against which the legal demands of the legal system in question can be identified.

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“Hunch” in Judicial Decision” 14 Cornell L.Q. 274, 274 (1929)

Step four, then, also marks the move from second to first order questions. This is the point at which legal demands can finally be ‘objectively’ recognised or identified:

4. Apply mechanism to determine ‘legal demands’.

Only now can we actually engage in what is generally perceived as the task of legal reasoning:

5. Implement mechanism: interpret and apply legal demands.

It is important to realise that all five steps must always take place, or be presupposed to have taken place; even to ‘select’ (to identify, discover, pick up, stumble across) a ‘legal norm’, is to select (to pick up, or appropriate) the manifestation of a theory, the conclusion of the operation of stages 1-3. The aim of this methodology is *not* to expand the nature of legal argumentation, but to *acknowledge* the extent it already bears. It is not, in one sense, to ask legal decision-makers to do more than they already do. Instead it is a plea to *recognise* what they already do (they choose between the products of competing legal theories, rather than empirically identifying ‘the law’, as they believe, or pretend, they do), and then to do it, more consciously, tentatively, and openly. Of course it is, however, a plea for legal decision-makers to work harder, and, hopefully, to do better.

A complete theory must articulate what it takes to be the current salient features of empirical reality; what it proposes law should aspire to; and why its particular vision

(mechanism) of law will best achieve that purpose.<sup>43</sup> Only once these points have been demonstrated (or at least argued for) can attention turn to the legal demands produced *by that particular theory*. However, and more importantly, debate is rendered complete and transparent. The various contenders for the essence of law can each be heard. It is likely, if not inevitable, that different essences (whether singular or composites) will be chosen for different places. As a result, law will be able to take on different forms in different places (and times) without being any the less law for that fact.

#### DIALECTIC AS CRITIQUE: CHOOSING BETWEEN THEORIES:

Once the theoretical options have been identified, and made commensurate, one can be chosen as the *best* ideal idea for the regulation of the society in question. If that theory were then adopted (implemented) consistently, the complexity of the social practice of law would be reduced sufficiently to facilitate the determinate recognition of legal norms without recourse to morality. In this way, law could both be made determinate, and avoid any (necessary) moral imperialism.

Two points must be emphasised here: first, that this technique of disaggregation and choice does not lead to a ‘correct’ theory of law, good for all times and places. Instead, it merely allows for structured (rational) choice between competing theories in a specific social setting. Second, that although this debate must ultimately resolve around the purpose of law (and so the question of why we *value* law), it does *not*

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<sup>43</sup> There is another complexity here. It may be that a version of law is favoured *not* (solely) because of what it will achieve, but also because others, which could do *more* are also liable to abuse, and thus the danger of doing considerably *less*, or even of doing more harm than good.

therefore degenerate into a 'post-modernist' acknowledgement of the ineffability of the 'otherness' of each legal theory seen from the perspective of any other theory.

#### Choosing Theories, or Toward a Topography of Critique:

There are several ways in which disagreement with, and critique of, extant theories can be structured, and several sources from which it can flow. Therefore, it is advisable to clarify the nature of one's disagreement with any given theory, rather than confusing (mistaking the target of) or conflating (eliding) dislikes. To do so, however, some form of topography, or typology, of critique must be assumed or stated. This should contain, at least, the following:

Pure political opposition to the ends of the theory, e.g. opposition to the political desire for world homogenisation under the 'liberal alliance' of 'free trade' and 'democracy', or ghettoisation of "them and us" camps (societies), which drives and characterises the classic New Haven perspectives on PIL.

Moral or political opposition to the means deployed. Even if one were to accept that their aims were good, any theory which elevates the powerful above the law entirely, or worse still redefines the law as a description of the activities of the powerful, as purely facilitative of their desires, ought to be opposed. This is the crux of the apology aspect of Koskenniemi's critique of PIL.<sup>44</sup>

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<sup>44</sup> There is no contradiction in my rejecting Koskenniemi's specific deployment of his critique as inaccurate, as misunderstanding the PIL it sought to destroy, while at the same time endorsing his analytic schema *per se*. Indeed I fully endorse his basic claim that (public international) law should be

These theories, however, tend to be more carefully presented, and to over emphasise their difference from the New Haven approach. The argument for a non-universally available right to deploy values is disguised behind the claim that “we can easily tell good from abusive claims”<sup>45</sup>; i.e. we recognise claims which meet *our* moral evaluative standards; but that assumes that we, the People, *know* who *we* are, even as we judge one of our own number.

However, that is precisely the moral imperialism denounced by the Utopian pole of Koskenniemi’s critique. It is precisely the solipsism and narcissism of moral imperialism, and it is acted out as political imperialism. This is the reality of neo-colonialism:

But how can a particular tradition speak in the name of humanity? What possible reason might the Turks, the Serbians and the rest of the world have to believe that? Surely this is the stuff of colonialism. ... The danger is that of mistaking one’s preferences and interests for one’s tradition – and then thinking of *these* as universal, a mistake we Europeans have often made.<sup>46</sup>

Consequently these theories must be met at the normative level. The efficacy with which such moralities could be imposed is not relevant, because it could not assuage the basic wrong of the imposition itself.

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*neither* Apologetic nor Utopian in his senses of those words. I maintain however, that a positivist theory of PIL avoids both poles and any eternal oscillation between them.

<sup>45</sup> Higgins R., *Problems and Process* p. 14.

<sup>46</sup> Koskenniemi, “International Law in Europe: Between Tradition and Renewal” 16 EJIL (2005) 113 at p. 115 paragraph breaks suppressed and footnotes omitted.



The analytic critiques would tend to focus on either the possibility of attaining the ends by the declared means, or the likelihood of abuse of the means, or on the measures of success adopted to determine the realisation of the ends by the means. Thus, for example, Tasioulas' transposition of Dworkinite methodology to PIL should be opposed not because it *cannot* be used to attain good ends, nor even because positivism is more likely to attain good ends, but because Tasioulas' methodology *begs* abuse in the international context. Absent the structural constraints of the domestic legal order, the system *cannot* be shielded against hijack and misuse. Tasioulas' system is in a lose-lose position. If it concretises its values for all times and places, it entrenches the (effects of the) ordinary violence of its own creation (its own "table of values"). If it does not concretise these values, then it must raise the powerful, those entitled or enabled to deploy *their* values, above the law.<sup>47</sup>

The question of realisation is a more vexed and more vexing, one. What does it mean for a system to have fulfilled, or to be fulfilling, its purpose? This is well illustrated in Van der Walt's notion of deconstruction,<sup>48</sup> and immanent critique, the working through of an idea to its logical conclusion, or its legitimating promise.<sup>49</sup> If human rights promise equality, they should be made to deliver equality, otherwise their legitimacy is based on an untruth; they then become illegitimate. This form of critique – which I believe is synonymous with Marks' "ideology critique" – works to consider the unnoticed effects of (unnoticed) ideologies in our perceptions of the world, and the (social) systems operating within it. In Marks' hands, this involves unmasking the ideologies, and tracing their effects; Van der Walt shows more commitment to the

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<sup>47</sup> This will be expanded in the analysis of Tasioulas, in ch. 4 *infra*.

<sup>48</sup> Van der Walt J., "Law as Sacrifice" 2002 *Journal for South African Law* 710-728.

<sup>49</sup> *Ibid.*

legitimatory promise which the (human rights) system he analyses makes, and seeks instead to unearth the reasons for its failure to fulfil that promise.

Finally, there are the empirical critiques, aimed at the accuracy of the empirical claims and assumptions underlying (and perhaps justifying and legitimating) particular theories. The central location of empirical conditions in moral philosophy has been obscured by the rise and dominance of rationality and legitimacy through universalisability, but it has simply been overlooked, it has not actually receded.<sup>50</sup> This is why the critical methods based on challenges to the empirical accuracy of the justificatory claims of certain legal theories remain important.

#### Summary:

At its very simplest and starkest, a legal theory is the exposition and justification of a technique (or method) for identifying, interpreting, and applying the demands and permissions of a given legal system, or of law generally. Different theories make more or less grand claims beyond this, but ultimately, all must fulfil this basic function in order to operate; and to maintain any relevance whatsoever to the practice of law. A direct, but often overlooked – ignored, disguised, or even denied – corollary of this is that all law, even the blackest of black letter law, is always already the application of a theory of law: law does not *and cannot* have (nor maintain) an a-theoretical existence. Therefore, because the theory we adopt will determine how we perceive law, what is then required is a *technique* for choosing a preferred theory.

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<sup>50</sup> Pogge T., *World Poverty and Human Rights* pp. 202-3 . Emphasis on the possibility of rationality and legitimacy, at the expense of historical enquiry and the possibility of necessary illegitimacy, also seems to be at the heart of Foucault's warning that we must "beware the lustre of Power"; see *Society Must be Defended*, esp. at pp. 43-62.

In order to elaborate, or fully articulate, a preferred theory we must go through several steps, which will also serve as our means of justifying and defending that theory. First we must postulate the precise (formal) purpose of the given legal system. Then we must expound and clarify our assumptions about the present nature of society (in this case international society), and any other empirical presuppositions necessitated by our preferred theory. Then we must offer an exposition of the theory itself, the ontology of law it embodies, and how this operates. Finally, we must demonstrate the effectiveness of our chosen means (theory of law/legal system) in linking the empirical presuppositions with the desired ends (purpose). A topography of critique simply focuses on each of these steps in the negative.

It is important to realise that the steps must be disaggregated; it is this which gives rise to the varying levels of critique. Composite critique of whole theories is simply impossible, because no objective, nor even a consistent intersubjective, frame of reference can be created. Therefore any critique of alternative theories must focus on their component parts in isolation. Consequently, as noted above, the evaluation of law, or rather of any given legal theory, must focus on: the empirical conditions; the means; the ends; and the inter-relations of the three. A good theory must be defensible at each level *independently* of its desirability in other regards. This is because it is *only* by separating the debates that we can formulate them in a manner conducive to rational argumentation. Until the ends (purposes) of law have been established, it is simply *pointless* to debate over which theories will best advance the purpose of law; the very question makes no sense, especially as different theories pursue conflicting purposes.

### MAKING THE CHOICE – PURPOSE IN A SPECIFIC SOCIAL SETTING:

The basic contention of the present work is that all extant theories of PIL are flawed according to one or more of the critiques outlined above, and that the resources for rectifying this are not to be found in the classic theories of domestic law, either because the contexts of the two types of system are too radically dissimilar, *or* because the idea that PIL must aspire to be like domestic law is fundamentally inaccurate.

By accepting this, the ground can be set for a new theory. In fact the theory I endorse is as much reactionary as it is novel; it is a theory of positivism, but one set out normatively, which constitutes the best theory to fulfil the roles demanded by the purpose of law best suited to the international social environment. It is not as such a description of what happens, but an analysis of the ideal underlying our cognition of actuality. It is a normative plea to restrict and refine PIL, to make it the best system it can be, but also to realise that this cannot be done until after we have agreed on a definition of best, a definition of the purposes that should be aspired to by PIL.

### Identifying and Ordering the Questions: the Role of the Revised Schema:

Any proposition offering a specifically legal answer to a given question begins from the presupposition of the differentiation of the legal sphere, but that, formal, assumption alone cannot provide the specifically legal answer. Instead, the *nature* of the specifically legal must be defined. That is, we must begin with a *claim* as to what

differentiates the legal from the non-legal. This claim will form the basis of the essence of law. It is a concretisation of the chosen purpose of law.

Consequently, from a strictly analytical perspective, we must go through several processes of concretisation before we can get from the concept to the conception of law, and more again to move from the conception to the implementation of the specifically legal demand. To further complicate matters, the necessary pluralism of this approach precludes the possibility that there is a single purpose of law, good for all times and places. As a result, these processes of concretisation are, themselves, contingent. We do not seek legal rules in the abstract, but rather the demands of a specific legal system. This means that the 'best available' purpose, will be that which best suits the location and needs of a specific community. The entire process can only be concretised in relation to a particular concrete situation. Even then, it is unlikely that any one purpose will be rationally superior to all others. The issue will remain, ultimately, subjective.

There is no more an objective answer to the question "what is the law for *here*?", than there is to the general question "what is the law for?". However, views on the former question will at least be more focussed. I do not claim that such questions are susceptible to rational resolution, I merely observe that they are implicit in questions of what the law demands. As such, they form part of the stakes in the resolution of that question. As this is a fact, it ought to be acknowledged. Once their existence is acknowledged, such questions must be formulated and answered.

To repeat, the composite question “what does the law say about  $x$ ?” cannot be answered unless it is first dis-aggregated. The question contains at least the following component parts:

1. What purpose should law pursue, so as to be justified *here*?
2. How does that purpose manifest itself; what is the *mechanism* by which that purpose is best pursued? [And: is that mechanism *available*? What is the best *available* mechanism?]
3. How does that mechanism define/identify legal ‘norms’?
4. Which legal ‘norms’ are on point?
5. What do those legal norms say about the proposed action ( $x$ )?

However, it is vital to realise that these questions, although consecutive, are also operating at different levels of understanding. Engaging with *that* fact is the peculiar strength of the multi-level system of analysis. The first two questions concern the choice of an appropriate essence of law; the third concerns the transformation of that essence into a conception of law, a legal system. The final two questions – the two most often asked by legal analysis and legal theory – presuppose that the others have been resolved. These questions deal with the implementation of the norms of a *specific legal system* (or conception of law).

What this entails is that the first three questions must be resolved in order to identify the orthodox legal theory for a given area. These tell us *which legal system is operative*. If the law is to fulfil any postulated role, it must be manifested as a specific legal system. Failure to recognise this means that the first three questions – the vital, if second order, questions – are rarely articulated. And yet, they must be resolved, as such a resolution is implicit in answering the final two questions. They are, therefore, resolved without thought, or even recognition. *That* is what creates the primary indeterminacy in legal reasoning.

### The Method Illustrated:

I have not offered a theory of law or justice, certainly not one good for all times and places. There is no Rawlsian Original Position, no Kantian Social Contract, nor even a Categorical Imperative. These thought experiments capture only the *hubris* of their authors: when in doubt, do as I would do. My thought experiment is, I believe, more formal, more neutral, or minimalist.

Imagine two (or more) protagonists in a court – or court like – environment. Each pursuing their ‘case’. Each protagonist argues for a specific effect (application) of the law. One says that the law is *a*, the other (or another) that the law is *z*.

The judge asks them why? Why does the law state *a* or *z*? The answer, schematically, must be that the relevant ‘norm’ states *a* or *z*. But why; why is that the relevant norm? Why does that norm exist? The answer to this question ought to begin “because ...” and go on to offer an exposition and defence of a specific theory of law: the ontology

of law, and then the identification and application of legal 'norms'. This does not occur, instead the process degenerates into the masquerade of the empirical.

Precedents and interpretative principles are bandied about.

The law, despite being a product of theory (and a disputed product of disputed theory at that) is presented as a series of empirical truths: these are legal norms, this is their logical chain, these are their interpretative and identificatory necessities. Furthermore, law must be pragmatic, reasonable, good, liberal; law must be these conflicting things because of its empirical centrality. The true debate, "what is justifying this centrality?" and, indeed, "is the law really central, or just the judicial decision?", is ignored. The debate is foreclosed, and yet must be authoritatively settled. The judge must decide what he understands law to be, and must then apply that law.

The methodology presented here seeks only to expose the true nature of this decision, to bring to light the questions the judge is actually facing. Even if these questions are ignored, they must nonetheless be engaged, they must be answered, or have their answers presupposed. This motivates and justifies the drive for transparency. Why is the law like that? Why should a legal norm be constituted in that manner? What *function* does law, postulated as you postulate it, pursue? Is that a good function for law to serve? Why will your mechanism deliver that purpose? At what price?<sup>51</sup> Will the law be too rigid? Or unfair? Will it be too flexible? Or indeterminate? Should judges be encumbered and entrusted with so much discretion? Are these prices worth paying? What other ways could law serve these functions? What other functions could it serve? What other norms would then be created?

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<sup>51</sup> I.e. will the mechanism proposed also do damage to the pursuit of that, or other, functions?



In short: why should I [the judge] believe in, or agree with, your particular vision of the law?

This is the question around which legal practice – or any other reality of the legal – must revolve. It is only by engaging this question, either alone, or at least with lexical priority over all others, that the stability of a legal system can be maintained. The judge should adopt a formal understanding of their role – alternatively, the judge as abstract paradigm should embody a formal understanding – not because this is conceptually necessary, but because it is beneficial. Stability is maintained because value selection is restricted; the only truly value-centric question engaged is “what is law for?”. Once this is answered, the other answers (what is law? what is the legal norm? how should it be interpreted?) follow (at least in theory) from the operation of logic.

Moreover, as the value question is posed formally, and at the systemic level, its answer ought to remain relatively stable over time. Thus focus on these questions, rather than on substantive preference in the outcome of the instant case, produces stability. The answers are far less likely to vary from case to case, and thus (more) determinate answers can be produced without reliance on substantive institutional bias: the law itself can provide determinate answers. This is the legitimating promise (or ideology) of law; moreover, it is a good purpose for law. The current taste for substantive choice in the instant case militates against determinacy; this can only be countered by engaging the formal question.

Nonetheless, it is a question which is generally overlooked, hidden behind unstable claims of synthesis, technical legal argument, and wafer thin dichotomies of explanatory reason. It is a question denied engagement.

A similar point has been raised, at a more obviously theoretical level, and in relation to CIL, by Tony Carty. Speaking at the Critical Legal Conference in 2004, Carty described the thesis of his book *The Decay of International Law* thus:

Theorists keep coming up with new ideas about what CIL is. These are used to explain – or argue for – new decisions, or novel courses of action. Then other theorists come along, and synthesise these new theories into existing understandings of CIL. The result is confusion and hidden contradiction: *the Decay of International Law*.

#### CONCLUSIONS:

So far, I have attempted to bring into relief, and elucidate, the crisis in which law currently finds itself: the crisis of radical indeterminacy. I have shown how this crisis arose, and why any attempts at empirical theorising will necessarily prove inadequate responses to this crisis. Furthermore, I have explained the methodological fallacies of the empiricist project, and suggested a re-orientation of legal theory: as a *necessarily normative* discourse. In doing so, I have opened, and attempted to resolve, a central question in the theory of law: how are we able to cognise law at all?

However, this resolution has led only to an apparent widening of the problem. It has exposed the multiplicity of normative orders competing for the signifier “Law”, and the analytic impossibility of making a rational choice between these. There can be no correct theory of law, at least not within the confines of normative legal theory.

Instead, the focus of analysis had to be altered: from the correct theory of law, to the *best available theory* of law. However, I also acknowledged that – in addition to this question having no objective, ultimate, or correct answer – this issue could not be solved ‘absolutely’; could not be solved for all times and places.

Instead of this, I have contended that the question can only be framed in such a manner that it may be susceptible to inter-subjective resolution, and even then only by reference to a specific legal system; a specific legal order postulated in relation to a specific society. The question of which legal theory is ‘best’ reduces, at least in large part, to the question of which purpose(s) that legal system should pursue. That question can only be engaged in relation to a specific and defined societal context. It is *not* a question of which purpose(s) law should pursue *per se*, but which purposes it should pursue *here*.

The move from a schema of intelligibility to a topography of critique and/or choice can only be made within such narrowly specified confines. The time to make this move is now upon us, and the topography will be developed in relation to a specific society: the international society. I have chosen this particular focus for a number of reasons: it was within Public International Law (PIL) that the inadequacy of legal discourse first became apparent to me. As a ‘naked’ legal system, PIL displays the symptoms of crisis at their most obvious; moreover, as a ‘legal system’ without

authoritative institutions, PIL stands in most urgent need of resolving this crisis; finally, the subject of PIL is, and always has been, my first love. This project was inspired by PIL, and must now return to its roots, by elucidating the problems within PIL (chapter 4), and then by seeking to articulate the best available response to those problems (chapter 5).

Having established the minimal nature of the concept of law, as claim of difference and justification for the existence (and recognition and perpetuation) of that difference, attention must now turn to some of the rival candidates for substantiating that claim.

CHAPTER 4: INDETERMINACY ILLUSTRATED: THE ‘CANDIDATES’ FOR A  
THEORY OF CUSTOMARY INTERNATIONAL LAW:

*There is not a person who, except in the field of his own specialization, is not credulous – Jorge Luis Borges.*

TWO VIEWS OF INTERNATIONAL LAW:

Thirlway has noted, in a stinging, but perhaps unwarranted, attack on the thesis presented by D’Amato,<sup>1</sup> that:

The distinguishing character of a *legal* claim, in the sense of a claim that a certain conduct is required or justified by law, is surely an implied assertion that an impartial third-party, called upon to consider the matter from the standpoint of law, would decide that the claim is justified.<sup>2</sup>

He continues:

Looking at the matter from the point of view of States, of what Professor D’Amato calls national “decision-makers” and their legal advisers, it would seem reasonable to suppose that in a “claim-conflict situation” where both sides could point to “rules of law” in Professor D’Amato’s sense, a question which the national decisionmaker would be bound to put to his legal adviser would be: Which view is right? – and this would mean, Which alleged rule

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<sup>1</sup> I have my own thoughts on D’Amato’s thesis, its failure and its necessary pathology, and these are expanded *infra*, see footnotes 49-81 and accompanying text.

represents the correct rule of international law? This in turn means, in the present writer's view, Which rule would be upheld by an impartial tribunal on the basis of international law?<sup>3</sup>

Two points must be noted: firstly Thirlway appears to adopt at least a neo-Hartian methodology, as how can we tell what a tribunal might do without relying on its previous conduct; secondly, Thirlway simply *assumes* the natural correctness of what could be called the 'English' or 'European' understanding of law, *viz.* that the law must and can reach impartial decisions.

The first point, while important, is not fundamental, because Thirlway's claim is ambiguous on this issue. He simply does not tell us *how* we ascertain the likely actions of a tribunal. Consequently, this claim remains compatible with the neo-Kelsenian claim, developed in the previous chapter, that the 'norm' precedes and determines the (correct) legal judgment. That is, the claim can be understood in *either* 'social fact' or 'ideal idea' terms. However, the likelihood is that Thirlway's methodology tends toward the social practice paradigm, as he implies that what the Tribunal would decide *constitutes* the law; and that in turn implies that 'the law' can be identified from the observation of the *consistent* behaviour of the relevant tribunals, which it cannot.

The second point suggests one possible root cause of the confusion of international law: American (or perhaps more accurately United Statesean<sup>4</sup>) legal thought is 'post-

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<sup>2</sup> *Customary Law and Codification* pp. 51-2.

<sup>3</sup> *Ibid* p. 52.

<sup>4</sup> Kennedy D. "The Disciplines of International Law and Policy" 12 *Leiden Journal of International Law* (1999) p. 9.

Realist' thought. What this means is that US legal thought, in abandoning Langdellian Formalism has also abandoned the *idea* of law as a neutral discourse, capable of producing determinate answers solely by reference to rules. Consequently, the *idea* of 'judge' (or "impartial tribunal") as the abstract paradigm of legal thinking has also been abandoned. The judge has been reduced to just another advocate, a site for persuasion, not a purveyor of correct answers. From an American perspective, Slaughter notes that:

The paradox is that the American conception of law, at least from a European perspective, is composed of equal parts cynicism and idealism ... American lawyers have long had difficulty thinking of law as an autonomous body of rules.<sup>5</sup>

As Hart noted, the response to this acceptance has fractured American legal thinking, causing a bifurcation between "the Nightmare and the Noble Dream".<sup>6</sup>

The details of these responses are, for present purposes, not relevant. The important point is that US legal thinking is *fundamentally different to* European legal thinking. International law must consider both perspectives. Ultimately, one must be privileged over the other – that much is true – but this should be the outcome of a process of rational engagement, not the arbitrary imposition of dogma as it appears in Thirlway's analysis.

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<sup>5</sup> Slaughter A. "An American Vision of International Law?" 97 *American Society of International Law Proceedings* (2003) p. 125.

<sup>6</sup> Hart H. L. A., "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream" reproduced in Hart *Essays in Jurisprudence and Philosophy* p. 123.

There is another, perhaps deeper and more serious, flaw in Thirlway's analysis: the *assumption* of a (single) legally correct answer. In line with Hart, Kelsen, Fuller and positivist thinking generally, Thirlway assumes that law not only can, but *does* produce determinate answers, or at least, determinate legal norms: that the norms can be identified by reference to a fixed test, or set of criteria. In direct opposition to this assumption, Carty has argued that:

The task of the jurist cannot simply be to identify phenomena as legally significant by applying an agreed legal criterion of identification. Legal controversy goes to the very nature of the criterion itself.<sup>7</sup>

There are no agreed criteria; Thirlway's second thesis must be abandoned, and consequently his claim for the specificity of the legal must fall. *However*, this is 'true' only within the confines of empirical theorising.

From the fact that law has no shape of its own, but always comes to us in the shape of particular traditions or preferences, it does not follow that we cannot choose between better or worse preferences, traditions we have more or less reason to hope we universalise.<sup>8</sup>

The question for normative theorising is whether Thirlway's ideal of law is *desirable*, and if so, whether it can be realised. I shall argue that both of these questions can be answered in the affirmative, but first, the *nature* of the problem must be more fully elucidated.

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<sup>7</sup> Carty A. *The Decay of International Law* p. 25.



### Locating Koskenniemi's Critique Within the Topography:

Koskenniemi offers the most devastating contemporary critique of the very possibility of CIL.<sup>9</sup> He claims that CIL must reduce either to a description of what states do (which Koskenniemi terms Apology) or to the arbitrary imposition of an ethical or political theory onto a heterogeneous world (which he terms Utopia). Worse still, these two options stand in bivalent contradiction; they cannot be blended or synthesised, yet neither can serve to justify CIL. Consequently, Koskenniemi claims two related points and a dialectic conclusion: PIL can admit to being neither apologetic nor utopian, yet PIL cannot help but be one or the other. *Therefore* PIL exists in a permanent and manipulable oscillation between the two.

What Koskenniemi's critique brings into relief is the analytic failure of contemporary theories of CIL. This failure is encapsulated in their tendency toward oscillation between Apology and Utopia. Consequently, Koskenniemi demonstrates the fact that CIL is fundamentally indeterminate; he also explains why this is the case. However, it is also vital to realise that the force of Koskenniemi's critique lies in an unarticulated postulate that this analytic failure, although an empirical reality, is normatively undesirable. Radical indeterminacy may be a 'fact' of contemporary CIL, but it is undesirable; it is a fact which should be contested, combated, and eliminated.

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<sup>8</sup> Koskenniemi "International Law in Europe: Between Tradition and Renewal" 2005 EJIL 113 at p. 119.

<sup>9</sup> See *From Apology to Utopia*. For an excellent synopsis of this thesis, see Koskenniemi M., "The Politics of International Law" 1 EJIL (1990) 4.

Accordingly, Koskenniemi's critique becomes the analytic *litmus test* within the topography of critique as outlined above. Passing this test is a necessary, but never a sufficient, condition for the acceptability of a theory of CIL. This is because, as noted, Koskenniemi's critique can be 'side-stepped' by those willing to endorse *either* Apology or Utopia, and thus substantivise their imposed morality, or leave law as a descriptive justification of the actions of, e.g., the 'alliance' of liberal states, the "coalition of the willing", or NATO. Either of these responses must be met at the *normative*, rather than the analytical, level. A successful theory must be defensible at all levels; the *best* theory must be preferable at all levels.

Koskenniemi's critique only works against those who assume certain purposes or characteristics to be innate to the law: consistency, impartiality, objectivity.

Koskenniemi's critique gains its critical purchase by playing on its *readers'* hopes and fears. *We* (the readers) ascribe force to his critique because it relies upon, echoes, and re-inscribes *our* beliefs in what law should be like. The critique brings a version of law's abstract promise, and our commitment to that promise into relief. Consequently the critique builds on the hopes of its readers, by illustrating to us that CIL fails to meet that promise, and why this is so.

In elucidating the nature of the problem, Koskenniemi also begins to unearth the outlines of its solution. This is an important critique, but one which can be met; and in meeting it, we shall discover an understanding of CIL which is neither Apologetic nor Utopian.

#### FALSE AGREEMENT AND THE THEORETICAL OPTIONS:

The critical issue is to ‘unpack’ Carty’s claim that there are no agreed criteria for the recognition of valid international law. This critique is of especial importance to – and was raised by Carty in relation to – CIL. This is because there are several different theories competing to explain CIL, but also because of academic attempts to synthesise these competing theories, and by the tendency – prevalent amongst both academics and practitioners – to jump lightly between competing theories, simply in order to justify their personal desires regarding the content of CIL.

Consequently, the first movement in Carty’s critique must be to denounce the tendency to jump between competing theories, and second to denounce attempts, *ex post facto*, to justify these jumps in terms of grand synthesised theories. This assumes a purpose of law not in the least dissimilar to Thirlway. International law ought to be normative, it ought to evaluate (and perhaps regulate) and not merely describe State behaviour. This ideal of law also appears to underlie Koskenniemi’s devastating nihilist critique of CIL. The emotive purchase of this critique lies in its premise: that good law, and especially good international law, should be *neither* Apologetic nor Utopian, much less oscillate between the two.

In chapter 5, I propose to engage directly with Koskenniemi’s critique, and to demonstrate the conceptual viability of its immanent inversion; the bringing into relief the *possibility* of realising its inarticulate premise of good law. We can create a justifiable ideal idea, which can function to allow the cognition, elucidation, understanding, analysis, evaluation, and critique of CIL. However, for now I wish to adopt the premises of Koskenniemi’s critique, and also to deploy the critique

(amongst other techniques) to demonstrate the *causes* of indeterminacy in CIL; but also to argue that this indeterminacy is detrimental – that the primary purpose of CIL ought to be the provision of ‘neutral’ and (more importantly) *determinate* legal rules. As Koskenniemi himself puts it:

If the universal has no representative of its own, then particularity itself is no scandal. The question would be: Under what conditions might a particular be able to transcend itself? What particular politics might we have good reason to imagine as a politics of universal law?<sup>10</sup>

At present this idea of determinate law, which we might call the rule of law ideal, is not being realised in CIL. Instead, a multiplicity of theories compete for our attention, and each defines the law differently, and so recognises different laws. To exacerbate this descent into the ‘rule of man’, academics, practitioners, and judges routinely move between these theories<sup>11</sup> without conscious thought, simply to ‘discover’ the rules which best suit their particular desires.

In order to alleviate this problem, two stages are required: first the movement between theories must be declared illicit (or licit only under certain carefully defined circumstances); and second, the competing theories themselves must be elucidated and fully articulated, in order that one of them may be *chosen* as the best available, and consequently *recognised* as the dominant, or orthodox, theory of CIL. In conformity with Carty’s plea, we must abandon the attempt to synthesise a ‘correct’

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<sup>10</sup> Koskenniemi, *supra* note 8, p. 115.

<sup>11</sup> This is the cause of what CLS have termed “Up/Down arguments”, see Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* pp. 40-1.

theory of CIL, and turn our attentions instead to the decision, the *choice*, of a ‘best’ theory:

The fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal.<sup>12</sup>

The key is precisely to find a law legitimately capable of speaking the universal, even if this must take place within a European dialect (Law). To recapitulate, briefly, we cannot objectively identify the content of legal rules in any given area of regulation unless and until we have established the orthodox legal theory through which the rules themselves are to be defined, and so by which the rules are to be identified. It is by adopting this methodology that we are able to separate arguments over what the law says from arguments over what the law is. Only after the latter arguments have been resolved can the former be rationally formulated.

Obviously, I cannot begin to synthesise all of the variant theories proposed as candidates for a theory of CIL, but shall instead subject exemplar theories to a test implicit in the claim Pound made many years ago, a claim picked up and amplified by Fuller. Pound said “ideas of what law is for are ... largely implicit in ideas of what law is”.<sup>13</sup> Fuller premised his entire theory on this claim that law *necessarily* had a purpose, and thus law must be restricted to forms and techniques *appropriate* to the realisation of this purpose; he called this essentialism. Fuller claimed that any object which had a purpose also had an essence,<sup>14</sup> a minimum concentration of properties allowing it to serve its function and be recognised as an object of its type. Fuller’s

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<sup>12</sup> Koskenniemi, *supra* note 8, at p. 115.

<sup>13</sup> Pound R. *An Introduction to the Philosophy of Law* p. 46.

argument is that this essentialism has been lost in regard to law – primarily because we no longer think about what law is for. Yet we all have views on this, whether we articulate them or not.

By disguising these divergences, these disagreements, behind the word “law” (and/or the phrase Customary International Law) we court confusion. This apparent agreement serves to disguise deep divergences in the techniques for ‘identifying’ the norms of CIL. Nonetheless, a ‘debate’ ensues over the meaning and application of these ‘norms. The underlying debate – the debate over which norms exist, and why this is so – has, tragically, never so much as been framed, let alone initiated, and much less resolved. Schematically, theorists, black letter academics, and practitioners of international law, transpose – or probably more accurately transplant<sup>15</sup> – assumptions about the “nature of law”, from the theory and practice of municipal law to the alien environment of international society. Koskenniemi is correct to draw attention to:

The domestic analogy that persuades us – contrary to all evidence – that the international world *is* like the national so that legal institutions may work there as they do in our European societies.<sup>16</sup>

Two problems arise as a result: first municipal law is not, itself, a coherent, nor an unproblematic, concept;<sup>17</sup> and second PIL is *not municipal law*.

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<sup>14</sup> Fuller L. *The Morality of Law* pp. 145-151

<sup>15</sup> The, very useful, distinction between transplanting and transposition was developed, and is elucidated, by Esin Orucu ; see “Law as Transposition” 51 ICLQ (2002) 205.

<sup>16</sup> *Supra*, note 8, at p. 122.

The disaggregation of debates may prove of great utility here. I believe that the ‘concept of municipal law’ can itself be subdivided into the necessary presence of four (or possibly five) key components, or central features. Municipal law – and thus, for the unreflective, law as such – is:

1. Socially central (law has *an* answer to *all* questions)
2. Enforced (law must be enforced, and thus law *is* what is enforced)
3. Impartial (the same laws apply, in the same way, to all subjects<sup>18</sup>)
4. Determinate (we can identify the laws quasi-objectively)
5. (Possibly) In some form congruent with a posited moral demand

The most interesting questions are which, if any, of these characteristics is truly necessary, definitional, or paradigmatic? Alternatively, which syntheses of the available elements can be created; how does privileging or concretising some (groups of) features, while excluding or marginalizing others, affect, or even effect, our understanding of law? There seems to be an undeclared, but generally observed,

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<sup>17</sup> See Kammerhofer J., “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems” 15 *EJIL* (2004) 523 at p. 550; see also Kletzer C., “Kelsen’s Development of the *Fehlerkalkul*-Theory” 18 *Ratio Juris* (2005) 46; and ch. 3 *supra*.

<sup>18</sup> Or, more precisely, to all subjects within a given (specified) class; however, within PIL (if we take Sovereign equality seriously, even at the formal level) then there is only one primary class of subjects; the Sovereign States.

convention that enforcement and centrality are the paradigmatic features of law,<sup>19</sup> with the corollary that the others can be marginalized as needs be.

Following the elision of law and Rule of Law, institutional enforcement, and the description of institutional techniques, has become the principal focus of a largely descriptive legal theory. Within an institutionalised municipal legal order this may make sense, though even here it must be open to normative or political challenge, simply because it implicitly posits a brutally Hobbesian purpose (the imposition and maintenance of order) to law as such. Certainly Fuller openly objected to this privileging of power over the specifically legal.<sup>20</sup> Moreover, as Dyzenhaus and Dworkin have shown, and as MacCormick appears to have conceded, this project is also analytically indefensible due to the sheer scale, complexity, and contradiction of the data of law understood as a “social practice”.

However, given our immediate focus, the most important questions reside in the transposition of law from the municipal to the international sphere. We must determine which features, or syntheses of features, could be most fruitfully developed to create, define, and identify PIL or CIL. My argument is that, ultimately, the debate revolves – and must be *resolved* – around the purpose of law. It is only once we have agreed on a purpose for law (or more precisely, for the specific legal system under consideration) that we can identify and articulate law’s ontology; and only *then* can we ‘objectively determine’ the content (the norms) of the given legal system.

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<sup>19</sup> Even Fuller, despite railing against the confusion of “deference to constituted authority with fidelity to law”, acknowledged the need to enforce law, and indeed even incorporated that need, implicitly, into his (wrongly) fixed enunciation of the purpose of law: “to *subject* human conduct to the *governance* of rules” (see *The Morality of Law* p. 106). Thus, enforcement – while generally considered insufficient for a definition of law, is nonetheless an agreed element in almost every theoretical analysis of law. The necessity for an enforced order is legal common-sense.



Moreover, at least in relation to PIL, only a well articulated, and carefully delimited, *positivist* theory can provide a satisfactory mechanism for the implementation of a coherent and acceptable purpose .

But before that can be demonstrated or proven, attention must turn to the issue of choice itself, and the important preliminary question: just what options do we have to choose between?

#### A Schematic Overview (Or Typology) Of The Theoretical Possibilities:

Roughly speaking, the options for the relationship between practice and *opinio iuris* are that they could create CIL as *either* an aggregate or a synthesis. But this shifts the question immediately onto the definition of each part. To provide a synthesis, the two parts would have to be part of the same thing, reflections of each other; inexorably bound and inseparable. To be an aggregate, the opposite must be assumed, that the two elements are radically separate from one another, each enjoying an atomistic existence. These options reflect, summarise, and encapsulate the classic and the modern theories of custom respectively. As should be apparent, they *cannot* be reconciled.<sup>21</sup>

There are two central options for State Practice, either it is *everything* that States do, or it is *some of* what States do. After this choice is made – or perhaps before this choice is made – we must decide how to decide which of the things which States do

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<sup>20</sup> Fuller, *supra* note 12, p. 41.

<sup>21</sup> This course of action has been suggested, and attempted, by Roberts, see Roberts A. E. "Traditional and Modern Approaches to Customary International Law: A Reconciliation" 2001 AJIL 757. My criticisms of this idea are developed at notes 85-102 and accompanying text, *infra*.

should count as State Practice. This question has been answered in different ways: for a classic natural lawyer, like Teson,<sup>22</sup> it is the congruence of the action with a posited ethical order (deemed self-evidently timeless and correct) which separates Practice from mere Conduct; for a classic positivist it is *opinio* which differentiates Practice from Conduct.<sup>23</sup> Those following D'Amato,<sup>24</sup> New Haven, or a Dworkinian approach<sup>25</sup> must, I believe, assume all state actions to be State Practice.

*Opinio iuris* too is a term of many meanings: it could be about the nature of the *claim* to act, or about the reception of this claim. Alternatively, it could be wider, covering all that states say (normative *opinio*); or, again, it could be some of what states say – e.g. that sufficiently congruent with “World Order Values”. Then again *opinio* may be a “state of mind” imputed onto states. Within this latter perspective, *opinio* could be understood as a belief in legality, a consent to be bound, or a simple normative claim for legality.

It is already almost impossible to track the potential permutations available between State Practice and *opinio iuris*, the “agreed elements” of CIL. However, all that must be stressed for now, is that each permutation will focus on different data; each perceives rule formation differently, and so each will return different rules. Moreover, these differences are largely masked by the apparent agreements over the structure and elements of CIL; and by their elision or confusion with those disputes over the content and meaning of rules; disputes which are endemic to the practice of law. It is the combination of all of this which leaves CIL wide open to the nihilist critiques of

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<sup>22</sup> Teson F. *Humanitarian Intervention* pp. 11-15.

<sup>23</sup> The classic exposition is from the *North Sea Continental Shelf Cases* 1969 ICJ Reports 3 at p. 43.

<sup>24</sup> *The Concept of Custom in International Law* pp. 87-98.

NAIL. Law is not an application of rules, it is an act of choice; justified *ex post facto* by reference to rules.

However, it is also important to realise that arguments over the ontology of law are disguised by apparent agreements, particularly in the sphere of CIL. Disputes over which rules exist, are thus completely elided with disputes over the content, meaning, and applicability of rules (already *presumed* to exist). This confusion occurs because the external dispute over the nature of law has been transposed into an internal plurality of articulated and unarticulated theories of CIL. These issues must be separated. CIL must be accurately defined, before it can be observed, or have its rules evaluated for content, meaning, and applicability.

Theories of CIL can be roughly divided into the following categories:

1. Single Element Theories:
  - a. Based solely on practice
  - b. Based solely on *opinio iuris*
  
2. Twin Element Theories:
  - a. Which consider the two elements in synthesis
  - b. Which consider the two elements in aggregate

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<sup>25</sup> See, e.g. Tasioulas J., "In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case" 16 Oxford JLS (1996) p. 84.

### 3. Avowedly Moral Theories:

- a. Based on an Evolving Morality
- b. Based on a fixed Morality
- c. Realist Theories

#### A MORE DETAILED ANALYSIS AND EVALUATION OF THE THEORETICAL OPTIONS AVAILABLE WITHIN CIL:

The development of a determinate theory of CIL must commence by singling out a single theory, which will be considered orthodox and will be privileged over all others. This can best be done by demonstrating the normative and analytic preferability of one theory, but can also be achieved negatively, by demonstrating analytic failings and normative failures within alternative theoretical options. That is the function of the topography of critique developed above. However, that topography then requires data to which it may be applied; that is, we must consider the varying theories of CIL in an attempt to isolate one as preferable to the others.

What I shall demonstrate in this section is the fact that, for structural reasons, all available theories of PIL are either analytically vulnerable or normatively objectionable. That is, all fall foul of Koskenniemi's devastating critique, in one way or another. These failings are not to be attributed to the idiosyncrasies of each individual theory, but to the very structures of the theories themselves. As a result, I shall show how each *type* (category or *genus*) of theory in the typology above is

doomed to failure, and to producing either apologetic or utopian ‘norms’ or, worse still, yet more likely, to oscillate between the production of each.

### 1. Single Element Theories:

There have been two important and, in their time, influential attempts to develop single element theories of CIL. One focussed exclusively on State Practice, driven by a methodological commitment to the empirically observable. The other, focussing exclusively on *opinio iuris*, comes across more as a lament for the absence of an international legislature, and an attempt to create its functional equivalent in the UN General Assembly.

#### State Practice Only (Early Kelsen):

Kelsen did, at one point, offer the view that state practice was the only necessary element in the formation of customary law.<sup>26</sup> However, he did not maintain this position.<sup>27</sup> This was perhaps inevitable. Firstly, it is obvious that such a position would breach Kelsen’s fundamental commitment to the is/ought distinction. It would allow a mere fact to become constitutive of a legal norm, consequently, deriving an ought from an is. This is well captured by Kammerhofer:

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<sup>26</sup> Hans Kelsen, “Théorie du droit international coutumier” 1 *Revue Internationale de la Théorie du Droit* (1939) 253-274. See esp. p. 264: ‘D’ailleurs la théorie selon laquelle l’élément psychique, l’“*opinio juris sive necessitatis*” est essentiel à la formation de la coutume, est fort contestable ....’; at 266: ‘Etant donné qu’une preuve objective de l’existence de l’élément psychique dit “*opinio juris sive necessitatis*” n’est pas possible, et que, par conséquent, l’existence de cet élément, de même que la qualité morale de la coutume, sa concordance avec la justice, dépend totalement de l’arbitraire de l’organe compétent à appliquer de règle considérée comme une norme du droit coutumier ....’.

<sup>27</sup> *The Pure Theory of Law* (2nd ed. 1960) Ch. 35.b.

such a view of customary law overlooks that practice alone is not a subjective attitude and practice alone cannot create law, a collection of facts has *descriptive*, not *prescriptive* value. A non-factual (subjective) law-belief is seen as necessary to make what 'is' into law. Without that *opinio* custom is a mere factuality, not a norm.<sup>28</sup>

This was a particularly strange error for Kelsen to make, because:

[the] breach of the duality of Is and Ought [is] a legal theoretical 'crime' [and, moreover,] it was Kelsen's work which made this violation a theoretical 'crime'.<sup>29</sup>

Moreover, as Kammerhofer again notes, such a theory would be unworkable. It would simply fail to reduce the complexity of international life in such a way as to discriminate between normatively relevant, and normatively irrelevant conduct:

The reason why the subjective element, formulated as *opinio iuris*, is considered necessary is first to determine between 'mere' usage and customary *norms*, and second to delimit between customary *law* and other normative orders.<sup>30</sup>

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<sup>28</sup> This important observation appears in an early draft of Kammerhofer's paper "Uncertainty in the Formal Sources of International Law" [on file with author] but did not survive the final editing of the paper. Kammerhofer assures me that this argument was culled for reasons of space only, and that he stands by its content.

<sup>29</sup> Kammerhofer J, *supra* note 16, at p. 546.

<sup>30</sup> *Ibid*, p. 535.

In short, an approach based solely on state practice must become merely descriptive of the actions carried out by states. In Koskenniemi's terms, this theory is resolutely apologetic in nature.

*Opinio Iuris Only (Cheng):*

A precise mirror image of Kelsen's single element theory was developed by Bin Cheng.<sup>31</sup> In an influential article, Cheng developed, and radically extended, the voluntarist thesis of CIL. That is, he started from the voluntarist assumption that all PIL derives from the consent of States and worked logically to the conclusion that such consent was, *alone*, constitutive of obligation in PIL, and therefore also, necessarily, in CIL. This eradicated the normative role of state practice; instead:

the role of usage in the establishment of rules of international customary law is purely evidentiary: it provides evidence on the one hand of the contents of the rule in question and on the other hand of the *opinio juris* of the States concerned.<sup>32</sup>

However, this is simply not a theory of *customary* international law, as Danilenko has pointed out:

It is important that according to Art. 38 *opinio iuris* must be based on practice.

The view that the expression of *opinio iuris* without accompanying usage or

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<sup>31</sup> Bin Cheng, "United Nations Resolutions on Outer Space: "Instant" international customary law?", 5 *Indian Journal of International Law* (1965) 23-48

<sup>32</sup> *Ibid*, p. 36.

practice can lead to the creation of custom disregards the specifics of custom as a source of law.<sup>33</sup>

Moreover, Cheng's theory gives very little guidance as to how to delimit the content of customary norms, nor even how to differentiate between norm creative and 'other' statements, unless his thesis is restricted purely to unanimous resolutions of the UNGA, in which case it is reduced to being a disguised plea for an international legislator. Outwith that institutional setting, only moral preference could perform this necessary discriminatory function.

#### Conclusion: The Impossibility of Single Element Theories:

Put simply, single element theories *cannot* sufficiently reduce the complexity of CIL. Kelsen's theory becomes purely descriptive, as not only does it fail to adequately reduce the complexity of international life, it also reduces law to Apology: the description of state actions. Cheng's theory suffers the opposite fate; absent practice it cannot really be considered a theory of *customary* law, but more importantly, neither can it be grounded, except in a Utopian vision which isolates statements on certain topics as normatively relevant and consequently as opposable to state will and action.

#### 2. Twin-Element Theories:

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<sup>33</sup> Gennady M. Danilenko, "The Theory of International Customary Law" 31 *German Yearbook of International Law* (1988) 9-47 at 31



As a result of the necessary failings of single element theories, the contemporary consensus privileges twin-element theories. However, between the varying twin-element theories there is no agreement on either:

1. The definition of *opinio* and state practice; *or*
2. The relationship between the two elements.

This creates a complicated topography of theories which must be articulated, elucidated, analysed, critiqued and, I shall suggest, ultimately rejected. As a result, isolating an ‘orthodox’ or ‘best’ two-element theory is not an easy task. In fact, even *if* we acknowledge the consensus and *assume* a two element theory of custom formation and even *if* we assume the two elements to be *opinio iuris* and State Practice,<sup>34</sup> we have still not reached any real agreement. More must be done: we must agree on the *relationship between* State Practice and *opinio*, and then we must agree on a *definition* of each concept.

#### The Classic Twin Element (Synthesis) Theories:

Classic two element theories understood state practice and *opinio iuris* as combining in synthesis to constitute new rules of PIL, understanding *opinio* as:

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<sup>34</sup> D’Amato, at least, has rejected this claim. See D’Amato A. *The Concept of Custom in International Law* pp. 73-86. Moreover, Mendelson appears to agree with D’Amato; see, Mendelson M “The Subjective Element in Customary International Law” BYBIL (1995), an article which Thirlway has characterised as “an eloquent plea for the abandonment of the concept of *opinio juris*”, see “The Sources of International Law” in Evans (Ed.) *International Law*, 117 at p. 143.

The psychological element in the formation of custom, the philosophers' stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules.<sup>35</sup>

However, although unanimous about its function, classic theorists did not agree on a definition of *opinio*. Instead two distinct propositions were put forward: *opinio* as belief that a practice conforms with (or is required by) law, and; *opinio* as consent to be bound by the proposed legal rule. However, it was agreed that the presence of *opinio iuris* transformed mere state conduct into normatively relevant state *practice*. In other words, the role of *opinio* was to reduce the complexity of international interaction into a manageable sequence of normatively relevant activities. In essence this is the same role as that performed by “rational reconstruction” in MacCormick’s ‘development’ of Hartian theory.<sup>36</sup>

It is vital that *opinio* be accorded this function. Law is a simplifying discourse, and consequently relies on having a tool to facilitate this process of simplification in a manageable and controlled manner. However, *neither* definition of *opinio* proposed by the classic understanding of CIL is actually capable of performing this function. The two classic candidates for the definition of *opinio* – belief in legality and consent to legality – are both flawed.

Consent theory seems to be the product of a simple error in logical reasoning. This is well explained by Mendelson.<sup>37</sup> In essence these theories take the orthodox belief that PIL is a consensual legal system to entail that each part of that system must also be

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<sup>35</sup> Thirlway H., *Customary Law and Codification* at p. 47.

<sup>36</sup> MacCormick N., “Reconstruction After Deconstruction: A Response to CLS” 1990 OJLS

consensual. So, if States (as a whole) can generate the sources of PIL by consent, then each source must *also* be subject to the consent of each state. This is simply not so; it betrays a genetic error in reasoning. States could agree that CIL should no longer be a source of law, but rather the Papal Bull should be recognised as law once more. *That* would be a consensual decision; the Papal Bull would become a source of PIL, but *it* (the content of each individual Papal Bull) would not therefore become subject to the consent of individual states. And no more need CIL.<sup>38</sup>

Consequently, the consent theory although falsely presented as a logical entailment of the consensual nature of PIL, is in fact adopted as an act of choice.<sup>39</sup> As a direct consequence, the desirability of the theory must be evaluated. The critical question becomes: is this a good theory of CIL? Consent is not a good theory of CIL, because it risks depriving the law of its normativity.

If *opinio* is reduced to the consent of individual states to be bound by the law, then that consent may (conceptually) be withdrawn with the same ease with which it was given.<sup>40</sup> Taken to extremes, this simply robs CIL of normativity. A state wishing to act contrary to the rules of the (momentary<sup>41</sup>) legal system, withdraws consent, acts (this cannot be a breach, as the rule no longer binds that State) and moves on. Consent theory privileges change over stability. In Koskeniemi's terms, consent theory is *necessarily apologetic*.

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<sup>37</sup> See *supra*, note 34, at pp. 189-90.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* pp. 189-94.

<sup>40</sup> *Ibid*, pp. 184-94.

<sup>41</sup> Raz J. *The Concept of a Legal System* pp. 34-5.

Alternatively, if *opinio* is defined as a belief in legality then change, normative evolution, the move from one momentary system to another, becomes impossible.<sup>42</sup> Thirlway captured this perfectly when he noted that defining *opinio* as belief:

Necessarily implies a vicious circle in the logical analysis of the creation of custom. As a usage appears and develops, States may come to consider the practice to be required by law before this is in fact the case; but if the practice cannot become law until States follow it in the *correct* belief that it is required by law, no practice can ever become law, because this is an impossible condition.<sup>43</sup>

Belief theory privileges stability over change. In Koskenniemi's terms, belief theory becomes *necessarily utopian*. More importantly, however, because neither theory can actually function, *and* neither theory can be acknowledged as not functioning, CIL can *only* evolve by privileging one claim over the other in an *ad hoc* situation specific decision.

The content of customary international law has always been vague and, all of us know, had really to be constructed every time it was "discovered" by the truth-declarers.<sup>44</sup>

That is *precisely* the oscillation between Apology and Utopia against which Koskenniemi's strictures are directed.

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<sup>42</sup> *Pace*, Kammerhofer, *supra* note 16, at p. 536.

<sup>43</sup> Thirlway, *supra* note 35, at p. 47.

<sup>44</sup> Rasulov A., "The Double Impossibility of International Law: Navigating the Practical Philosophy of the International Legal Project" [unpublished manuscript, on file with author] p. 23.

Thus, neither consent nor belief theories can adequately explain the psychological element of CIL, because neither is acceptable as a *definition of opinio iuris*. This necessitates either abandoning the idea of *opinio*, or the articulation of an alternative definition of *opinio*. Both strategies have been attempted, but neither has been wholly successful. It should be stressed that most theories of CIL have arisen as a result of the impossibility (and indeed implausibility) of the classic approach. Some have, however, arisen out of a more realist concern with the content, and ‘necessary’ pragmatism, or ‘realism’, of CIL. They have arisen from the legalist belief that law, because it is socially central and authoritative, must also be reasonable and pragmatic. Legal solutions ought, above all, to be correct. This is an impossible, and pathological demand. It involves the imposition of a singular definition of the “correct”, and must be opposed at the strictly normative level. As MacCormick has noted, the need for law is greatest precisely when moral agreement is absent.<sup>45</sup> These two ‘branches’ of modern theorising shall be analysed separately.

#### The Modern Twin-Element (Aggregationist) Theories:

The defining feature of modern theories is the abandonment of the *idea* of CIL as a synthetic product. Modern theories consequently posit, and build from, a total separation of state practice and *opinio iuris*. This is designed to evade the stasis, or metaphysical puzzles, of the classic theory; however it simply leads to another degeneration into the oscillation between apology and utopia. This is for one simple reason: once separated, state practice and *opinio iuris* each manifest one of the poles

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<sup>45</sup> MacCormick N., 'The Concept of Law and "The Concept of Law"', 14 *Oxford Journal of Legal Studies* (1994) 1 at p. 5.

of the apology/utopia dialectic. As a direct consequence, theories built on this separation must either *privilege* one pole over the other or *oscillate* between the two poles.

Article I. Custom in Mendelson and D'Amato:

Both Mendelson and D'Amato attempt to restructure and reinvigorate customary international law – to rescue it from its perceived ambiguities, inconsistencies, paradoxes and illogicalities – by downplaying the subjective element, *opinio iuris*. D'Amato is more consistent in his destruction of *opinio*, which he replaces with a concept he terms “articulation”.<sup>46</sup> Mendelson on the other hand perceives *opinio iuris* (still conceived as a truly subjective element, a state of mind, or a consent to a given rule) as a sufficient, but not a necessary, criterion of customary international law.

The individual State's consent is not a *necessary* condition [to bring a rule into being], though it may be a *sufficient* one.<sup>47</sup>

This reversal of the usual ordering of sufficiency and necessity is probably the most novel and profound aspect of Mendelson's treatment of customary law.<sup>48</sup>

Both writers accept and advocate a bifurcation between general and specific custom, and both seem to agree that the psychological element is more important in the latter.

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<sup>46</sup> See D'Amato A., *The Concept of Custom in International Law*; available at: <http://anthonydamato.law.northwestern.edu/Books-2.htm#conceptofcustom>

Chapter 4, p. 1. [note, in citations from D'Amato, the page numbers refer to those given in the .pdf file cited above; and not to the original text of the book]

<sup>47</sup> 1998 Mendelson M., 'The Formation of Customary International Law', 272 *Recueil de Cours* (1999) 155, at p. 249

In the former, general customary law, the psychological element is neither a necessary nor a useful tool<sup>49</sup>, while in the latter it does retain utility and so importance.

D'Amato's most fundamental insight is that States do not have minds, and thus *opinio* conceived as a truly subjective element would be a logical impossibility.<sup>50</sup> From this he postulates the necessity of replacing *opinio* with articulation. This has the effect of splitting customary international law into "physicalist state practice" and "normative *opinio iuris*".<sup>51</sup> A customary rule is still to be formed by the coincidence of the two elements, but the very nature of the elements themselves has altered.

Articulation is the oral or written statement of a rule; practice is action in conformity with that rule. Both are required to constitute customary law, but they need neither (temporally or spatially) coincide (nor need they even be attributable to the same state, let alone individual actor<sup>52</sup>) nor recur. A single articulation can be solidified by a single conforming action into a rule of general customary international law. *but*, this can only happen if the area in question is currently legally unregulated.

This raises the first problem with D'Amato's concept of custom. According to many legal theories, legal non-regulation is a conceptual (logical) impossibility. Closure is,

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<sup>48</sup> Or, as Mendelson himself puts it "I appreciate that this is a somewhat unusual way of using the distinction", *ibid* footnote 249.

<sup>49</sup> Both authors are very proud of the logical consistency and efficiency of their theories, and Mendelson in particular is vocal in his philosophical support of Occam's razor. As Mendelson states "The only tools we can use here are an understanding of the practice of international decision-makers, common sense, and, perhaps, Occam's razor – "entities [in this case legal concepts and fictions] are not to be multiplied unnecessarily"" (*supra* note 46, at p. 250).

<sup>50</sup> Thirlway also draws attention to this fact, but notes that this is no reason not to adopt a subjective approach as a useful shorthand; *supra*, note 2, p. 49.

<sup>51</sup> Roberts, *supra* note 21, p. 757.

<sup>52</sup> However, the actor must have actual or constructive notice of the articulation before they can be said to act in compliance with it; *supra* note 46, p. 2

in Raz's terms "an analytic truth"<sup>53</sup>. Thus D'Amato's concept has utility only at the foundation of a legal order. This is not an insurmountable problem, as D'Amato's notion of legally unregulated really seems to mean that a given act is neither legally compulsory nor legally prohibited. Thus customary rules can form in any area which is legally subject only to what Raz terms "conclusive privileges".<sup>54</sup> In D'Amato's own terms:

A single writer or a single state may effectively articulate a new rule of international law in an area that ... is not established as clearly based on comity.<sup>55</sup>

The *repetition* of an act constituting the quantitative element of custom serves to enhance the rule significantly. Two acts are significantly more persuasive than one; since in the third situation [dissent] there would be no effective way of cancelling the rule by acting differently.<sup>56</sup>

Moreover, D'Amato prides his theory in its accommodation of legal change, but does not really explain how this happens. The unfolding of the theory outside of the realm of permitted behaviour or legal novelties is not given extended exposition in D'Amato's text.

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<sup>53</sup> Raz J., *The Authority of Law* p. 77

<sup>54</sup> *Ibid* p. 67. A "conclusive privilege" arises from an absence of prohibition, and manifests the closing rule, that all which is not prohibited is, *therefore*, permitted. It is "conclusive" in the sense that it is the conclusion of an analysis which reveals no extant prohibition. This is contrasted to an "express privilege" which is an explicit legal permission to act; though one which falls short of forming a (claim) right.

<sup>55</sup> *Ibid*. The clear establishment of an area as one of comity seems to be analogous to the Razian idea of an "express privilege".

<sup>56</sup> *Ibid* p. 10.



D'Amato does note “the possibility, and actuality, of *change* in customary law”<sup>57</sup> and asserts that traditional theories of custom are unable to account for this, as they appear to “lay down a rule that the *first* case or first few similar cases generates a customary rule, and that later cases would simply be violations of the customary rule and should be given no effect”. This would lock PIL in stasis, which in D'Amato's view is “logically absurd”. D'Amato believes that his theory can accommodate change, “by giving legal effect to departures from preceding customary norms”.<sup>58</sup> This is an important issue, but D'Amato in practice offers little to aid in its resolution.

For D'Amato, repetition of actions increases their normative weight, “two acts are significantly more persuasive than one”, but “a single contrary case can cancel a previous one”.<sup>59</sup> Therefore a single articulation followed by a single action could not displace a rule founded on two articulations and two actions, but the latter could be superseded by a rule based on a single articulation and many acts. Yet elsewhere he castigated as metaphysical enquiries<sup>60</sup> earlier attempts to calculate the number of repetitions necessary to make an act general or widespread. This seems to undercut his reliance on numerical equivalence. Moreover, as Thirlway notes, linguistically custom implies ideas of repetition and generality, and thus whatever the other merits of D'Amato's position it cannot be considered as a concept of *customary* law.<sup>61</sup>

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<sup>57</sup> *Ibid.* (emphasis in original)

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* p. 9.

<sup>61</sup> In ch. 5, *infra*, I shall also attempt to demonstrate a *conceptual* and not just semantic link between CIL and repetition of practice.

Nonetheless, D'Amato does note that "[e]ven a rule of custom based on two or more situations can be changed".<sup>62</sup> This possibility is attributed to the fact that "resort to the World Court or to any other international tribunal is ... a highly a-typical event"<sup>63</sup> and so disputes are normally resolved by reference to states' "view[s] of international law" and these will be influenced by non-legal factors. D'Amato seems to argue that the ICJ would treat a single articulation and action as constitutive of a custom – though this seems to contradict, *inter alia*, the orthodox reading of the *North Sea Continental Shelf Cases* – and would preclude a state from offering its own counter practice (i.e. that practice now being adjudicated) to negate this rule.<sup>64</sup> However, according to D'Amato this is not so problematic for his own theory as it is for (his interpretation of) orthodox theory. This is because the vicious circle adverted to by Thirlway – that *opinio* precludes legal change as the actor must know it is breaching the law and so cannot possess the *opinio* requisite for legal change<sup>65</sup> – is circumvented by D'Amato's substitution of articulation for *opinio*.<sup>66</sup>

Outside of the judicial environment (which D'Amato in US-style seems to postulate as the paradigm of legality – "what actual courts will in actual fact decide") the refusal by the 'breaching' state to make amends *would* have normative effect. It would negate a nascent (single articulation and event) rule and weaken or undermine

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<sup>62</sup> D'Amato, *supra* note 51, chapter 4, p. 11

<sup>63</sup> *Ibid*, p. 10.

<sup>64</sup> *Ibid*, p. 10. D'Amato does not appear to consider the possibility that the respondent state would simply argue that no prohibitive rule existed, and that the Court, following *NSCS* would probably agree. This would leave the area as one of conclusive legal permission, rather than a *lacunae*, or *non liquet* as such. In effect, this would be equivalent to arguing that an actively permissive rule governed the area of conduct in question.

<sup>65</sup> Thirlway, *supra* note 35, at p. 46.

<sup>66</sup> It should, however, be noted that the abandonment of *opinio* was unnecessary to achieve this result. D'Amato is forced to abandon *opinio* because of the a-systemic nature of his interpretative techniques. Interpretation can evolve within the system as claims of the form "x is a *better* understanding of rule y because it takes account of principles or other rules, or because it takes account of other developments in the systemic context" are perfectly valid forms of legal argument. In other words, rules themselves

an established one. This effect would be increased if the 'victim' state accepted this refusal, or failed to protest adequately. The next state would then be in a position to negate or alter the rule:

E would argue that its own refusal to pay would constitute the second disconfirmatory instance which would then serve to negate the two affirmative precedents<sup>67</sup>

This does not, unfortunately, explain the exact status or necessity of numerical equivalence of examples and counter-examples in the function of altering rules.

D'Amato is unclear in the extreme:

The number of disconfirmatory acts required to replace the original rule is a function partly of the number of acts that established the original rules in the first place, the remoteness in time of the establishing acts, the legal authoritativeness of the participating states,<sup>68</sup> and other factors.<sup>69</sup>

The important point for D'Amato is that "an 'illegal' act by a state contains the seeds of a new legality" and that his theory "allows for the smooth working of change in customary international law".<sup>70</sup> This does not actually seem to be true at all; although D'Amato explains why change *can* happen (because it does), it is still unclear in the

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can evolve, and so the system need not only evolve by extinguishing and replacing existing rules, but rather can modify the demands of the (same) continuously existing rules over time.

<sup>67</sup> D'Amato, *supra* note 51, ch. 4 p. 11.

<sup>68</sup> D'Amato has a sub-theory that more "sophisticated" states have (and should have) a greater impact on the normative process (*ibid* p. 11). This seems to be an acknowledgement of reality which is being theoretically grounded, and yet it radically underplays the effects of realpolitik; quite simply the actions of the powerful are far less likely to be protested, and probably more likely to be emulated.

<sup>69</sup> *Ibid* p. 12.

<sup>70</sup> *Ibid*.

extreme *how* change is to be identified as having occurred in his model. Though one must assume that “articulation” plays a role, the precise nature of this role remains unclear.

D’Amato seems to assume that the state seeking (or inadvertently prompting) change will articulate a rule. That is the state will seek to justify its actions through universalisation, or perhaps will (explicitly or implicitly) rely on a previously articulated rule which contradicts the current legal position. However, this assumption is neither declared, nor necessarily well founded. More importantly, D’Amato does not appear to perceive the necessary tension between change and stability. If law is to be more than a descriptive discourse it must privilege stability even while allowing for change. What is required is a means of differentiation within *prima facie* transgressive behaviour: separating (merely) *deviant* conduct from conduct leading to (or crystallising) normative evolution.

D’Amato seems to miss this point primarily because his understanding of action, and its variable interpretations, is overly simplistic. He states that while there may be many articulations of varied rules, practice determines *which* will become law, and so concretises the articulation into a rule (of law). This is because actions are susceptible of only one interpretation. As D’Amato puts it:

Many contradictory rules may be articulated, but a state can only act in one way at one time. The act is concrete and usually unambiguous ... The state’s act is visible, real, and significant; it crystallises policy and demonstrates

which of the many possible rules of law the acting state has decided to manifest.<sup>71</sup>

This latter claim, due to its inaccuracy,<sup>72</sup> undermines his conceptual architectonic.

Mendelson also focuses almost exclusively on state practice. However, he does concede to *opinio* a role in discriminating between relevant and irrelevant actions, but he does not expand on this role:

I suggest that it is useful to think of the subjective element as a means of distinguishing not so much (or only) one class of rules from another, but those instances of State practice which *count* towards the formation of law from those which do not.<sup>73</sup>

Thus, for Mendelson *opinio* is not (merely) relevant to the distinction between social and legal rules (the role ultimately accorded to it by Kelsen<sup>74</sup>), but actually plays its most important role in facilitating a distinction between the evolution and stability of norms within the legal order; *opinio* differentiates between normatively relevant and normatively irrelevant acts of state(s).

Mendelson excludes *opinio* from general customary law, not because it is conceptually incoherent but, because it is unnecessary, and therefore falls under Occam's razor:

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<sup>71</sup> D'Amato, *supra* note 51, ch. 4 p. 7.

<sup>72</sup> See notes 75-6 and accompanying text, *infra*.

<sup>73</sup> *Supra*, note 46, at p. 272.

<sup>74</sup> See note 27, *supra*.

Although recourse to the subjective element helps us understand why, in particular circumstances, a constant and uniform practice does *not* give rise to a customary rule, these are somewhat exceptional cases and, in the run-of-the-mill case, the subjective element is of limited value.<sup>75</sup>

This is the wrong way to assess the problem, if for no other reason than it creates an unnecessary and unwieldy distinction between ordinary and special cases. If *opinio* does no harm then it need not be eliminated from our understanding of ordinary cases, and so this distinction can be avoided. Moreover, Mendelson confuses limited visibility with limited value, and yet the most important parts of many machines are precisely those we rarely view.

Mendelson's theory could be easily rescued if he realised that his focus on practice is not so much the *dismissal* of *opinio iuris* as the *presumption* of *opinio iuris*. Acts are *presumed* to have normative force, but this may be rebutted by displaying an absence of *opinio iuris*, which Mendelson terms *opinio non iuris*. Mendelson's logical mistake is to misunderstand Occam's razor. He has not eliminated the concept of *opinio iuris* but has merely restricted its role, but he has on the other hand invented the concept of *opinio non iuris*. Now three concepts are at work in customary law, *opinio iuris*, state practice, and *opinio non iuris*. This is one more than is necessary; the operation of CIL can be explained solely by reference to the first two concepts, and therefore the latter concept falls under Occam's razor.

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<sup>75</sup> *Supra*, note 46, at p. 246.

Theoretical approaches to law can be roughly divided into micro- and macro-theories. That is, theories about specific areas of law and theories about law or legal systems as such. Mendelson's mistake is to incorporate a theorem of macro-theory (Occam's razor) into his own micro-theory on customary international law in run-of-the-mill cases. This error causes him to confuse concepts "in play" with concepts "in existence". Concepts in play in the analysis of any part of the system (described and unified by macro-theory) are extant concepts, even when they are not at play in (descriptions of) other parts of the system, and Occam's Razor deals with extant concepts, and not only concepts in play. Thus even if Mendelson is correct in his observation that customary law can (generally) be explained without reference to *opinio iuris*, *opinio* continues to exist for those parts of the system where it does come into play. It never ceases to exist, and cannot fall under Occam's razor sometimes, but not others. Things either exist or they do not.

This takes us back to Mendelson's more important point, albeit one made in passing and more as a concession than a contribution, that *opinio* plays a role in data discrimination. Not all state actions are of equal normative importance – nor indeed is each susceptible of a single uniquely correct interpretation. This can be well illustrated by a simple example from the law of war (International Humanitarian Law or IHL). There is a general prohibition in IHL on weapons which are indiscriminate, or which cause unnecessary suffering or superfluous injury. Use of such a weapon could be understood in any of three ways (at least): as a simple breach of IHL; as a statement that the specific weapon does not *actually* breach IHL (*or* that the specific weapon should be entitled to a specific exemption<sup>76</sup>); *or* that the rule prohibiting

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<sup>76</sup> Given the structure of IHL, and the definitions given to indiscriminate, unnecessary, and superfluous, these two interpretations are really different ways of saying the same thing.

indiscriminacy etc. should itself be revoked.<sup>77</sup> Three interpretations, but only one single action, and prior articulation of rules helps us not at all. Neither for that matter does *opinio non iuris*, except perhaps in regard to interpretation 2. These interpretations can only be separated by seeking or implying (distilling) some sort of subjective element accompanying the acts.

Mendelson is more interested in the definition and utility –rather than the outright rejection – of *opinio iuris*. He points out weaknesses in both the belief and consent definitions (understandings) of *opinio*, and seems to feel that this suffices in undermining the role of *opinio* itself.<sup>78</sup> He does not consider an understanding of *opinio* as merely normative intent. In reality, his own common law training and epistemology seem to lie at the basis of this theory. Here, again, we can observe the impact of ‘theory’ on the identification and interpretation of the data putatively ‘forming’ (being the content of) the practice (law). Mendelson attempts to relocate customary law in the conceptual matrices of English common law thinking, and most especially (explicitly) in “legitimate expectations”<sup>79</sup> and (implicitly) in the doctrine of estoppel.

This allows for the sufficiency but non-necessity of *opinio* to hold a state bound by a customary rule. In effect *opinio* for Mendelson formalises an informal rule. That is, once state A accepts a rule, it creates a legitimate expectation on which state B may rely, and this expectation is normatively relevant, in fact binding, even if the rule has not completed the necessary formalities to become part of the general customary

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<sup>77</sup> This example is deployed, in a slightly different context, and for a different end in the *Nuclear Weapons Advisory Opinion* 1996.

<sup>78</sup> *Supra*, note 46, at p. 253. Mendelson implies that, “having discovered deficiencies in both schools”, he has exhausted the field.



international law. Thus *opinio* (now become acceptance or consent) is sufficient but not necessary. Had the rule been properly formalised, it would bind regardless of *opinio*. This is exactly the process by which estoppel formalises a flawed contract in English Common law.

However, this limited understanding of the role of *opinio iuris* undermines Mendelson's analysis of the general part of customary international law, and in particular the stability of customary law even in the face of inconsistent conduct by states. This is perhaps best illustrated by consideration of the possibility of a customary rule facilitating torture. Torture undoubtedly goes on throughout the world, in fact it is probable that more states resort to torture than do not. In both Mendelson and D'Amato's theories this amounts to a significant accumulation of state practice, and should therefore tend toward normative change, namely the evolution of the prohibition on torture into a qualified permission to torture. This can only be avoided by discounting the state practice in question.

Mendelson can discount this practice only by reference to *opinio iuris*, or to his own concept of *opinio non iuris*, the admission of illegality in effect. However, he can only rely on this distinction if he first demonstrates that this is an exceptional, rather than a run-of-the-mill case. This brings a dilemma to light, what is to count as exceptional? Torture is an endemic feature of international life; the action itself therefore cannot be considered exceptional. This drives Mendelson's theory into the position that it is the *nature* of torture (as an especially heinous activity) that renders this an exceptional area. But, the crux and purpose of Mendelson's theory was to remain within the

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<sup>79</sup> *Ibid* p. 249.

positivist tradition, and this in itself would appear to exclude such morality based reasoning. Rescuing his theory here would therefore entail transforming it into its opposite, a natural law based explanation of international law.

If the issue is put in Koskeniemi's terms, the pathology of Mendelson's theory is most clearly visible: Mendelson's generally Apologetic (i.e. descriptive) theory (which is empiricist, rather than positivist, in nature) has an unstable Utopian movement. This movement becomes *active* when the user wishes to maintain a rule of CIL in the face of challenge, or even endemic breach. There is no reason to assume that the Utopian movement cannot come into play to facilitate the creation of a rule not otherwise mandated by Mendelson's theory. The theory *necessarily* oscillates between apology and utopia.

Here D'Amato may be in a slightly stronger position, but probably by accident or luck rather than design. State practice only counts in D'Amato's theory if it follows an articulation of a rule. So for acts of torture to count as (normatively relevant) state practice, there must have been (at least one) public articulation of the right to torture, of which torturing states have actual or constructive knowledge. This leaves D'Amato in an almost positivistic position of having to trust an unbounded humanity not to publicly articulate such a claim as a general norm. It also leaves him in the uncomfortable position that if some major journal *were* to publish the articulation of such a claim, even once, we would be well on the way to establishing just such a permissive rule. Unless, of course, in a Utopian moment, articulations (or values) more conducive to liberal morality were privileged.

This Utopian moment comes into relief when we consider D'Amato's analyses of US armed interventions abroad. Generally, according to D'Amato these are "justified responses to tyranny";<sup>80</sup> at this moment, values swamp the system, and D'Amato slips from apology to utopia. Liberal or democratic (i.e. pseudo-Kantian) theory functions as the utopia (the manipulable political theory) to be imposed at will. Alternatively, D'Amato's work remains apologetic insofar as his theory merely *describes* US armed adventures abroad.

There is thus, from the perspective of Koskenniemi's critique, an inexorable pathology about aggregationist theories of custom; they are a crisis in disguise, always requiring the sovereign act of choice to substantiate them. In every given application of the law, a concrete decision (which will determine the outcome of the case) must be made *at the point of law application*. Which should prevail, practice or *opinio*? Which moral theory should apply? What does that theory demand *in concreto*? Complexity has not been reduced in a structured and consistent manner, therefore none of this can be determined in advance. In effect, the rules must be *created* at the point of application – the sovereign decision (the creation of law) is displaced to the judicial act, *and* removed from its institutional constraints.<sup>81</sup>

Truly traditional natural law theories do avoid this criticism; for them God, Human Nature, or Reason play the role of sovereign, and thus (at least in theory) lend determinate character to law. Modern theories can be insulated from the descriptive and oscillatory charges in Koskenniemi's critique in the very same way; by imposing upon them a fixed, determinate (though not necessarily timeless) moral order.

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<sup>80</sup> See e.g. "The Invasion of Panama was a Lawful Response to Tyranny", 84 AJIL (1990) 516.

<sup>81</sup> See Rasulov, *supra* note 44 at p. 23.

However, both sets of theories then become Utopian, and therefore are open to attack at the normative levels of presuppositions (that such a universal, objective, and determinate ethics exists) and purposes (that the World should be homogenised into a Pax-Americana, or Holy Roman Empire, or ‘democratic’ free-market economy).<sup>82</sup>

This brings to the surface a very interesting tension in D’Amato’s text, between the neo-Fullerian naturalism of his general (legal) theoretical commitments (the internal morality mandating the moral legitimacy of law as such), and the non-evaluative nature of articulation and practice as the source of legal rules. This implicit tension surfaces as outright ambiguity when D’Amato’s empirical architectonic is redeployed in a Rawlsian theoretical schema by Roberts.<sup>83</sup>

#### Classic and Modern Theories, and the Impossibility of a Reconciliation:

The central distinction between modern and traditional theories of custom lies in the relationship they posit as existing between (and thus defining) State Practice and *opinio iuris*. Modern theories are aggregationist in the sense that they perceive the two elements as radically separate, and as combining in aggregate (where one element may be given preferential treatment, or each may receive identical weighting) at a certain (generally unannounced) threshold level to create CIL. Classic theories do not see the elements as separable at all; it is the existence of *opinio* which transforms

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<sup>82</sup> It should also be noted that the theories would actually remain open to Koskenniemi’s primary analytic claim of necessary indeterminacy; because the formulation of objective morality (in whatever guise) must, in order to gain consensus, be constructed at such a high level of abstraction, that its potential concretisation into specific demands is open to multiple interpretations and the legitimation of conflicting norms.

<sup>83</sup> Roberts, *supra*, note 21. Tasioulas avoids this outcome by ignoring the tension, and reading D’Amato’s concept of *opinio iuris* (articulation) in a wholly moralised manner; see, *supra*, note 25, p. 85.

*mere action* into State Practice.<sup>84</sup> However, classic theories do not agree upon, nor consistently – let alone persuasively – articulate the nature of *opinio*, nor its effects on State Practice.

One understandable, though pathological, response is to attempt to engineer a reconciliation. This has been attempted by Roberts. Adopting the simplified dialectics which Rawls christened “reflexive equilibrium”, Roberts (who had already explicitly adopted aggregationist presumptions)<sup>85</sup> set out to reconcile the impact of the always already separated State Practice and *opinio* – to move between, and gradually reduce the distance separating Apology and Utopia, and to temper each with the demands of the other. This may help to reconcile the theories of D’Amato and Kirgis, maybe even Tasioulas<sup>86</sup> too. It does not reconcile traditional and modern: it does, however, prove Koskenniemi’s secondary (Schmittian) claim that PIL will degenerate into manipulable oscillation, simply in order to avoid the unpalatable choice of choice itself.

Article II.     Robert's Reconciliation: Thoughts on a Misunderstanding Illustrating the Impossibility of Reconciliation:

Roberts has proposed the deployment of a Rawlsian “reflective equilibrium” as the only effective technique of reconciliation between the “old” and “new” strands of theory regarding customary international law.<sup>87</sup> This version of rational liberalism is portrayed as more apt than that put forward by Dworkin for transposition into the

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<sup>84</sup> See, e.g., Thirlway, *supra* note 35.

<sup>85</sup> See *supra*, note 21, p. 757.

<sup>86</sup> On Tasioulas’ arguments, see notes 94-113, and accompanying text, *infra*.

<sup>87</sup> Roberts, *supra*, note 21.

international arena. Unfortunately, far from reconciling the two epochal theories of customary international law, Roberts has simply misunderstood both the classic theory and (because of this) the nature of the disagreement.

The debate central to Roberts' thesis is that between Weil<sup>88</sup> and Tasioulas,<sup>89</sup> however her misunderstanding of Weil's position is manifest from the moment that she states that the analysis and proposed reconciliation will take place within an understanding of CIL as comprising "physicalist" state practice and "normative" *opinio iuris*.<sup>90</sup> Thus the key question for Roberts is whether *opinio iuris* or state practice should predominate in the formation of customary law.<sup>91</sup> All state actions are deemed state practice and the font of *opinio iuris* is sought outside observable activity. At this point, from the traditional perspective, the debate is already lost.

Classic theories of custom do not *and cannot* accept this separation. For a liberal positivist like Weil it is anathema. Following the exposition in the *North Sea Continental Shelf Cases*, state practice and *opinio iuris* are mutually constitutive. They are not discreet entities to be weighed one against the other, nor cumulative; neither can exist without the other. The key question, the key difference between the traditional and modern perspectives, is not "what role does *opinio iuris* play?" but "what is *opinio iuris* and where does come from?" This is mirrored in the question of

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<sup>88</sup> Weil P. "Towards Relative Normativity?" 77 AJIL (1983) p. 413.

<sup>89</sup> *Supra*, note 25,

<sup>90</sup> This is also the position expressly adopted by Tasioulas, see *supra* note 25, at p. 86. However, it is acknowledged by him to be quite distinct from Weil's classic liberal positivism; see *ibid* p. 96. Moreover, it should also be emphasised that while Tasioulas does appear to interpret all state activities as state practice in the normatively significant sense, he explicitly *rejects* the idea that all statements, or even all UNGA resolutions, are automatically examples of *opinio iuris*. This status is reserved only to those displaying sufficient congruence to Tasioulas' unenumerated list of World Order Values. See Tasioulas *supra* note 25, at p. 101.

<sup>91</sup> Compare, e.g. Kirgis F "Custom on a Sliding Scale" AJIL 146, and D'Amato A. "Trashing Customary Law" AJIL 101.

what constitutes state practice. The central argument between traditional and modern understandings of CIL is not primarily what *opinio* does, but what constitutes *opinio*, and *mutatis mutandis* state practice, in the first place. Reference to Rawls' equilibrium seems to be an attempt to bridge or suppress this gap. Roberts' 'reconciliation' fails at a methodological, or pre-theoretical, level, because it adopts D'Amato's "physicalist" understanding of state practice, rather than – indeed *in preference to* – the classic, symbiotic, and evaluative understanding of state practice and *opinio iuris* as mutually constitutive.

The classic position's absolute commitment to factuality is its central dogma, and this commitment is misunderstood and so mis-portrayed in Roberts' attempted reconciliation. In the classic understanding, state practice and *opinio iuris* cannot be separated, as any separation has to postulate the creation and recognition of *opinio iuris* solely by reference to correspondence with arbitrarily chosen external standards. It does not matter what role these external standards are given; simply granting them a role in the creation or validation of law is in itself incoherent with the understandings of classical legal positivism.

Adopting the "physicalist understanding", as Roberts (at least initially) explicitly does, presupposes the answers to these questions, and so relocates – or rather comprehensively misunderstands – the nature of the disagreement. It is only when the argument is thus mis-represented that the stage can be set for the triumphant Rawlsian reconciliation. As all (physical) State activity is now deemed "state practice" the only relevant questions are the source and effect of *opinio iuris*. Paradoxically, this understanding *both* expands *and* contracts the class of action to be understood as state

practice (in the normative sense). On the one hand, classic examples of state practice, e.g. protest, are now excluded; on the other, state activities in clear breach of PIL are now to be awarded the normative significance of practice.<sup>92</sup>

This is all at odds with the classic position. Roberts' attempt at reconciliation opens by conceding the debate to the progressive forces of the new order (the relative normativists), albeit with the pronounced caveat that the "normativity threshold" is reintroduced, though in a manifestation unrecognisable to the classic understanding. Thus the key question, which underlies the debate, how to separate actions in breach of the law from those pertaining to its evolution, is misrepresented in Roberts' (re)construction and replaced with that of which extra-systemic sources should determine the moral validity of the distinction. For classic PIL, as a liberal positivist theory, there is no outside, no extra-systemic value, against which the validity of system decisions can or should be measured.<sup>93</sup>

In fairness, Roberts appears to notice this implicitly, and an undeclared ambiguity in her notions of *both* state practice and *opinio iuris*, slips into the later (explicitly Rawlsian) sections of her paper. For example, "state practice must be accompanied by some articulation of legality so as to distinguish between legal and social obligations",<sup>94</sup> "inconsistent state practice can be interpreted as a breach of an existing

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<sup>92</sup> This seems to be a feature of modern approaches to custom, and also seems to contradict the ICJ case from which they draw their central support, the *Nicaragua* case. In para. 184, the Court very clearly drew a line between state practice (proper), and the things states just happen to do.

<sup>93</sup> At least none which the system should recognise, nor which should have direct ingress to system decision-making. Of course, as Weil (*supra*, note 90) (and Kelsen before him; see *Pure Theory of Law*, pp. 66-7) notes the system can and should be evaluated and critiqued by external standards, but only at the political level, and only to tend toward such political change as is recognised by, and therefore influences, the legal system. Critique is a reason to *initiate* the process of norm creation; but it is not part of that process, and nor should it become that process.

<sup>94</sup> Roberts, *supra* note 21, p. 776.



custom or a seed for a new custom”;<sup>95</sup> which would tend to suggest a symbiosis of state practice and *opinio iuris*. She, however, also suggests, “State practice is ambiguous because some states torture their citizens with minimal protest by other states, while others do not engage in torture. Further, most states have accepted declarations against torture (*opinio juris*)”,<sup>96</sup> which adverts to the return of a separation between the two. This is rapidly followed by the utterly ambiguous claim that “practice can only form a custom if there are statements that [it] is a legal obligation, not just a social practice (*opinio iuris*).<sup>97</sup> The two are then categorically divorced: “Statements of *opinio juris* ... are mainly relevant to the dimension of substance because they represent what the practice should be, not necessarily what it has been”.<sup>98</sup> Then reunited in synthesis: “a state’s resort to factual or legal exceptions to justify a prima facie breach of a rule has the effect of confirming the general rule, rather than undermining it or creating an exception to it”.<sup>99</sup> This fusion of *opinio iuris* and state practice is drawn from the ICJ’s judgement in the *Nicaragua* case, and seems to meet the classic criteria of symbiosis, a point which Roberts apparently confirms.<sup>100</sup>

In short, Roberts simply fails to reconcile the two epochal theories of CIL, moreover, she does not even fail consistently. Having initially adopted ‘modern’ aggregationist premises, she then moves toward a classic understanding of CIL as a synthesis, but also fails to adopt this approach consistently. Ultimately, unable to blend the two theories, she fails (or refuses) to privilege one over the other, and instead oscillates

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid* p. 781.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* p. 782.

<sup>99</sup> *Ibid* p. 783.

<sup>100</sup> *Ibid* p. 785.

between the two. The attempt at reconciliation was doomed to failure from the start; given their presuppositions, the two sets of theories are irreconcilable. One approach had to be privileged over the other, but recourse to a Rawlsian reflexive equilibrium simply could not provide the resources for this act of choice. Absent such a choice, Roberts inevitably remained trapped within the oscillation between apology and utopia. Only by adopting an avowedly utopian model could this have been avoided while aggregationist assumptions were maintained.

#### Tasioulas' "Dialectical Route" To Reconciliation:

Tasioulas develops precisely such a moralised, such an openly utopian, model. Although it is, briefly, worth considering the extent to which Tasioulas does in fact attempt to synthesise classic and modern approaches, it is ultimately more important to understand that the model he in fact offers is utopian in nature. Moreover, that model does not work, and so it is also important to elucidate how the failings of Dworkin's social practice methodology manifest themselves in the international environment.

Despite Tasioulas' claims to "sketch a dialectical route" between traditional and value centric approaches to customary law,<sup>101</sup> he is not interested in reconciliation or synthesis, but in proof of the anti-thesis, a neo-Dworkinite natural law as a reliable foundation for relative normativity.<sup>102</sup> Such an approach involves endorsing a radical separation of state practice and *opinio*, and an understanding of CIL as an aggregate of the two. The question is how to formulate or define that aggregate.

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<sup>101</sup> See Tasioulas, *supra* note 25, at p. 85.

<sup>102</sup> *Ibid.* p. 96.

Tasioulas adopts and expands Frederic Kirgis' rationalisation of the *Nicaragua* case<sup>103</sup> suggesting, in its defence, that it cannot be considered an “*ad hoc* and arbitrary manipulation of the traditional understanding of custom”<sup>104</sup> but should rather be seen to have “a deeper rationale in Dworkin's re-statement of natural law theory”.<sup>105</sup>

Thus Dworkin's interpretative concept of law is deployed to provide parameters within which the World Order Values (WOVs) necessary to the relativist approach can be contained. In this way, it is intended, indeterminacy would be reduced, and radical indeterminacy, a “spectre ... conjured up by positivists like Weil”, would be “exorcised”.<sup>106</sup> The obvious implication is that Dworkin provides a theory which can mediate between radical indeterminacy and value imposition.

Dworkin's theory is predicated on ‘constructive interpretation’, a “matter of imposing purpose on an object or practice”. For analytical purposes, this is accomplished in three distinct stages. First, the ‘raw data’ to be interpreted is identified. Second, that data is interpreted to discern the rule to which it gives rise. Finally, at the post-interpretative stage, the interpreter “adjusts his sense” of what the data really requires, so as to better suit the rule he has distilled from it.<sup>107</sup>

This interpretative process takes place within a matrix created by the “relationship between the dimensions of fit and substance which condition the acceptability of an interpretation”. Fit is the extent to which the rule discerned coheres, or ‘fits’, with the

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<sup>103</sup> Kirgis F., “Custom on a Sliding Scale” 81 AJIL (1987) p. 146.

<sup>104</sup> As suggested by Alston and Simma, see Tasioulas *supra* note 25, at p. 110.

<sup>105</sup> *Ibid*, pp. 110-1.

<sup>106</sup> *Ibid*, p. 115.

data from which it is drawn. Substance is, essentially, the desirability of the rule.<sup>108</sup> In customary international law, the raw data to be examined, and with which a proposed rule must ‘fit’, would be state practice and *opinio juris* while the ‘substance’ of the putative rule would be measured in terms of its appeal to WOVs.

However, the two dimensions of fit and substance are not “discrete hurdles that competing interpretations must negotiate”,<sup>109</sup> nor are they ‘fixed’ by reference to any set external standard.<sup>110</sup> Rather, “they must be balanced against each other in order to ascertain the best interpretation”.<sup>111</sup> This happens in several ways: fit influences substance, as any interpretation which best fits is *prima facie* to be preferred; substance affects fit, allowing deficiencies to be compensated by reference to the desirability of the proposed rule from a WOV perspective. Moreover, and more radically, however:

The ‘minimum level’ of fit is not an ‘external’, invariant standard  
unconditioned by substantive considerations.<sup>112</sup>

The constraint imposed by fit rather relies for its efficacy on the good faith of the interpreter. Only by refusal to subordinate fit entirely to substance can the decision maker be seen to interpret, rather than invent, the law. There is no hierarchy between fit and substance, and therefore neither can overrule or eliminate the other:

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<sup>107</sup> *Ibid*, p. 111.

<sup>108</sup> *Ibid*, p. 112.

<sup>109</sup> *Ibid*, p. 113.

<sup>110</sup> *Ibid*, This is certainly true of fit, but is substance not decided in reference to fixed, albeit indeterminate, WOVs?

Thus, the determinacy of interpretation is emergent upon the tension among, and the process of mutual adjustment between, the different convictions of fit and substance the interpreter accepts: ‘Whether any interpreter’s convictions actually check one another, as they must if he is genuinely interpreting at all, depends on the complexity and the structure of his pertinent opinions as a whole’.<sup>113</sup>

Drawing on Kirgis’ suggestion that state practice and *opinio juris* could be separated;<sup>114</sup> that an abundance of either could be used to compensate a deficiency of the other; and that the aggregate needed to ‘create’ a norm could be varied by reference to WOVs,<sup>115</sup> Tasioulas defends the sliding scale:

as a sketch of that part of a working theory of the interpretation of customary law which elaborates the relationship between fit and substance [which] permits the adoption of an interpretation as best even though it fares poorly on the dimension of fit (e.g. because, despite considerable support in normative words (*opinio juris*), little state practice supports the putative norm and much practice conflicts with it) provided the putative norm possesses very strong appeal on the substantive dimension (i.e. it expresses an essential part of the good which the institution of customary international law is supposed to achieve, such as peaceful co-existence).<sup>116</sup>

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<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, p. 115.

<sup>114</sup> This idea had already been implicitly mooted by, *inter alia*, Cheng and Kelsen.

<sup>115</sup> Kirgis, *supra* note 4, at p. 149.

<sup>116</sup> Tasioulas, *supra* note 25, at p. 113.

Thus, the sliding scale, or rather Dworkin's idea of fit and substance, provides a technique by which legal norms can be identified from amidst the chaos of international life. We can construct and interpret the social practice of law using fit and substance as an epistemic grid; that is, we can identify the relevant data, and explain the imputation of a specific result, the creation of a legal norm. This approach claims that an abundance of either element can be used to compensate a deficiency of the other; and that the aggregate needed to 'create' a norm could be varied by reference to WOVs. In other words, the more 'important', 'reasonable', or 'necessary' the rule was deemed to be, the lower the aggregate necessary for its establishment as a rule of CIL.

However, there is a complication here, as "substance" appears to be playing two roles at once. First, substance as congruence with WOVs identifies a statement as normatively relevant,<sup>117</sup> as an instance of *opinio*. Second, substance as desirability functions to lower the 'threshold level' at which a normative claim is recognised as a norm of CIL. Tasioulas has misunderstood the data from which his theory derives legal norms; he has misunderstood the relationship between fit and substance, and the absolute dependency of fit upon substance. As the raw data which an interpretation must fit is the aggregate of state practice *and opinio juris*, there is no reason to understand the example of limited state practice but abundant *opinio* as one of poor fit. It should instead be recognised as one in which a high degree of fit is achieved through the malleability of the raw data itself.

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<sup>117</sup> *Ibid.* 101.

This brings a major complication to light; if *opinio juris* is separated – as opposed to more traditionally abstracted – from state practice, it must have its own source. The spring from which it flows would appear to be sustained by WOVs.<sup>118</sup>

It is not then the form, the forum, or the popularity of any given “articulation” – be it a resolution, a treaty, or whatever – which allows it to be considered as *opinio juris*, as the ‘raw data of constructive customary interpretation’. Rather it is its substantive content, and the concurrence of this with WOVs. There is no logical reason, given or extant, not to reduce this simply to  $WOV = opinio\ juris = raw\ data$ .

Because substantive desirability defines the raw data, the system cannot adequately reduce complexity to provide determinate legal norms. As a result, this theory offers no way to prevent the ‘interpreter’s’ values (which identify, in part construct, and interpret the data) from becoming the law. This is particularly problematic if we maintain an assumption of formal equality in the identification and application of legal rules. Having failed to define the values relevant to law creation, Tasioulas’ system must mandate each particular interpreter to bring their particular values into the process of norm ‘identification’. Consequently, for each interpreter, the legal system will produce a norm consonant with their values. But, of course, these values are unlikely to be the same for different interpreters; consequently, the law becomes an indeterminate description of the desires of each interpreter, or actor.

Despite all of this, Tasioulas simply asserts his position:

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<sup>118</sup> *Ibid.*

The interplay between convictions of fit and substance notwithstanding, a genuine distinction between interpretation and invention will result provided that they are sufficiently independent of each other to enable the former to impose a normative ‘drag’ on the latter.<sup>119</sup>

This independence is both conceptually impossible, and empirically precluded by Tasioulas’ particular adaptation of the Dworkinite schema. Nonetheless, Tasioulas attempts to turn the question into one of onus, when he suggests that:

Opponents of relative normativity such as Weil thus have the harder task of showing that the sliding scale conception of custom does not articulate a sufficiently complex relation between fit and substance to produce the requisite tension in any particular case.<sup>120</sup>

By doing so, Tasioulas clearly implies that this is the only way to portray relative normativity as precluding a genuine distinction between interpreting and creating the law. This is an interesting, but ultimately disingenuous approach. Tasioulas’ challenge, even if it were appropriate, presupposes an external, *quasi*-objective, category of raw data, rather than one whose very existence is defined by reference to the criteria of substance. While fit and substance may be able to temper one another, this can only have a genuine effect where the data an interpretation must ‘fit’ has an existence external to the ‘substance’ by which that ‘fit’ may be modified. Yet in Tasioulas’ scheme the ‘fit’ and the ‘substance’ of data are evaluated from the same

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<sup>119</sup> Tasioulas, *supra* note 25, at p. 115

<sup>120</sup> *Ibid.*



source, WOVs. These are then effectively asserted to exercise a “normative drag” on themselves, a clearly impossible suggestion.

Moreover, the transposition of Dworkin to PIL is problematic, and produces pathological consequences. Dworkin’s theory has two central assumptions neither of which is sustainable in PIL. These are the existence of a “thick”, or value-homogenised, community (whose values may, indeed often must, be imposed on dissenters) and the centrality of adjudication in the understanding and functioning of law.

Although the question of the role of adjudication, and the use of a theory of adjudication to answer a pre-adjudicative question of the existence (and identification) of law (the rules to be adjudicated on), is itself problematic, its demotion of the courts from the “Capitals of Law’s Empire”<sup>121</sup> in Dworkin’s thesis, to little more than interesting villages in PIL’s theoretical topography which is of most concern. Due to the voluntaristic nature of adjudication in PIL, the courts move from a central to a contingent role, with a consequent diminution in involvement and prestige. The centrality of adjudication in the Anglo-American domestic legal systems is manifest;<sup>122</sup> its peripheral status in PIL equally so.

The data from which Dworkin constructs the social practice of law – the opinions of authoritative courts – is absent in PIL. Consequently, Tasioulas must identify a different set of actions which can be categorised as the relevant data for the

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<sup>121</sup> Dworkin R., *Law’s Empire*, p. 407.

<sup>122</sup> It is probably also worth noting that the centralised position of, and general infatuation with, courts is, itself, a peculiarly, Anglo-American, or perhaps Commonwealth, phenomenon. This enthralling

elucidation of the rules of PIL. But this new data, which can only be the actions of “authoritative decision-makers”,<sup>123</sup> will be even vaster, and even less coherent than that relied upon by Dworkin in the municipal setting. Even in its original setting, the data could not provide the determinacy required.<sup>124</sup> The new setting merely exacerbates this problem, and therefore, the interpreters’ values play an even larger role.

This is a centrally important point, because *any* tendency toward stability, the role of law, and the avoidance of radical indeterminacy in the Dworkinian analysis are all predicated on the centrality of the courts, or at least of the possibility of unilateral recourse to the courts. Dworkin relies on the courts to stabilise the law (and thus authoritatively determine which values are in the system), but in PIL they simply cannot play this role. Stability, which is a prerequisite for the independence of the law, can only be protected by the law itself.

If the law is understood as a social practice, then that practice must be identified from the rhetoric and actions of the authoritative decision-makers, but these are too many in number, and their actions are too disparate. Consequently, to provide stability at all, *the law* must exert a greater control over these decisions; the decision-makers’ discretion must be limited by clear legal rules, and clear processes by which new rules can be identified. This necessitates a *process* to determine which values may enter the system, *and* necessitates that this process is not open to change based on substantive

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importance is not allocated to courts in all municipal legal orders, and thus cannot be necessarily imposed upon PIL.

<sup>123</sup> For a sympathetic, but nonetheless useful, account of this notion, see Higgins R *Problems and Process: International Law and How We Use It* pp. 1-16, esp. pp. 9-11.

preference. If this approach is not adopted, the data becomes too vast and indeterminate to be ordered into a coherent whole. Instead of that, the 'law' is 'identified' (created) according to the substantive preference of the 'interpreter' at the point of application. The law becomes an apology for its subjects' political interests.

The positivist process may be slower, less responsive, than that offered by Dworkin, but given the absence of centralised adjudication, and the consequent fragmentation of "authoritative decision making", value-centrism, and thus the diffusion of the right to embody values in the law, effectively denies the law content. To preserve a role *for* law, it must be focussed on certainty and the prevention of subjective alteration.

Indeed Tasioulas appears to accept this when he acknowledges the need for determinate WOVs:

It is only to be expected that relativistic doctrines will be indeterminate if there are no universally accepted criteria in terms of which the value judgements they require may be assessed. From this it is evident that the anti-pluralism charge is the more fundamental of Weil's two objections, since it explains why in the last resort any appeal to values in international law process is inevitably indeterminate.<sup>125</sup>

This is a strange, but accurate, concession; any response to the anti-pluralism charge opens itself to the charge of indeterminacy, and vice-versa. In Koskenniemi's terms the potential answers, for reasons immanent to themselves, *cancel each other out*.

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<sup>124</sup> Barring the fortuitous or deliberate assembly of like-minded judges, judges sharing (in some detail) the same values and beliefs, Dworkin's system does not produce determinacy in municipal law either, it simply better disguises that absence. See ch. 1, *supra*.

It can therefore be seen that Tasioulas' arguments against indeterminacy are little more than a framework, and perhaps even an unnecessary framework at that. They do not provide, or even tend toward, determinacy themselves; rather they show how a value imposition, already presupposed to be legitimate, can be controlled.<sup>126</sup> Yet even this control relies for its efficacy on the determinacy of the values to be imposed. Therefore, if WOVs cannot be established, the anti-indeterminacy argument collapses; the framework for limiting their role is irrelevant if their existence and content are indeterminate. Moreover, if 'legitimate' WOVs can be identified, the controls offered by Tasioulas are ineffective, and the only bulwark against radical indeterminacy is the determinacy of the WOVs themselves, which renders any attempt to control the parameters of their content redundant.

This does not render Tasioulas' argument wrong, but merely incomplete and inconclusive. It does, however, illustrate a central problem with the policy science or relative normativity approach to PIL, which is the school's inability to prove the existence of, let alone define, control, or *justify* WOVs.

Tasioulas does not return to a direct attempt to prove WOVs. Having apparently succeeded in his task – the internal critique of Prosper Weil's positivism – he left his abstract purpose to be completed by others. He does, however, warn of the difficulties of:

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<sup>125</sup> *Ibid*, p. 116.

<sup>126</sup> Interestingly, as well as doubts which may be harboured as to the applicability of Dworkin's analysis to PIL as a whole, it would appear that Tasioulas actually inverts its logic: where Dworkin says 'value imposition is legitimate, here is how to control it', Tasioulas interprets 'here is how value imposition may be controlled, therefore it is legitimate'. In strict logic this reversal of antecedent and consequent, the affirmation of the consequence, is illicit.

provid[ing] an account of the substantive values that determine the formation and application of universal international laws which is not vulnerable to general accusations of radical indeterminacy, ethnocentrism, and patriarchy.<sup>127</sup>

It is a strange theory, which ends in a plea to others, someone, anyone, *else* to provide the central mechanism required for the theory to operate. Tasioulas provides a vehicle, but asks someone else to design the engine when they have time. This is not, at present, a usable theory, even on its own terms.

However, to say that this theory cannot do what it claims to be able to do is not synonymous with claiming that it cannot function at all. There are (at least) two ways to rescue Tasioulas' theory. One would be to create (and impose) a moral code, that is to provide WOVs; the other technique would be to read the theory as a normative plea for institutional reform. As Tasioulas himself notes:

As Weil concedes, the problem would be alleviated if the World Court asserted an activist role in determining customary norms on the basis of considerations of world public order.<sup>128</sup>

This can be read in either of two ways; first, as a plea for enhanced use of value oriented legal reasoning, in which case I maintain my original critique that the ICJ

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<sup>127</sup> Tasioulas, *supra* note 25, at p. 128.

<sup>128</sup> Tasioulas, *supra* note 25, p. 104.

cannot and should not perform such in role in contemporary PIL.<sup>129</sup> However, the quotation could also be understood as a political plea for institutional reform, an attempt to recentre law in international life. This would be a major institutional reform, turning the international (un)society<sup>130</sup> into a rule of law community of some kind. However, all of these alternatives seem anti-pluralistic, either directly or indirectly, and it is worth bearing in mind that the accrual of institutional power by value driven courts need not be synonymous with a victory for law. In short, Tasioulas' theory can be rescued. But can this be achieved at an acceptable price?

The central question, obfuscated by Tasioulas, goes unrecognised by Roberts, but nonetheless remains: if *opinio iuris* is separated from state practice, how is it to be independently identified? Obviously, it must have moral identifiers, but those offered by Roberts, "commonly held subjective values about actions that are right and wrong, which a representative majority of states has recognised in treaties and declarations"<sup>131</sup> are not merely circular, but devoid of content, and can offer no more *practical* aid in the identification of *opinio iuris*, than could Tasioulas' plea for someone (anyone) *else* to enumerate the list of WOVs.<sup>132</sup> Moreover, Roberts more conspicuously fails to explain why such commonly held values, shared by a representative majority of states, are not reflected in practice; nor why they might need help to get in to a consensually made body of norms (as the classic theory understands PIL to be).

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<sup>129</sup> See Beckett J., "Behind Relative Normativity: Rules and Process as Prerequisites of Law" 12 EJIL (2001) 627.

<sup>130</sup> On the idea of the International Unsociety, see Allot P., *Eunomia* p. xlix, and s 13.102.6.

<sup>131</sup> *Supra*, note 20, at p. 762.

<sup>132</sup> Tasioulas, *supra* note 25, at p. 128.

In other words, the “fit and substance” schema of understanding can *only* adequately reduce complexity if “substance” is authoritatively defined. This is *not* simply a result of Tasioulas’ peculiar reading of Dworkin. Even if we were to refuse to separate fit and substance as Tasioulas does, and were instead to accept the alternative reading of Dworkin that suggests substance helps us to identify and interpret the data of fit, the same problems would arise. What Tasioulas’ separation of the two *highlights* is a fact inherent in, but denied by, Dworkinian methodology: *viz.* that fit is always determined by substance, because the data is always identified because of its substantive appeal. In other words, both attempts at ‘reconciliation’, Roberts’ and Tasioulas’, collapse into utopian theories, or exist in perpetual oscillation between apology and utopia. This is so because somewhere between half and all of the ‘data’ against which “fit” is to be measured is itself identified and made ‘relevant’ by its substantive appeal.

The purpose of fit and substance is to allow the simplification of reality, the reduction of complexity, but to attempt to do so while also maintaining a claim to empirical justification. However, this claim is simply meaningless, because the data against which the putative norms are to be empirically justified is itself a product of moral preference. Even where an attempt is made to deny this, and state practice is radically separated from *opinio iuris*, and from substantive appeal – i.e. when all state action is considered as state practice – things do not improve. Instead the theory moves from the Utopian to the oscillatory: state practice becomes apology, *opinio iuris* (and ‘substance’ *per se*) manifest utopia. The content of any given legal norm can be identified *only* by privileging one over the other. The system can only be stabilised by becoming avowedly Utopian, *and* having the courage of its convictions in declaring that utopia.

Indeed, from this perspective it becomes (more) apparent that the central bone of contention between the traditional and modern approaches to custom is *purposive*, rather than descriptive. The modern approach seeks to *impose* a moral code on PIL, while the traditional approach adheres to a belief that (near) universally agreed moral claims will emerge *within* the body of laws. The problem faced by the modern approach is the separation of good from bad moral claims. The traditional approach takes no stance on this issue. The modern approach can only function by becoming avowedly utopian; the classic approach simply cannot work at all. In short, despite their heterogeneity, the theories accommodated in the preceding typology do have one important feature in common: none of them *works*!

#### The Failure Of Neutrality: Avowedly Apologetic Or Utopian Theories:

One final response to the apparent impossibility of a structured reduction in the complexity of international life is to turn to an avowedly moralised separation between the relevant and the irrelevant. This can be accomplished in either of two ways: firstly the legal system as a whole can be made subservient to specific, identified, moral values; secondly, certain states could be moved ‘above’ the system of legal regulation, either explicitly, or by reference to *their* (exclusive) ability to import the values ‘necessary’ to the determinate identification of CIL. In many ways these theories, prominent in the USA, operate interdependently to justify, *ab initio*, the actions of the so-called alliance of liberal states.



However, for analytic purposes the two strands of theorising can be separated. Although each purports, fundamentally, to advance the cause of a ‘liberal’ international law, the works of Teson and Slaughter tend toward the first and second techniques respectively. A non-United Statesean (and in many ways non-liberal) version of the first technique is also evident in the work of Hall.

Fernando Teson, CIL as the Manifestation of a Fixed Morality:

Teson offers us a morally driven vision of international interaction, where the “unity between law and ethics operates most strongly in the field of international law”.<sup>133</sup>

From this perspective:

When a court or impartial observer (such as a scholar) is surveying history in order to find patterns of international conduct, the search is not unprejudiced ... Rather, the selection of instances of state practice, of those pieces of past history that count as custom, is informed by a theoretical framework within which ethical considerations play an important role. In this sense, finding customary law is not an objective or value-neutral process, nor should it be so ... Accordingly, a primary reason why [specified actions] count as custom is that the process and the outcome of those cases are justified by a moral theory that ... is preferable to the ... alternative.<sup>134</sup>

This creates two problems; one apparent, the other less so. The apparent problem is the need to justify the application of that particular moral theory in a heterogeneous

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<sup>133</sup> Teson F., *Humanitarian Intervention* p. 11.

<sup>134</sup> *Ibid* pp. 11-2.

world. The less apparent problem is the role of that theory which, in effect, *constitutes* the data of CIL. On the first point, Teson is less than convincing:

If we are equipped with a moral theory which on reflection seems to us correct, our process of selecting those precedents that shape a customary rule shall be naturally guided by such theory.<sup>135</sup>

The suggestion that a theory “which seems to us ... correct” could provide determinacy in CIL is, quite simply, ludicrous. It possesses no content whatsoever, and reduces CIL to the whim of the (admittedly *not*) ‘impartial observer’. Moreover, Teson also alludes to the impact of this *utter indeterminacy* on the identification of CIL: the theory defines the data. Nonetheless, Teson denies that this is the logical conclusion of his approach:

This value choice, however, is not exercised from nowhere,<sup>136</sup> in a vacuum. International legal discourse is not co-extensive with moral philosophy. Rather, international legal propositions are the children *both* of institutional history (diplomatic history, treaty texts) and political philosophy, in the sense of a background political theory.<sup>137</sup> Thus, state practice (that is, institutional history) is *interpreted* in the ascertainment of international law. State practice thus remains a central touchstone of international legal reasoning.<sup>138</sup>

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<sup>135</sup> *Ibid* p. 12.

<sup>136</sup> I would suggest that this claim is simply untrue, Teson seeks, precisely, to offer the view from nowhere; the objective truth. Moreover, all that he demonstrates, on his own terms, is that this is not a view *of* nowhere; the view is exercised on certain data, but that data is not constitutive of the location *of* the viewpoint itself.

<sup>137</sup> Teson attributes this observation to Dworkin.

For the reasons demonstrated with regard to Roberts and Tasioulas, this is simply not true. At best, this statement is meaningless, or a denial of the true claims made by Teson's thesis, because the data which *constitutes* state practice is, itself, constituted by reference to substantive preference. At worst it signals another descent into inexorable oscillation between Apology and Utopia; if state practice *can*, somehow, be given an existence separate from its moral desirability, then the relationship between practice and *opinio* becomes one of oscillation.

Consequently, this claim should be treated as false, and attention should be displaced to Teson's underlying claim: that he has discovered a *legitimate* universal ethics. This claim is made most prominently in his book *A Philosophy of International Law*, where he sets out to develop and "offer ... a modern reconstruction of Kant's thesis. ... accurate ... against the backdrop provided by Kant's general moral theory".<sup>139</sup> I do not propose to go into the substance of Teson's moral philosophy, but only to point out two important defects. Firstly, Teson fundamentally misunderstands the Kantian thesis, and in particular the power of reason over will which that thesis implies. Secondly, Teson does not offer any proof of the legitimacy, let alone the *universal* legitimacy, of Kantian theory.

The first point can be made succinctly by considering the following claims by Teson:

Kant includes freedom (respect for individual autonomy under the rule of law) as the first tenet of international ethics.<sup>140</sup>

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<sup>138</sup> Teson, *supra* note 114, p. 15.

<sup>139</sup> Teson F., *A Philosophy of International Law* p. 2.

This is simply *not* Kant's understanding, let alone definition of freedom. For Kant, freedom is subjugation of will (desire) to Reason.<sup>141</sup> It is not some democratic pipe dream. As Reiss states:

[Kant] assumes that a plan of nature must intend the elucidation of mankind into a state of freedom. Or (to put it differently) since nature has endowed man with reason, and since the purpose of nature is to realise man's essence, nature has made man in order that he become rational.<sup>142</sup>

This misunderstanding re-occurs when Teson attempts to co-opt the ideal of the Social Contract to the democratic cause. For Teson, the social contract is the relationship between governed and government, whereby the former select and control the latter.<sup>143</sup> However, for *Kant*, the social contract is an artificial device of Reason, against which the *decisions*, the *laws*, of a government or State may be assessed.<sup>144</sup> It does guarantee freedom to the citizens, but only in Kant's sense, subjugation to reason. As Reiss puts it:

The social contract must therefore be seen as a practical Idea of reason.<sup>145</sup>

What Teson *refuses* to see is the potentially totalitarian element to Kant's thinking.<sup>146</sup> Consequently, the first strand of Teson's justification for a moralised vision of PIL, his support in the works of Kant, cannot be justified.

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<sup>140</sup> *Ibid* p. 3

<sup>141</sup> *Groundwork for the Metaphysics of Morals* ch. 2, s. 38. (2002 OUP ed. pp. 240-2); see also ch. 3.

<sup>142</sup> Reiss H. *Kant's Political Writings* (2<sup>nd</sup> ed.) "Introduction" p. 36.

<sup>143</sup> *Supra*, note 141, pp. 57-8.

<sup>144</sup> See, e.g. *Foundations of the Metaphysics of Morals* s. 47. See further, Rawls J. *A Theory of Justice* pp. 11-2.

This leads to the second, and deeper charge: that Kant's theory, even properly understood, is neither self-evidently correct, nor is it timeless. Kant's reliance on Reason cannot escape Hume's observation that:

Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.<sup>147</sup>

The contingency of Reason has since been conceded by the most famous (and globally influential) neo-Kantian of present times, John Rawls.<sup>148</sup> The genius of Kant simply cannot legitimate a world wide system of moral imperialism. Nor, it should be noted, was it ever designed to do so. Kant spoke out, in Teson's central Kantian tract, "Perpetual Peace"<sup>149</sup> *against* aggression or intervention,<sup>150</sup> even by the members of a "Federation of Free States".<sup>151</sup> *If* the doctrine of Universal Reason were true (and I contend that it is not) it would win out by persuasion.

Teson's theory simply attempts to disguise and justify an apology for an alliance of 'liberal' states, specifically as manifested in NATO.<sup>152</sup> At a more structural level, Teson, having offered no proof of the universal nature of the Kantian thesis, can

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<sup>145</sup> *Supra*, note 144, p. 28.

<sup>146</sup> This is not a new charge to lay against Kant, it has been made by, *inter alia*, Nietzsche (*Beyond Good and Evil*, p. 211), Foucault ("What is Enlightenment" in *Michel Foucault: Essential Works*, vol. 1 *Ethics*, (Faubion J. ed.) 303) Deleuze (*Nietzsche on Philosophy* p. 2), and Hardt and Negri (*Empire* pp. 183-4).

<sup>147</sup> Hume D., *A Treatise of Human Nature* s. II:iii:3 (1978 OUP Selby-Bigge L. ed., p. 415)

<sup>148</sup> See "Kantian Constructivism in Moral Theory: The Dewey Lectures 1980", 77 *The Journal of Philosophy* (1980); see also *Political Liberalism*.

<sup>149</sup> "Perpetual Peace: A Philosophical Sketch" in *Kant's Political Writings* Reiss H. (ed) 93.

<sup>150</sup> *Ibid.*, p. 96 "Fifth Preliminary Article"

<sup>151</sup> *Ibid.* p. 102 Second and Third "Definitive Articles"

<sup>152</sup> See, e.g. Teson "Collective Humanitarian Intervention" 17 *Michigan Journal of International Law* (1996) 323.

surely offer no coherent argument against the claim that *another morality*, “which on reflection seems correct” to *its advocates* could not similarly become the substantive content of CIL. In short, Teson’s thesis is likely to become entangled in the Apology to Utopia dialectic, and to the extent which it avoids this by adopting a non-universal ethic as universal, it is illegitimate, and must be normatively opposed.

#### Stephen Hall and the Persistent Spectre of Natural Law:

Hall offers a complex, and in places convincing, argument for “positivism’s” inability to justify the *authority* of PIL. I do not wish to deal with this here, because, in my opinion, the authority of law is epiphenomenal. For what it is worth, I agree to some extent with Hall, that classical positivism does have problems, on its own terms, in justifying, or even *demonstrating* the authority of PIL, but that is an irrelevant, and parasitical, concern.

Nonetheless, it does bear mentioning, because Hall seeks to ground the authority, and consequently the content, of CIL in a higher source altogether: God. Hall locates himself completely within Finnis’ vision of natural law and natural rights:

Our natural rights ... are fundamental components of the common good. They may be conveniently mediated by treaties and custom, but they are not *conferred* by positive international law. Natural rights form part of the broad limits within which we are free to fashion positive laws.<sup>153</sup>

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<sup>153</sup> Hall S., “The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism” 12 EJIL (2001) 269 at p. 301.

This thesis is open to all the usual criticisms: reason is not universal; there are no self-evident natural rights; it is moral imperialism; the Roman Catholic Church lost this battle many years ago; Finnis was wrong; etc. Stated in such bare fashion it is, quite simply indefensible.

In essence, Hall asks that we take his avowedly moral theory on trust. *He* knows what the self-evident goods are, he knows how to identify the rights to which they gave rise, at least according to “the common good under the natural law”. Perhaps the blind moral imperialism of this thesis is best represented in the following short quote:

In particular states are not free to transform moral wrongs into human rights *with complete juridical effect*. ... The establishment of a human or fundamental right to abortion under the positive law would be an example of an attempt to transform a moral wrong into a human right. Laws authorizing abortions, and buttressing access to abortions, are radically unjust (and radically immoral).<sup>154</sup>

Hall gives us no reason to accept this Universalist moral judgement, let alone to subject ourselves to it; *a fortiori* he can give no reason why we should (be allowed to) subject others to it. He does, however, remind us that:

The temptation to turn moral wrongs into human rights arises when, unmindful of the richness of the common good under the natural law, every

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<sup>154</sup> *Ibid* p. 302.

person's desire or preference is a potential candidate for promotion to the ever-expanding pantheon of positive human rights.<sup>155</sup>

What we are not offered, and what we should be sceptical about accepting, is a reason to privilege *Hall's* (or even Finnis') *understanding* of the "common good under the natural law". We are not offered a reason to distinguish this from *their* "desire[s] or preference", but we are warned not to give unnecessary weight to such desires and preferences. Perhaps PIL should become a more ethical discourse, but this cannot be legitimately pursued in a heterogeneous world by returning to disputes over the "One True God", and *imposing* one moral truth on others. How badly could things turn out, if we choose the *wrong* God?

#### Realist Theories From Yale to Harvard, New Haven and Slaughter:

The idea of blending law with other discourses, from propaganda analysis and political science, to ethics, psychology, etc. is not a new one. It is, amongst other things, one of several responses to the project of American Legal Realism. PIL, naturally, has not been immune to this process, nor to the desire for a 'better law' which drives it. The law, in these theories, is to be made *substantively* better, more useful, more responsive, more pragmatic. In this sense then, these theories deny the duality of is and ought, and in both directions too: sometimes deriving an ought from what is, and invariably understanding what law is in light of what a given writer thinks it ought to be.

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<sup>155</sup> *Ibid.*



Two exemplars of this tradition are New Haven Policy Science and Anne-Marie Slaughter's "Liberal" synthesis of PIL and international relations. These particular theories are significant. They are not only exemplars, but also (currently) the 'book-ends' of this type of theorising in PIL. But regardless of their other strengths and weaknesses, no theory of this type is capable of adequately reducing the complexity of international life, to facilitate the provision of determinate, let alone neutral, answers.

### The Original and the Best? New Haven Policy Science:

As Duxbury notes, New Haven was both a response to, and a refinement of, American Legal Realism.<sup>156</sup> New Haven scholars adopted the basic rule-sceptical premise of ALR, but sought to rationalise and structure ALR's eclectic borrowings from the social sciences. From one perspective, New Haven aimed to 'positivise' ALR.<sup>157</sup> However New Haven was also a normatively driven theory, a theory with a specific purpose:

The genesis of New Haven lay in the Second World War and the emergence of communism as an international political force ... For MacDougal and Lasswell [the founders of New Haven] the choice was one between nuclear annihilation and the global promotion of US democratic values.<sup>158</sup>

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<sup>156</sup> Duxbury N., *Patterns of American Jurisprudence* ch. 3.

<sup>157</sup> *Ibid* pp. 164-76; See also Morrison J. L., *John Austin* ch. 6.

<sup>158</sup> Scobbie I. "Some Common Heresies about International Law" in Evans M (ed.) *International Law* at pp. 68-9.

This mixture of motivations falls readily into Koskenniemi's Apology/Utopia dialectic:

By trying to achieve a more empirical [i.e. Apologetic] account of the operation of law in society, and by postulating the instrumental [i.e. Utopian] aim of achieving human dignity.<sup>159</sup>

However, although from Koskenniemi's perspective this might undermine the theory, from a strictly New Haven perspective, such a critique is simply inapt. New Haven did not aim to produce 'lawyers' understood as neutral rule appliers, but rather to "provide systematic training for policy makers";<sup>160</sup> i.e. 'lawyers' who would act as advocates, not neutral advisers, nor litigants.

Nonetheless, it has been claimed that:

The realisation of preferred values is not ... the sole factor in decision making, law does constrain. Recourse must be made to trends of past decisions, and how these relate to the goals the decision-maker wishes to achieve.<sup>161</sup>

However, this is simply not so. Under the New Haven approach, trends of past decisions can *only* be identified and interpreted by reference to values: after all, the trends themselves are merely embodiments of those underlying values. Consequently, at its descriptive pole, the theory tends absolutely toward Apology, as the object of

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<sup>159</sup> *Ibid* p. 70.

<sup>160</sup> *Ibid* p. 68.

<sup>161</sup> *Ibid* p. 71.

description (the trend interpreted) is constituted by the very value it then seeks to justify.

This necessitates a move toward utopianism to rescue the theory from descriptive indeterminacy. If the theory is to work at all, it must postulate fixed values. It does so, and calls these “World Order Values”. There are nine in total, and these values are set for all times and places by McDougal and Lasswell as:

Health; Well-being; Affection; Respect; Skill; Enlightenment; Rectitude;  
Wealth; Power<sup>162</sup>

Two aspects of these values are immediately apparent; one is their bland indeterminacy,<sup>163</sup> the other their remarkable correspondence with the liberal individualist underpinnings of the US Constitution. As with Finnis’ seven basic goods,<sup>164</sup> they are simply postulated as self-evident.<sup>165</sup>

These values are meant to *constrain* decision-makers. However, as MacDougal and Lasswell had themselves observed: “normative statements of high-level abstraction can be manipulated to support any specific social goal”.<sup>166</sup> Contrary to Higgins’ claim that such an articulation of relevant policy factors has a conditioning influence on

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<sup>162</sup> MacDougal M., and Lasswell H., “The Identification and Appraisal of Diverse Systems of Public Order” in MacDougal and Reisman W., (eds.) *International Law Essays* 15, at p. 20.

<sup>163</sup> *Ibid.*; see also Lasswell and MacDougal “Legal Education and Public Policy: Professional Training in the Public Interest” 52 *Yale Law Journal* (1943) 203, at p. 213.

<sup>164</sup> Finnis J., *Natural Law and Natural Rights* 73, and 85-90.

<sup>165</sup> *Supra*, note 162.

<sup>166</sup> Lasswell and MacDougal, *supra*, note 164.

decision-makers,<sup>167</sup> by MacDougal and Lowell's own admission, they possess no such force.

There is a *paradox* in the functioning of the New Haven approach: if the rule is a "shorthand" and consequently an inadequate method of communicating desired action, it is *also* an inadequate (or more precisely indeterminate) vehicle for the transmission of values. This is brought most starkly into relief by Rex Zedalis' deployment and inadvertent *reductio ad absurdum* of New Haven method in his defence of the 'pre-emptive' Israeli strike on the Iraqi Osirak Nuclear Power Station.

Zedalis locates the relevant trend of decision-making as having culminated in the rules stated in the *Caroline* incident.<sup>168</sup> He offers no particularly convincing argument for the *Caroline* rule's capacity to over-ride the apparent textual clarity of the UN Charter (UNC)<sup>169</sup> (but then he need not, what value textual clarity if law is not about rules anyway?), but proceeds directly to an application of *Caroline* to the legality of the Israeli destruction of an Iraqi nuclear power station.<sup>170</sup>

*Caroline* set out three criteria for anticipatory self-defence, as follows: an attack must be imminent; leaving no moment for deliberation; and no choice over means. Zedalis

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<sup>167</sup> Higgins R., *Problems and Process: International Law and How We Use It* p. 5

<sup>168</sup> This incident occurred in 1837 and led to a heated exchange of letters between the UK and the USA in 1842. The outcome of this exchange was to recognise a right to "pre-emptive self defence" under carefully defined conditions; the 'defending' state must demonstrate the "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation". This statement was to decisively structure customary PIL, at least until the advent of the UN Charter (UNC). For a brief overview, See Brownlie I. *Principles of Public International Law* (6<sup>th</sup> ed) 701-2.

<sup>169</sup> Art. 51 UNC states that States retain their right of self-defence "if an armed attack occurs". This is generally understood to mean that self-defence can only be legitimately resorted to *once an attack has commenced*. Consequently, anticipatory self-defence is not permissible within the UNC system.

<sup>170</sup> Zedalis R., "Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense", 19 *Case Western Reserve Journal of International Law* (1987) 129.

identifies the unifying factor underlying this trend as the need for *certainty*,<sup>171</sup> arguing, in effect, that as long as the decision-maker ‘knows’ that the attack will happen at some point – it does not matter when the attack will happen, only that we know it will – then his pre-emptive action (which on another reading will be a use of force, contrary to art. 2(4) UNC) will be lawful.

The latent ambiguity with this interpretation is the rules’ emphasis on the temporal element; surely the value, if a value is to be sought or privileged at all, underlying this trend is temporal imminence. On the most natural reading of the *Caroline* restrictions, the vital factor is the absence of time, and so of alternative courses of action, rather than certainty as postulated by Zedalis.<sup>172</sup> Yet Zedalis is acutely sure that he has identified the correct value, and this, and this alone legitimises his account: the strike was lawful *because* it accorded with Zedalis’ choice of “underlying” value, but Zedalis cannot claim this privilege to himself. Rather any decision, by any authoritative decision-maker is valid to the extent that it accords with that decision-maker’s choice *both* of applicable trend, and of underlying value.<sup>173</sup>

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<sup>171</sup> *Ibid* pp. 133-4, and 144-53.

<sup>172</sup> This is especially so as the certainty must itself be undermined by the potential for recourse to peaceful means of dissuasion.

<sup>173</sup> I have focussed on Zedalis quite deliberately, even though some may claim this to be unfair. Zedalis is extreme, he takes New Haven toward the limits of plausibility, he uses surprising values where others may see or deploy only (culturally) orthodox ones, he (accidentally) makes the method ludicrous. Zedalis does not make New Haven ludicrous, but rather illustrates that it already is so. New Haven relies on a consensus of values which does not exist. Values orthodox and important in one culture, milieu, or social-setting may be strikingly incongruous in another. New Haven can overlook this by only preaching to the converted, the orthodox, the West. What Zedalis provides is a glimpse, perceptible to Western eyes, of the outsider’s view of New Haven, the startling arbitrariness of its value impositions, the utter indeterminacy of its directions, and the apologetic nature of its analysis – at least vis-à-vis the major Western powers and their friends (in the particular case Israel). New Haven, from this perspective, exists in the absence of compulsory adjudication to legitimise international actions to domestic audiences. See also Falk R., “Casting the Spell: the New Haven School of International Law” 104 *Yale Law Journal* (1995) 1991.

It is at this point – when the disutility of New Haven as *method* becomes manifest – that New Haven as a theory must be reconsidered. As theory, New Haven can and does guide the identification of trends, and the choice of underlying values, as these must be commensurate with, and aid the realisation of, the permanent and universal values of World Public Order. Only from this fixed point can the “tension” and “normative drag”, which Tasioulas postulates as saving the New Haven system,<sup>174</sup> be anchored. However, if, as suggested above, the values are either meaninglessly vague and ambivalent, or simply examples of wrong-headed moral imperialism, then the theory cannot play this role. In this case, the theory can only defend or legitimise the chosen trends and values by reference to previously chosen trends and values, and this form of emotivist escape is manifestly pointless. The New Haven method cannot be rescued from the theory, and the theory (for good or for ill) does not work. If it can be defended at all, New Haven is a normative *choice*; it is not a reflection of the neutral rules of discourse and international intercourse. It is as a choice to promote the United Stateseanisation of the World (which must be considered as one option amongst many), and not as the necessary precondition of understanding, that New Haven must be evaluated, and should be rejected.

#### Even Better Than the Real Thing? Slaughter’s Liberal Alliance:

According to my methodology, I am precluded from claiming that the mixture of international law and international relations theory as proposed by Slaughter just isn’t law. However, my basic charge does not differ far from that: Slaughter’s approach

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<sup>174</sup> *Supra*, note 25, p. 115.

cannot adequately reduce the complexity of international life to allow for the production of determinate norms. As she herself puts it:

International relations (IR) theory does not provide determinate legal answers; it is ... a tool to situate doctrines in the context of international politics and sort out the underlying policy arguments.<sup>175</sup>

These different arguments can be translated into legal justifications and mapped onto existing legal rules and principles ... but that is once again the job of the international lawyer. The international relations/international law method is a means rather than an end, aiding international lawyers to accomplish their own ends<sup>176</sup>

There appear to be two quite distinct movements here; the first is the synthesis of PIL and IR, but the second is an essentialisation of PIL. Between them, these contradictory movements bring a degree of opacity to Slaughter's thesis: what exactly *is* the synthetic method?

Slaughter is clear that her method is "liberal". She does not delve randomly into IR theory, but adopts a particular variant thereof: liberal IR theory. Slaughter is also clear that the process is "positive not normative" (by which she means descriptive not prescriptive); it is an empirical theory:

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<sup>175</sup> Slaughter A. "An International Relations Approach" 95 *ASIL Proceedings* (2001) p. 25.

<sup>176</sup> *Ibid* p. 26. it is worth noting that, in Koskenniemi's terms, this looks like a process for structuring "instrumentalism", that is, for elucidating and evaluating what is actually desired (by the instant actor, presumptively a Liberal State for Slaughter) and thus facilitating the 'recognition' of the legal rules most likely to facilitate that outcome. On instrumentalism, see Koskenniemi, *supra* note 8, p. 124. On the move from instrumentalism to formalism, see ch. 5 *infra*.

These codes and norms may not seem like law at all. Yet scholars and practitioners seeking to predict actual behavior must take them into account as empirical facts that guide action<sup>177</sup>

The theory is prescriptive in so far as it calls for the production and analysis of law *exclusively* from the liberal perspective. It takes as its foundational assumption, which Slaughter terms “hypothesis”, the existence, and the moral good of an alliance of Liberal States. PIL should be their law, and should seek to make others emulate them. Alternatively, PIL should be a non-universal form of law, applying only to liberal states, and to the conduct of liberal states in intervening in non-liberal states:

The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States based on their domestic political structure and ideology.<sup>178</sup>

However:

We may find that in some instances it will be more attractive to use the model to generate a universal set of concepts and norms, applicable to liberal and non-liberal States alike.<sup>179</sup>

These are *normatively objectionable* assumptions; they necessarily involve a moral imperialism. Nor are they defended by Slaughter. However, they are contingent.

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<sup>177</sup> Slaughter A. “A Liberal Theory of International Law” 94 *ASIL Proceedings* (2000) 240 at p. 244.

<sup>178</sup> Slaughter A. “International Law in a World of Liberal States” 6 *EJIL* (1995) 503 at p. 504.



Slaughter appears to concede that if her hypotheses about the existence and goodness of liberal states are false, then her theory fails:

The project ... is a thought experiment ... designed to generate a hypothetical model of international law based on a set of assumptions about the composition and behaviour of specific States. Its ultimate value must await empirical confirmation of specific hypotheses distilled from this model.<sup>180</sup>

The 'concept' of a Liberal State is defined by reference to six hypotheses:

1. Peace
2. Liberal Democracy
3. Market Economics
4. A Dense Network of Transnational Transactions
5. Transgovernmental Communication
6. Collapse of the Foreign/Domestic Distinction

States, or rather groupings of States, bearing these characteristics will be compliant with liberal law. Essentially, Slaughter's theory is motivational in nature: it is not about law creation, nor even about recognising legal norms. It is about motivating compliance with legal norms presupposed to exist, but also legal norms substantively generated and constrained by liberal individualist moral assumptions:

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<sup>179</sup> *Ibid* at p. 515.

<sup>180</sup> *Ibid.* at p. 505.

The methods used to imagine or conceptualize legal relations in a world of liberal States ... follow logically from the various assumptions and attributes already discussed.<sup>181</sup>

There are two obvious problems with this conceptualisation of legal relations. First and most obviously, Slaughter simply does not tell us *how* legal rules (norms, principles, etc.) are to be *identified* at all; secondly, her descriptive vision of liberal democracy seems wildly optimistic, to say the least:

Liberal States are States with governments of limited powers, powers limited by law enforced by courts. Such governments are thus accustomed to the application of a legal instrument to curtail asserted political power ... liberal States guarantee a host of individual rights against the government, to be enforced through legal action. Thus it is possible to imagine individuals as monitors of government compliance with agreed rules ... arrived at through ... an international legislative process. Fourth is a commitment to transparency as a key cog in the mechanism of liberal government. ... Fifth, liberal States are more likely to be monist than dualist.<sup>182</sup>

The key here appears to be democratic responsibility; that liberal States will be controlled by their citizens, and that this reinforces, but also obviates the need for, international regulation. Anyone familiar with both the recent US/UK adventure in Iraq, and the attempts made in both countries to prevent this flagrant illegality, may be less optimistic than Slaughter on these matters. As Alvarez notes:

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<sup>181</sup> *Ibid* p. 518.

<sup>182</sup> *Ibid* p. 533.

The widespread support for the Gulf war among the US public indicates [that] the ‘openness’ of American society leaves it open to ... media-induced nationalist fervour.<sup>183</sup>

This, as he implies, may not be the most robust safeguard imaginable. The problem with Slaughter’s thesis is that it takes place in the imagination. The founding hypotheses cannot be empirically validated, but are nonetheless treated as if they justify the thesis. Of course “it is possible to imagine individuals as monitors of government compliance with agreed rules”; it is also possible to imagine a Unicorn, but that does not bring the mythical creature into existence. The dangers of Slaughter’s thesis are manifest, as Alvarez again notes:

All that we may be doing is giving the US and other liberal policy-makers a legal license to wage war against those that they choose to define as outside the ‘zone of law’. This is all the more dangerous to the extent that ... liberals appear ready to discount the alternative: that pluralist institutions and their rules may exert a constraining influence on states, liberals and non-liberals alike.<sup>184</sup>

In short, Slaughter does not really offer a theory of law, but instead offers a partisan theory of motivation for compliance with legal rules already assumed to bear some essentialised existence as ‘facts’ outwith the scope of her theory. This is an unhelpful, and imperialistic theory, developed on the foundations of unverified (and in all

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<sup>183</sup> Alvarez J “Do Liberal States Behave Better?” 12 EJIL (2001) 183 at p. 237.

<sup>184</sup> *Ibid.*

likelihood false<sup>185</sup>) empirical assumptions. The fate of the theory has perhaps been best summarised by Slaughter herself:

The very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall 19<sup>th</sup> century distinctions between ‘civilized’ and ‘uncivilized’ States, rewrapped in the rhetoric of Western political values and institutions.<sup>186</sup>

I would happily place myself amongst that “many”.

#### THE END OF CUSTOMARY INTERNATIONAL LAW?

I have attempted to demonstrate schematically why all theories of CIL presented so far fail, and indeed, were bound, *ab initio*, to failure. The fact that unacknowledged, and logically illicit, moves between these theories exacerbate this problem should be instantly apparent. However, it is also important to realise that the different categories of theories ‘fail’ for different reasons.

Classic theories of CIL fail analytically, they simply cannot accomplish the tasks they set themselves. This is also true of modern aggregationist theories, notably those drawing on D’Amato or Mendelson. This is why Tasioulas, Roberts, Mendelson, and D’Amato are challenged primarily at the analytic level: they claim, but *fail*, to deliver

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<sup>185</sup> See e.g. *ibid* generally, but especially at pp. 194-224; see also Pogge T. *World Poverty and Human Rights*, generally on the behaviour of ‘liberal’ states in the maintenance of an economic order which tolerates 50,000 avoidable human deaths *daily*.

<sup>186</sup> Slaughter (EJIL) p. 506.

neutral and determinate legal rules. This is a purpose I find normatively appealing; it is not a purpose these theories are capable of fulfilling.

As they make their theories Utopian to overcome this analytic failure, Tasioulas and Roberts open themselves up to *both* normative and empirical challenges. At the empirical level, neither can demonstrate the existence of the type of objective ethics their theories demand. At the normative level, neither can give sufficiently strong reasons for ignoring charges of anti-pluralism inherent in imposing a morality which cannot be demonstrated to be objectively correct. Teson is subject to a similar mixture of normative and empirical criticism. His timeless ethics proves little more than an idiosyncratic misreading of Kant; even were this not so, he does not offer adequate support for his foundational thesis of the neutrality and objective correctness of Kantian moral or political theory.

New Haven, Slaughter, and any other attempt to synthesise PIL and IR can be problematised analytically, but are mainly met at the normative level. Analytically, it can be demonstrated that these theories are incapable of reducing complexity sufficiently to allow for the provision of determinate, legally correct, answers. However, normatively, it could also be argued that this was never intended or promised by these theories. They privilege the 'correct', the 'prudent', the 'optimal' course of action above the merely 'lawful'. Consequently they have no desire to reduce complexity to the levels required for the provision of determinate answers. This is to ignore law's primary strength and promise, which is precisely the provision of such determinate answers. Consequently these theories are normatively objectionable.

The synthetic PIL/IR theories are also empirically vulnerable. New Haven relies on ‘self-evident’ World Order Values which are neither self-evident, nor sufficiently determinate to prove meaningful. Slaughter relies on an idealised image of an alliance of liberal states, which simply cannot be supported by the data of international interaction. These theories manage, interestingly, to fail on every level of the topography of critique.

To summarise: all of the theories presented so far fail. Either they fail to adequately reduce complexity at all, or else they fail to do so in a normatively acceptable manner. CIL remains trapped within the Apology-Utopia dialectic. We cannot transcend *kitsch*<sup>187</sup> and move from an Instrumentalist to a Formalist understanding of CIL.

This would appear to prove both the Realist and the CLS claim that law is necessarily indeterminate, but, and here is a curious point, none of these theorists *wanted* to be right.<sup>188</sup> Goodrich, following Teubner, terms this ‘desire to be incorrect’ “the Critics secret love of the law”,<sup>189</sup> which he characterises as an “epistemically hidden ... desire for a return to legal idealism”.<sup>190</sup> We could almost see Critics as frustrated formalists (this is certainly how Higgins portrays Koskenniemi<sup>191</sup>), throwing a tantrum because the legal system doesn’t live up to its promise. This, of course,

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<sup>187</sup> The idea of *kitsch*, a manufactured niceness, a sugary-sweet *alternative* to thought, is developed by Milan Kundera (see *The Unbearable Lightness of Being*) and transposed to the analysis of PIL by Koskenniemi. On the function of PIL as *kitsch*, see Koskenniemi, *supra*, note 8 at pp. 121-3.

<sup>188</sup> See e.g. MacCormick N., “Reconstruction After Deconstruction: A Response to CLS” 1990 OJLS 539 at pp. 541-7, esp. note 13.

<sup>189</sup> Goodrich P., “The Critics Love of the Law: Intimate Observations on an Insular Jurisdiction” 10 *Law and Critique* (1999) 343 at p. 344.

<sup>190</sup> *Ibid*

<sup>191</sup> Higgins R. *Problems and Process: International Law and How We Use It* pp. 14-16.

assumes the system has a promise; moreover, it also assumes that we all agree on that promise – on the purpose of the system; on *what law is for*.

Koskenniemi's Plea:

We should take much more seriously those critiques of international law that point to its role as a hegemonic technique. Once that critique has been internalised however, I want to point to its limits. If the universal has no representative of its own, then particularity itself is no scandal. The question would then be: Under what conditions ... might we have good reason to imagine ... a politics of universal law?<sup>192</sup>

It is to *answering* that question, which Koskenniemi repeated poses but does not resolve, that attention can now turn. For this surely is the question: under which circumstances can the norms of PIL be neutrally created and impartially observed? Put differently, which politics should a universal law “congeal” into legal norms? Which actions, under which conditions, ought to be recognised as law constitutive, so as to produce a legal system which avoids *both* indeterminacy *and* moral imperialism?

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<sup>192</sup> Koskenniemi, *supra* note 8, p. 115

## CHAPTER 5 : INVERTING KOSKENNIEMI, AN IDEAL SOLUTION?

### INTRODUCTION:

Having considered the advances and the limits of legal theorising so far, and having constructed a technique for the full articulation, differentiation, and evaluation of legal theories – with an aim to disaggregating complex arguments so as to allow for the determinate identification of legal demands in the ideal case – attention must now turn to the construction of the best available theory of PIL as I understand it. This is a theory of a rule structured, determinate, system of law, adopting the classic positivist separability and identification theses. It is also a system limited, and rendered contingent, by these very characteristics. It is a theory of law as a specific tool, and the point of departure for an analysis of the role this law should play, the types of situations it should regulate.

Far from amalgamating international law with international relations,<sup>1</sup> I seek a radical separation between the two, in order to facilitate analysis of their actual and/or ideal interaction. It must also be emphasised that, while my project manifests a political claim – the *value* of formalism<sup>2</sup> in international law – it is primarily epistemic in nature, and is so at two distinct levels. First, the project is epistemic in attempting to describe the way in which the cognition of law is possible at all. It is an epistemic

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<sup>1</sup> As, e.g. Anne-Marie Slaughter has attempted; Slaughter A., “International Law in a World of Liberal States” 6 EJIL (1995) 503

<sup>2</sup> Formalism is different to legal positivism in two regards: first, where legal positivism aims for determinate norm *identification*, formalism goes further, arguing that the norms themselves ought to determine the outcome of the dispute; second, formalism *need not* be associated with rules as such, but rather with the determinate resolution of disputes, from this perspective, Dworkin is a formalist



theory of what it *means* to cognise phenomena as legal phenomena: as legal norms and a legal system. It attempts to elucidate how we can group the co-occurrence of certain phenomenon as signifying the existence of a legal demand. This is the recognition of the fact that law itself is a *product* of complexity reduction.

*Second*, it advocates an inherently epistemic role *for* law. Law in this analysis becomes an epistemic grid, an “observational language”, a *way of looking at the World*. Law is a technique for reducing the complexity of the reality of human conduct outside of law. This is the only necessary function of law; all other functions or attributes are epiphenomenal in nature. Even *if* we assume (and I do not) that law ought to be obeyed or enforced, that law ought to regulate, condition, or direct human behaviour, that can *only* be done after law has served its initial epistemic function. In order to function as a normative discourse, law must give a baseline against which actions can be evaluated; only after this has occurred can ‘remedial’ action be undertaken to ameliorate, or atone for, any divergence between legal expectation and actual conduct. The first task has lexical priority, and, moreover, is, in my opinion, the *only* task truly germane to law.

#### KOSKENNIEMI’S CRITIQUE:

##### The Oscillation Between Apology and Utopia and the Consequent Necessity of

##### Radical Indeterminacy:

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theorist. However, my own commitment is to the first variant of formalism. A commitment to what Franck has termed “idiot rules”, see *The Power of Legitimacy Among Nations* 67-83.

Koskenniemi claims that, no extant theory of CIL has escaped the apology-utopia dialectic, and also that no theory *can* escape this dialectic; the collapse of theories of CIL into apology, utopia, or oscillation is a *conceptual necessity*. CIL (indeed PIL as a whole) is inherently indeterminate, and as a result can *always* be made to defend its subjects' political choices.

The combined effect of the elements of necessary indeterminacy is that PIL must remain trapped in destructive oscillation between apology and utopia. Each of the competing value-commitments is manifested in one pole or the other. Consequently, a neutral, objective, PIL is conceptually impossible, as it would simultaneously require the law to be concrete and normative, but:

The two requirements *cancel each other*. An argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and the more political it seems. The more it seems just another apology for existing power. An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule's distance from state will and practice. The more normative a rule, the more political it seems because the less it is possible to argue it by reference to social context. It seems utopian and – like theories of natural justice – manipulable at will.<sup>3</sup>

Hence PIL conducts its illusory existence in the dialectic between Apology and Utopia, in a perpetual and manipulable oscillation between these poles. As a process

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<sup>3</sup> Koskenniemi M., "The Politics of International Law" 1 EJIL (1990) 4, at p. 8

law cannot be differentiated from description, it has no normative value. At its normative pole law has no objective support, it is a disguised (and illegitimate) political manoeuvre.

As the force of Koskenniemi's critique has been demonstrated in the previous chapter, the focus of the present chapter is on the *inversion* of the critique; the elucidation of a theory of CIL which is *neither* apologetic nor utopian. The articulation of the very theory Koskenniemi claims to be impossible.

#### My Initial Misreading:

When I first with engaged Koskenniemi's critique, I thought that his charge of the necessary indeterminacy of PIL was, to say the least, overstated. I even thought it contradictory:

Koskenniemi, however, argues that, because the application of any formal test can have relatively indeterminate results and a margin of 'political' discretion – i.e. a choice of justice theory – is involved in the distillation and application of legal rules, objectivity becomes a myth. This argument, while superficially persuasive, is ultimately unfair. Language, and therefore the articulation of rules, will always permit of a degree of uncertainty, but any suggestion that this precludes objective, or at least consistent intersubjective, understanding is ultimately self-defeating. If this were not so, what would save the written claim of radical indeterminacy from its own charge; why would it alone be intelligible?<sup>4</sup>

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<sup>4</sup> See Beckett J., "Behind Relative Normativity: Rules and Process as Prerequisites of Law" 12 EJIL (2001) 627, at p. 644.

This was an inaccurate reading, and thus an unfair critique. My one redeeming claim in this regard is that at least I was not alone:

The articulation of the experience of fluidity in *From Apology to Utopia* has sometimes been misunderstood as a point about the semantic open-endedness or ambiguity of international legal words. ... But the claim of indeterminacy here is not at all that international legal words are semantically ambivalent. It is much stronger (and in a philosophical sense, more "fundamental") and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled.<sup>5</sup>

In other words, Koskenniemi's assertion of the necessary indeterminacy of PIL is deeper and more sophisticated than the caricatured thesis I and others thought we had refuted.

#### The Real Cause of the Problem, Competing Value Commitments:

Indeterminacy is not semantic in nature, but flows from the fact that rule-makers, and rule-appliers, are *simultaneously committed* to an array of *conflicting* values and desires, and that these are manifested in rules simultaneously pursuing different and *conflicting purposes*:

To say this is not to say much more than that international law emerges from a political process whose participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future ... Even where there is little or no semantic ambiguity about an expression in a rule ... that expression cannot quite have the normative force we would like it to have. ... because no rule is more important than the reason for which it is enacted, even the most unambiguous rule is infected by the disagreements that concern how that reason should be understood and how it ranks with competing ones. ... It follows that it is possible to defend *any* course of action - including deviation from a clear rule - by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions and interpret rules in the context of evaluative standards.<sup>6</sup>

Moreover, it should be noted that, from Koskenniemi's perspective, this 'problem' (indeterminacy) is not, in fact, a problem at all:

The important point I wish to make in *From Apology to Utopia* is not that all of this should be thought of as a scandal or (even less) a structural "deficiency" but that indeterminacy is an absolutely central aspect of international law's acceptability. It does not emerge out of the carelessness or bad faith of legal actors (States, diplomats, lawyers) but from their deliberate and justified wish to ensure that legal rules will fulfil the purposes for which they were adopted. Because those

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<sup>5</sup> Koskenniemi M., *From Apology to Utopia* (2<sup>nd</sup> ed.) "Epilogue" p. 27. Note, this edition has not yet been published, all page references are to the unpublished manuscript (on file with author) as printed as a free-standing word document.

<sup>6</sup> *Ibid.* pp. 27-8, paragraph break suppressed and footnotes omitted.

purposes, however, are both conflicting as between different legal actors and unstable in time even in regard to single actors, there is always the risk that rules – above all "absolute rules" – will turn out to be over-inclusive and under-inclusive. ... This fundamentally - and not just marginally - undermines their force. It compels the move to "discretion" which it was the very purpose to avoid by adopting the rule-format in the first place.<sup>7</sup>

Nonetheless, *I* contend that such indeterminacy *is* a problem; that it precludes PIL from working as it ought to, from fulfilling its (best available) purpose. I also contend that this issue of indeterminacy can be resolved, that a functioning, neutral, and determinate PIL (and CIL) *is conceptually possible*.

#### Koskenniemi's Confused Resolution: Deny, But Work With, Indeterminacy:

Koskenniemi himself appears trapped within something resembling the apology-utopia dialectic. At times he claims this indeterminacy 'just is'; at times that it is conceptually inescapable; and at yet other times that it is normatively desirable. These positions would seem to map quite nicely onto: apology, necessary oscillation, and utopia, respectively. Nonetheless, this indeterminacy should not be acknowledged:

Little seemed to be gained from thinking about international legal argument as being "in fact" about something else than law. Had I responded to my superiors at the Ministry when they wished to hear what the law was that this was a stupid question and instead given them my view of where the Finnish

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<sup>7</sup> *Ibid.*

interests lay, or what type of State behaviour was desirable, they would have been both baffled and disappointed and would certainly not have consulted me again.<sup>8</sup>

Yet, without admitting to doing so, that is exactly what the competent international lawyer must do. Law is radically indeterminate, and can support any argument. It is deployed to promote someone's view of "where the [State's] interests [lie]".

Consequently, at the descriptive level, there is a danger of Koskenniemi's analysis, precisely by accepting and legitimating these contradictions, degenerating into a self-fulfilling prophecy:

It only shows the inevitability of political choice, thus seeking to induce a sense that there are more alternatives than practitioners usually realise, that impeccable arguments may be made to support preferences that are not normally heard; that if this seems difficult through the more formal techniques, then less formal techniques are always available – and the other way around.<sup>9</sup>

Ultimately, however, what I wish – and thus what I *choose* – to focus upon is Koskenniemi's *plea*, made in his keynote address to the European Society of International Law.<sup>10</sup> This, as I understood it, was a plea for a neutral and determinate PIL, a project encapsulated in the move from instrumentalism to formalism.<sup>11</sup> That is,

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<sup>8</sup> *Ibid* p. 3

<sup>9</sup> *Ibid* p. 38

<sup>10</sup> This has subsequently been published as "International Law in Europe: Between Tradition and Renewal" 2005 EJIL 113.

<sup>11</sup> *Ibid* p. 124.

in the move from rules used “instrumentally” to justify pre-formed policy choices, to “formalist” rules which can be counterpoised to policy choices (desires).

METHODOLOGICAL CONFLICTS: KOSKENNIEMI’S EMPIRICISM AND MY IDEAL POSITIVISM:

This appears to be the critical issue, the crux of the problem: Koskenniemi and I adopt incommensurable methodologies. It is, I suspect, for this reason that Koskenniemi does not consider idealising the rules of PIL as a potential resolution of the indeterminacy issue: no social practice methodology can cognise an ideal idea. This distinction manifests itself in Koskenniemi’s claim that, “the closer to state practice an argument is, the less normative and the more political it seems.” Because it is in this statement that Koskenniemi implicitly rules out the possibility of *idealising* state practice. The critical question from a positivist (or ideal) perspective is: *which* state actions ought to *count as* state practice? That is, what is state practice?

It is precisely by understanding state practice as an ideal idea – that is, as a structured and justified *selection* of specific actions from amongst the mass of state conduct – that a distinction can be drawn between those state activities which are pertinent to the norm creation process and those which are not. It is *that* distinction which allows the establishment of the conditions within which CIL can generate rules which can be simultaneously normative and concrete.

The Purpose of Methodology Reprised (the *structured* reduction of complexity):



Methodology is, at its most functionally basic level, a technique whereby the complexity of reality is reduced to manageable levels. This is accomplished by privileging certain aspects of reality. Thus, from the overwhelming array of “space-time-events” the privileged few are abstracted, isolated and deemed to be relevant. Consequently, methodology is simply a signifier denoting the technique through which certain data is included in our (momentary) focus, and by which all other data is implicitly excluded. Methodology is the construction of the epistemic grids whereby reality is rendered intelligible. In our specific context, methodology is the set of techniques whereby the data which will function to constitute the phenomenon “Law” is identified.

Methodology is the construction, and ideally the evaluation, of the categories through which we can make sense of the world. Once this is realised, it becomes obvious that the categories themselves represent the *conclusion* (and in a sense the compression) of their host theories, and that these theories must be chosen between. The role of methodology then is to provide structure to this act of choosing between theories and categories.

#### THE IMPOSSIBILITY OF EMPIRICISM: DATA MUST BE CLASSIFIED:

Despite its methodological weakness, Koskenniemi adopts a variant of the ‘social practice’ model of law, whereby:

"competence" in international law is not an ability to reproduce out of memory some number of rules, but a complex argumentative practice ... We develop

an ability to distinguish between competent arguments and points [which] somehow fail as *legal* arguments. The descriptive thesis in *From Apology to Utopia* is about such intuitions. It seeks to articulate the *competence* of native language-speakers of international law. It starts from the uncontroversial assumption that international law is not just some haphazard collection of rules and principles. Instead, it is about their use in the context of legal work. ... even in the midst of political conflict, international lawyers are able to engage in professional conversation in which none of the participants' competence is put to question by the fact that they support opposite positions. ... [W]hatever else international law might be, at least it is how international lawyers argue, ... But ... [w]hy not speak directly to the legal rules and principles, the behaviour of States, the stuff of law as a part of the international social or political order? *From Apology to Utopia* assumes that there is no access to legal rules or the legal meaning of international behaviour that would be independent from the way competent lawyers see those things.<sup>12</sup>

This “competence” can be articulated as a “grammar” of international law:

The grammar that emerges from the analyses in *From Apology to Utopia* takes its starting-point from the tension between concreteness and normativity that structures all (competent) international legal speech. Any doctrine or position must show itself as concrete - that is, based not on abstract theories about the good or the just but on what it is that States do or will, have done or have willed. A professionally competent argument is rooted in a *social concept of*

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<sup>12</sup> *Supra*, note 5, p. 7.

*law* - it claims to emerge from the way international society is, and not from some wishful construction of it. On the other hand, any such doctrine or position must also show that it is not just a reflection of power - that it does not only tell what States do or will but what they *should* do or will. It must enable making a distinction between power and authority and, in other words, be normative. The more concrete an argument is, the less normative it appears, and vice-versa. This tension structures international law at various levels of abstraction.<sup>13</sup>

#### Criticism 1, Failure to Reduce Complexity Adequately:

By understanding law, and thus PIL, as a social concept, Koskenniemi must focus on the empirically identifiable. However, Koskenniemi's methodology does differ from the Hartian or Dworkinian understanding; it is not, quite, a social practice methodology, because Koskenniemi does not presuppose that law possesses the coherence necessary to understand it as a practice. In other words, Koskenniemi adopts a variant of Unger's idea of "mapping" the legal order (of PIL). There is, however, one crucial difference: the absence of centralised institutions.

Thus, where Unger advocated mapping the decisions of centralised legal institutions (courts), Koskenniemi must focus on legal arguments. However, being bereft of institutional vetting – by which 'good' legal arguments could be separated from 'bad' ones – Koskenniemi must accord the label 'legal argument' to arguments emanating from 'lawyers'. This creates a very wide category of raw data, as there is no

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<sup>13</sup> *Ibid*, p. 12.

distinction between ‘winning’ and ‘losing’, ‘successful’ and ‘unsuccessful’ arguments. There are only arguments which are adopted, and those which were not. However, as Koskenniemi himself has noted, adoption of legal arguments owes more to the desirability of their conclusions than to their intrinsic merits. In short, ‘legal arguments’ is a category in which contradiction is endemic.

#### Criticism 2, Circularity in Data Identification:

Koskenniemi effectively dismisses the idea of understanding law as an ideal idea when he locates its existence in the practice of lawyers. However, as noted in chapters 1 and 2, such an escape is not actually available, it presupposes the ‘objective existence’ of ‘lawyers’ as some essentialised (or at least essentialisable) reality. But, what constitutes a lawyer is a product of agreement, and thus of definition. Moreover, Koskenniemi’s particular methodology is – on this issue – patently circular. “Competence” is the capacity to engage the practice, but the practice itself is identified by reference to “competent lawyers” (i.e. practitioners). In short, competence distinguishes lawyers from laymen, but the distinction between the arguments of lawyers and laymen is the definition of competence. This can be avoided only by treating legal argument – implicitly or explicitly – as an ideal idea.

#### Criticism 3, Random Reduction in Complexity Nonetheless Occurs:

A similar difficulty arises in regard to the “tension between concreteness and normativity”, and more particularly the (implicit) *definition* of concreteness. “A professionally competent argument ... claims to emerge *from the way international*

*society is*". But this is simply not so. A legal argument, or legal theory, does not claim to emerge from the way the *whole* of a society – international or not – *is*; it comes from the way *certain aspects* of that society are. Rooted in reality does not mean reflective of the *whole of* that reality, but reflective of certain parts of it.

This opens a simple question: which aspects of international society ought to be reflected in PIL? This leads to another, simpler yet more profound question: why? Why *those* aspects and not others? It is *impossible* to root anything in the totality of reality, because that totality is incapable of being cognised intelligibly. Consequently, a good theorist bears the burden of *justifying* her or his particular reductions, of justifying the decision to privilege (to abstract) the particular aspects of reality their theory demands.<sup>14</sup> Koskenniemi does not appear to recognise, nor rise to, this challenge.

#### Miscellaneous Additional Critical Observations on Koskenniemi's Methodology:

Koskenniemi's critique also displays what we might term the pathologies of 'pragmatism'. He claims that PIL must be capable of producing 'reasonable' answers, and that that necessitates flexibility:

This may require lowering the expectations of technical certainty and increasing sensitivity to the ways in which law gets spoken.<sup>15</sup>

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<sup>14</sup> See chapter 3, notes 9-20, and accompanying text, *supra*..

<sup>15</sup> *Supra*, note 10, p. 119.

Turning this into *critique*, he suggests that fixed or formal rules are likely to prove “over” and “under” inclusive. This, he claims, makes them bad rules or, more precisely, bad legal rules. This criticism manifests a collapse of the is/ought, and the descriptive/censorial, divides in legal theorising. It seems premised on the assumption that legal rules have, also, to be pragmatically or morally ‘good’ rules. More importantly, Koskenniemi does not identify the standards by which (acceptable) inclusiveness is to be judged. Consequently, this desire for law descends into Koskenniemi’s own apology-utopia dialectic. The turn to “grammar” merely *disguises and perpetuates* these pathologies. Koskenniemi’s thesis becomes a self-fulfilling prophecy.

Perhaps the preceding criticisms will seem unfair, after all, Koskenniemi was simply describing a social practice *as it is*, but that is the very heart of the problem: there can be no such thing as a ‘social practice as it is’. A social practice is a social construct; it is not a thing in itself. To ‘observe’ a social practice one must first identify that practice, and to do so, one must, implicitly or explicitly, *define* that practice.

It is only by reference to our categories of thought that we can impose intelligibility onto ‘reality’. It is the proximity of certain aspects of reality to a pre-formed ideal which allows us to group those aspects of reality together, to assemble them into a distinct phenomenon, in this case the law or legal practice. The social practice of law relies on the understanding of law as a category (enforced or authoritative command) to structure and understand a ‘reality’ of law as a social practice. This cognition of reality is only possible because the data privileged for abstraction from reality is

sufficiently similar to this ideal image to be recognisable as a member of that category, or as an instance of that concept.

Consequently, the category itself must be articulated and explicated; or at the very least assumed. It is the act of creating and imposing a category, and that act alone, which can *constitute* the ‘practice’ as an object capable of being subjected to analysis. Koskenniemi has fallen into the trap of orthodoxy: to constitute the social practice of law as an observable object, he has constituted that practice by implicit reference to the *necessary centrality* of the legal. He has assumed the authority of law.

This is an orthodox assumption, but it cannot be defended solely on the grounds of that orthodoxy; nor can it be defended on the ground of empirical accuracy, as it has no data outside of itself against which it may be evaluated or validated. Instead, the assumption must be analysed purposively. What is the purpose of socially central law? At first glance, the answer is obvious: its purpose is to regulate human behaviour. However, it cannot achieve this by reference to rules, as Koskenniemi himself has shown. Socially central (definitionally authoritative) law is *necessarily indeterminate*, because this is the price for its political acceptability. In a centralised legal system, e.g. a municipal system, this indeterminacy can be disguised, because law can bring momentary determinacy by *authoritatively allocating final decision-making power* to named institutions (usually courts). Moreover, practitioners and academics can then “service” the system, disguising and denying its indeterminacy by unconsciously idealising it as a rational reconstruction.

This approach, *by definition*, can only work in a centralised legal system. In a decentralised system, authority is decentralised, and consequently the allocation of decision-making authority is also decentralised; it is spread amongst “authoritative decision-makers”. An inherently indeterminate law has no role to play in a decentralised system. Nonetheless, Koskenniemi has made it abundantly clear that his was not a proposal for the development of authoritative, or centralised, institutions:

The fact that there is no alternative institutional blueprint in this book is not an incidental oversight. ... Indeed, ... institution-building seem[s], as David Kennedy would say, "part of the problem". ... Today, it often seems that academic work in the field is justifiable only if its ends up in a proposal for institutional reform. From the perspective of *From Apology to Utopia*, however, the offer of policy-relevance by engaging in institution-building was a poisoned chalice.<sup>16</sup>

In short, to maintain its ‘centrality’ Koskenniemi robs law of its normativity, and in doing so denies law any role outside the *legitimation* of state conduct. PIL becomes necessarily apologetic, and *that* is its “instrumentalism”. The law (i.e. the rule chosen because of the desirability of its content) becomes the instrument by which pre-selected state conduct is legitimated.

The law ‘controls’ all decisions, but it conditions very few, and determines none. The law is *permitted* to remain ‘central’, but only because it always and only ‘demands’ or ‘mandates’ what the state in question wished to do anyway. Only power is left as a

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<sup>16</sup> *Supra*, note 5, p. 39.



true determinant of the ‘legal’ and the ‘illegal’; because the law always and necessarily says what the powerful wish it to say. This necessitates the move from instrumentalism to formalism, but the details of that move are not provided by Koskenniemi; because they cannot be understood from within the methodological structures he has adopted.

We can identify the possibility of a theory of CIL which adopts the premises, but denies the conclusions, of Koskenniemi’s critique. But only by understanding (or theorising) law as an ideal idea. To understand why ideal idea theorising can do this, attention must be turned to the structure of Koskenniemi’s critique, which must itself be explicated from the perspective of the ideal idea. Put differently, it is from the perspective of the ideal idea that I am best able to constitute the intelligibility of Koskenniemi’s critique, and consequently, it is from that perspective that I see the possibility of refuting – or inverting – that critique.

#### DISAGGREGATING KOSKENNIEMI’S CRITIQUE:

##### The Meanings of Apology and Utopia:

There is an unnecessary complexity in Koskenniemi’s critique induced by his failure to separate three questions dealing, respectively, with the ontology of law, the content of particular norms, and the obligation to obey the law. Koskenniemi struggles heroically, but ultimately unsuccessfully, to mount a parallel critique at all three levels. The unfortunate outcome is an opacity in the meaning of his central terms

(apology and utopia) as each bears the burden of three separate but related contents corresponding to the three levels of critique.

Before responding to this, we must understand the poles themselves. Koskenniemi's critique can be read in either of two ways: we can understand the critique as truly deconstructionist in as much as its own polar dichotomy has always already been deconstructed: the poles are so reliant on one another that they meet conceptually. Perceived in this way, apology relies on and contains utopia, and vice-versa. Alternatively, we can adopt a more rigorously analytic model and examine the elemental components of each pole in isolation.

This latter perspective offers greater clarity, and elucidates certain confusions and elisions within Koskenniemi's analysis; it shall be adopted for the remainder of this thesis. This perspective brings into relief the multiple definitions of each pole as it operates in Koskenniemi's critique.

Apology has three distinct meanings:

1. CIL is descriptive of what States do:

The critical purchase of this claim lies in the assumption that law must be normative. This is the most important of the three meanings of Apology: the law is necessarily created at the point of 'application'. Consequently, the law can only describe, but can never regulate state conduct, or at least the conduct of the most powerful states. Any

postulated course of action is capable of being defended by reference to legal rules, by reference to “impeccable legal arguments”.

This version of the critique presupposes the temporal collapse manifested in social practice methodology. It presupposes that everything which has previously been accepted as a “competent” legal argument will be accepted again. It assumes that law creation necessarily takes place at the point of law application, and consequently draws no distinction between those manifestations of state action and will which ought to be considered law-constitutive, and those which ought not to be so considered. It is for that reason that the reintroduction of the temporal axis to the analysis of law is so vital, as it is on that axis alone that this aspect of Koskenniemi’s critique can be withstood.

## 2. CIL reflects the wishes of its subjects:

Higgins presents a different analysis of Koskenniemi, one which roots apology in the consensual nature of PIL *per se*; in effect Higgins argues that Koskenniemi perceives law as the vindication of authority over power, and that, as a result, no consensually agreed code could amount to law. Consent itself, in Higgins’ reading of Koskenniemi, precludes law, because no consensually agreed code could be normative.<sup>17</sup> This top down definition of the necessity of imposing law seems both irrelevant and politically reactionary, it goes against what we could call the democratic spirit of our times. If the apologetic pole of Koskenniemi’s critique is to have force, it must be a critique of the form and function, not merely the substance, of law.

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<sup>17</sup> See Higgins R. *Problems and process, International Law and How we Use It*, at pp. 15-6.

Once it is accepted that law *must* be an embodiment of values, the congealed essence of *somebody's* values or the outcome of some political struggles,<sup>18</sup> it scarcely seems a criticism at all that the particular values embodied were consensually chosen. It is only the alteration of the rules to meet putative new values *at the point of application* which would deprive law of its normativity. The normativity of law is *not* a disguised claim to the impartiality of law, let alone of legal rules. Rules are not, and cannot be, impartial – as embodiments of value they are definitionally partial – but the function of law is not to be objectively impartial, but to provide *common* standards against which diffuse conduct can be (quasi-)impartially evaluated.

### 3. CIL reflects only the wishes of States:

Although, methodologically and theoretically, simply a variant of meaning 2 above, the third version of the apology critique does possess a far greater political impact. In effect, it rails against international society as a political system, built on the primacy of the State form. States are portrayed as evil, or at least selfish. Why then should it be the congruence of *their* interests, and not the interests of their peoples, which dictate the content of the law? This criticism, and its force, can be well illustrated by reference to the manner in which the Laws of War – particularly before the advent of Additional Protocol 1 to the Geneva Conventions – privileged States and their armies.

Taken in isolation, the requirement, encapsulated in art. 13 of the *First Geneva Convention* of 1949, that “members of organised resistance movements ... fulfil the

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<sup>18</sup> See, e.g. Asmal K, ‘Truth Reconciliation and Justice: The South African Perspective’, 63 *MLR* (2000) 1, at 15, n. 72.

... criteria ... of having a fixed distinctive sign recognizable at a distance”<sup>19</sup> seems unproblematic. This serves to distinguish combatants from civilians, and thus to protect the latter. However, and this I believe is Koskenniemi’s point, it *also* serves to make ‘lawful’ rebellion or insurrection (revolution according to the rules of IHL) tantamount to collective suicide on the part of the rebels. This rule was agreed between *states*, and it is in the common interests of states (though not, necessarily of their peoples) to hinder any possibility of revolution.

We can also see this form of apology rear its head in relations between states, particularly in relations between victors and vanquished. Commenting on the Nuremberg trials, historian Sven Lindqvist has noted:

[R]ather than establishing that the Allies too – in fact, especially the Allies – had committed this kind of War Crime, the American prosecutor declared that the law had been rendered invalid by the actions of the Allies.<sup>20</sup>

However, from a strictly methodological perspective, this is not a critique of the possibility, nor even of the desirability of PIL *per se*. It does provide an excellent perspective from which a critique of the substantive content of contemporary PIL could, and should, be mounted, but ultimately confuses the ‘how’ and the ‘why’ of law-making.

#### Two Meanings of Utopia:

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<sup>19</sup> Art 13 (2) (b).

<sup>20</sup> Lindqvist S. *A History of Bombing* para. 239.

Alongside these three competing visions of Apology, Utopia bears two contradictory meanings:

1. CIL reflects a consistently imposed political theory:

The crux of both meanings of apology is an attack on the illicit imposition of a political theory onto an international society, which is assumed to be heterogenous. To impose a fixed political theory – in the assumed absence of its ‘objective truth’ – is anti-pluralistic; it is an act of moral imperialism. As there is neither an objectively correct political or moral theory, the law should be (made, or understood, to be) identifiable without recourse to political or moral theory.

2. CIL reflects an indeterminate political theory:

This is probably the most forceful of all the critiques of apology or utopia. It blends the failings of the first manifestations of *both* apology and utopia. An indeterminate utopian CIL would be both morally imperialistic, and open to manipulation at the point of application. This remains true even if the indeterminacy is a price paid for moral or political consensus. In particular, any attempt to ‘identify’ a ‘universal ethics’ would have to be formulated at such a high level of generality as to support multiple and conflicting concrete applications. As a result, any law requiring concretisation against such ethics would also be open to multiple conflicting interpretations.

Interim Conclusions:

Only the first version of apology and both images of utopia are genuinely critiques which require refutation. The second and third manifestations of apology are different. The second ‘critique’ in particular merits respect and not derision. It acknowledges the necessarily value-laden nature of law, and seeks to ensure that the law reflects the values and desires of its subjects. This should be understood as its great *strength*, not its weakness, at least by anyone who believes in the idea of democracy. The third version of apology is a political (not a legal) critique; the question of the goodness or badness of States is radically separate from the question of the conceptual validity or practicability of CIL. So, the real question is, can we construct a theory of CIL which encapsulates these but is not susceptible to the other critiques? The answer, of course, is yes.

#### TOWARDS A SOLUTION:

A solution, a viable response, to Koskenniemi’s critique can only be ‘discovered’ or constructed by accepting the necessity of, and understanding a move to, ideal idea methodology. It is only by *structuring* the reduction of complexity that this process can be made to yield manageable and determinate results. Consequently, we must construct the ideal of CIL.

#### The Functions of the Ideal of CIL:

The ideal idea of CIL, the image of CIL, allows us to make sense of ‘reality’, to abstract parts of that reality to constitute something recognisable as law or a legal

system. However, the ideal *also* serves as the point from which that present reality can be critiqued. Analogously, the ideal allows us to identify the extant norms of CIL, but that in turn facilitates critique of those norms. Consequently, the ideal image serves four separate (though related) functions:

1. Data identification, the *construction* of ‘the present’ of CIL. We can understand extant actions, events, processes, etc. *as* legally relevant or law-constitutive, or as legal arguments etc., *only* because of their proximity, or similarity, to our ideal image of law, or in this case of CIL.

Consequently, we must focus on the creation and content of that ideal, so as to better understand why we understand reality in a particular way. It is only from that understanding that we can generate an understanding of that reality as a coherent whole. This can be compared to Koskenniemi’s *randomly* constructed present of CIL as a social practice.

2. Critique of extant practices of rule formation. The reality is merely proximate to, rather than identical with, the ideal. The ideal functions to make reality intelligible, but this will also serve to highlight differences between that reality and the ideal. Consequently, the ideal serves as something to which reality ought to aspire; it gives *focus* (and consistency) to the critique of that reality.
3. The identification of legal norms (in CIL). Although the extant processes ought to be critiqued for their distance from the ideal, they are nonetheless recognisably law-constitutive processes. Consequently, they are the realisation



of the ideal, and their effects (their ‘products’) also count as realisations of that ideal. Once we know what the ideal is, and how it operates in reality, we can use this knowledge to identify the legal norms of CIL.

4. Critique of extant norms. This is the separation of ‘descriptive’ and ‘censorial’ jurisprudence. Having accepted that the extant practices of norm formation, although recognisable as such, are flawed, it stands to reason that the norms they have produced over time will also be flawed. Consequently, the identification of extant norms also forms the *sine qua non* of the critique of those norms. This leads to a two-level struggle. Having gone to the trouble of identifying extant legal norms, it seems reasonable also to seek their application. However, we must also take seriously the critique of the substance of these norms. The ideal of CIL is to reflect the wishes of all states, but in practice CIL is hegemonic, privileging the values of those states with the power to act. Consequently, its norms merit extended evaluation and critique. However, this critique must function alongside the demands for application. Put simply, it is bad enough that the law merely embodies promises reflecting the desires of the powerful; it is much worse when those same powerful states then seek to implement legal theories enabling them to avoid even those promises; to deny the weak even those crumbs.

#### ABSTRACT FUNCTION OF LAW: THE REDUCTION OF COMPLEXITY:

A Double Reduction of Complexity: The Norm as Legislator-Text and the Law as

Regulative Ideal:

The law necessarily operates by reducing the complexity of reality, moreover, the law itself is also a *product* of the reduction of the complexity of reality. Consequently, there are *two* movements of complexity reduction: *first*, certain actions are abstracted from the mass of human activity and are designated as law-creative; *second*, the laws, the legal norms, thus constituted are applied as an epistemic grid to subsequent human conduct to determine its ‘key features’ or ‘material facts’ and to provide a matrix within which that conduct, reconstructed in terms of those key features, can be legally evaluated. These two movements are consecutive but inter-related; the *authority* of the second stage is contingent upon the *legitimacy* of the first. This allows us to formulate another simple thesis:

Our responsibility *to* the law we identify is conditioned by our responsibility *for* the processes by which we assume law is created (and so by reference to which it must be identified).

Nonetheless, the two movements must be studied and analytically reconstructed in isolation. Law cannot be understood as a social practice in any real, or empirical, sense. This is because the ‘social practice’ is *itself* a reduction in complexity: it is a *product* of (pre)theory. This is a necessary epistemic response to the overbearing complexity of ‘real reality’. Therefore, the first question which must be faced is how to reduce the complexity of reality sufficiently to facilitate the identification of an intelligible entity ‘the legal system’. Only then can we begin to identify, recognise, elucidate, and apply the norms of that system to bring about a structured reduction of the complexity of the remainder of reality.

If the aim of law is to provide a *structured reduction* in the complexity of reality – and such an aim is *inherent* in an understanding of law legitimated by the production of determinate answers – then the reduction of human conduct to the law-creative must also be structured. The understanding of the legal system as a “regulative ideal” provides the structure for the second reduction (the reduction of the complexity of social life by reference to legal norms). However, the understanding of the ideal idea of the norm as legislator-text, itself, structures the *first* reduction. It is this, first, reduction which *constitutes* the regulative ideal (i.e. the process or product *governing* the rational reconstruction) itself.

Only by focussing on this first reduction can we prevent the regulative ideal, and thus the ‘legal system’ itself, from degenerating into a random series of reductions driven by nothing more than the personal preferences of the ‘norm identifier’. Only in this way can we maintain a clear distinction between the Rule of Law and the Rule of Man; most especially in the international arena.

It is precisely to perform this role, and to *initiate* the process of structured reduction that an ideal theory of law (in this case, an ideal theory of CIL) must be developed. This entails the necessity, and thus the possibility, of a specific form for PIL/CIL as opposed to Koskenniemi’s claim of the necessary ‘Formlessness’ of law:

From the fact that law has no shape of its own, but always comes to us in the shape of particular traditions and preferences, it does not follow that we

cannot choose between better or worse preferences, traditions that we have more or less hope to realise.<sup>21</sup>

We must seek to universalise not only a tradition, or preference, not only a content for law, but also a *form* of law. It is not enough to claim that “law has no shape of its own”, because that is precisely the issue at stake: *can* law have a fixed or set form? Absolutely, of course, the answer is no, but in any given specific setting, the answer is that law both *can and should* be understood as having a fixed form. Consequently, the present thesis is precisely directed toward elucidating the possibility that, and the conditions under which, law can have a “shape of its own”; and then toward identifying the ‘best available’ form for PIL. It is to accomplish these tasks that attention must be directed to the Form-Purpose Dialectic.

#### SYNOPSIS OF THE ONTOLOGY OF PIL: APPLYING THE FORM-PURPOSE DIALECTIC:

As law has no fixed ontology, nor any necessary features, its form in any given setting is dictated by the function it is intended to serve. However, law has no more of a fixed function, nor purpose, than it does a fixed ontology. Consequently, the only fixed point is the *relationship between* form and function. This relationship is governed by the form-purpose dialectic. The form imposed onto law is a direct consequence of the function the law is intended to serve (the purpose law is intended to fulfil) in the given specified social setting. The form of law is a manifestation of law’s reason for being, of law’s *purpose*.

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<sup>21</sup> Koskeniemi, *supra* note 10, at p. 119.

The form-purpose dialectic is the technique by which law is both constructed and identified; law is a product of this dialectic. Consequently, the dialectic must be applied; schematically speaking, to apply the dialectic we need:

- A Purpose for Law
- A Specific Social Setting (International Society)
- A Set of Empirical Assumptions About That Society
- A Postulated Mechanism to Link Assumptions to Purpose

#### The Purpose of PIL:

To create a determinate ontology for law in any given setting, that law must be understood as pursuing *one single* purpose. However, to repeat an earlier point, this is a *formal* purpose<sup>22</sup> whose concretisation provides the ontology (but *not*, necessarily, the substance<sup>23</sup>) of law in that setting. In regard to PIL, I would suggest the following purpose as the most appropriate:

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<sup>22</sup> However, some formal purposes, e.g. the realisation of the liberal-individualist project do *entail* certain substantive contents for law, or at least limit or restrict the possible available contents of a legal system constructed by reference to them.

<sup>23</sup> See Chapter 2, notes 52-6 and accompanying text, *supra*.

PIL ought to facilitate the provision of agreed common standards for the ‘objective’ evaluation of State Conduct.

By separating different aspects of this conduct, and in particular by distinguishing conduct at the point of rule formation from that at the point of rule application, that we can identify rules of CIL which *are*, simultaneously, concrete (at the point of creation) and normative (at the point of application). The norms of PIL ought, at the point of their creation, to reflect the wishes, the congruence of the interests, of the community of States. As Koskenniemi has noted:

The fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal.<sup>24</sup>

PIL should pursue the provision of a common perspective from which the actions of states can be (legally) evaluated, that is, international law provides the rules against which conduct can be evaluated ‘objectively’.<sup>25</sup> As a result, it must also strive to produce determinate rules. I adopt this understanding of law, which endorses or may even actively entail a strict separation between law and politics,<sup>26</sup> as an act of *choice*; because law has neither necessary characteristics, nor a necessary function, but can only pursue the best available purpose in the best available manner.<sup>27</sup>

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<sup>24</sup> *Supra*, note 10, p. 115.

<sup>25</sup> Obviously, this is not an absolute neutrality, it is not an Archimedean point, but an agreed and fixed point, a substitute for neutrality. See chapter 1, notes 104-6, and accompanying text, *supra*.

<sup>26</sup> Though always already under the condition that legal rules are recognised as the congealed outcomes of political struggle.

<sup>27</sup> See ch.s 1-3 generally.

This affirms the political value of legal formalism, which I understand as the *most desirable* function of PIL. In a legal system lacking centralised institutions, lacking a universal morality, and in which no-one has the ‘right’ to impose their preferred morality, acceptable standards can only be those which are agreed amongst the group. Moreover, in the absence of centralised institutions, the rules need to be clear, and to the greatest extent possible “auto-interpretative”.<sup>28</sup> If this is not so, the rules will be used merely to legitimate (or describe) and not to evaluate, or regulate, the conduct of the more powerful. For this reason:

in a thoroughly policy-oriented legal environment, formalism may sometimes be used as a counter-hegemonic strategy.<sup>29</sup>

International society is, at present, precisely such a policy-oriented legal environment. In this environment, PIL, and especially CIL, are being used to justify the desires of the most powerful States. Only by defending the clarity of the rules, and the (moral) neutrality of the rule formation procedures can we hope to elucidate a legitimate *international law*.

#### Empirical Assumptions:

This purpose is drawn from a particular understanding of the present state of international society. In particular, I believe the following four conditions to be both ‘true’ and important.

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<sup>28</sup> Pace, Franck, *supra*, note 2; Koskenniemi *supra*, note 5 p. 29.

<sup>29</sup> Koskenniemi, *ibid*, p. 38.

## 1. The Redoubtability of the State Form:

The analysis offered is predicated on a strong central presumption that, for good or ill, the State exists, and will continue to exist as a major power centre for the foreseeable future. As Foucault – who could hardly be called a Statist thinker, let alone an apologist for State power – has noted:

For several centuries, the state has been one of the most remarkable, one of the most redoubtable, forms of human government.<sup>30</sup>

Moreover, I contend, that PIL does, and *should*, recognise and respond to this.

Consequently, this ‘empirical assumption’ also contains a normative movement:<sup>31</sup> PIL should recognise the State as privileged actor as this allows for accountability<sup>32</sup> and adequate complexity reduction. Consequently, this assumption functions to *deny* the relevance of non-State conduct. The “disaggregated State” is *not* an empirical truth worth recognising. *Pace* Slaughter,<sup>33</sup> PIL *should* focus on the unitary State. To do otherwise is to introduce too many variables into the definition of normatively relevant conduct, and consequently to tend away from the provision of *determinate* legal rules.

## 2. The Absence of Centralised Institutions:

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<sup>30</sup> Foucault M. “*Omnes et Singulatim*” in Faubion J (ed.) *Michel Foucault Essential Works of Foucault 1954 – 1984* vol 3 *Power* 298 at p. 325.

<sup>31</sup> Of course, this is true of *all* ‘empirical assumptions’ as ‘reality’ can *only* be made intelligible through reduction; and reduction is driven by normative commitments.

<sup>32</sup> This assumes the efficacy of the doctrines of state responsibility; responsibility for the conduct of *all* of a state’s citizens; including those overseas, and transnational companies.



The ‘international legal system’ is a decentralised one, because international society is decentralised, and ‘officially’ structured through horizontal rather than vertical relationships. It has no apparent Sovereign and, according to the doctrine of sovereign equality, no hierarchy amongst its (primary) members,<sup>34</sup> the states. Moreover, there exists in PIL no court of general *and* compulsory jurisdiction, nor is there a recognised legislature. The UN Security Council does have a degree of hierarchical authority within its own sphere of competence, but is best understood as an executive – and *not* a legislative nor judicial – body.

I posit the above purely as empirical ‘realities’, and maintain a strict normative ambivalence on whether to pursue an Institutionalisation Programme. Such a programme is neither entailed by, nor incompatible with, my project.<sup>35</sup> However, were a programme of institutionalisation to be pursued within the boundaries of my project, it would be an *inversion* of the Hartian or Realist understanding, with the competences and (legitimate) actions of the institution(s) *determined by* the pre-existing law.

### 3. The Absence of Automatic Sanctions for Breach:

Despite Kelsen’s somewhat desperate efforts to prove the contrary,<sup>36</sup> it seems apparent that – at least so long as PIL is understood as a(n even vaguely) determinate body of rules – there exists no operative mechanism whereby sanctions automatically flow from the breach of its norms.

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<sup>33</sup> *Supra*, note 1.

<sup>34</sup> That is, there is, on the orthodox formal reading, no *legal* hierarchy amongst states, but states as a whole are recognised as hierarchically superior to all other ‘subjects’ of international law.

<sup>35</sup> Koskeniemi maintains a powerful opposition to such projects, see note 16, *supra*.

The rules of PIL need not necessarily be enforced, but this means that non-enforcement cannot (necessarily) be equated with non-breach. Acts can be illegal but legitimate, as for example the Independent International Commission concluded in relation to the 1999 NATO campaign of ‘humanitarian intervention’ over Kosovo:

The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.<sup>37</sup>

The implication is that such illegalities ought to be condoned. They may or may not lead to a change in the law; the important point, however, is that the legitimacy, and the lack of enforcement, do not, *per se*, demonstrate or create legality. Moreover, state actions could be illegal, bad, immoral, illegitimate, and *still* not give rise to enforcement.

#### 4. The Absence of an *A Priori* Universal Morality:

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<sup>36</sup> Kelsen H. *Principles of International Law* (2<sup>nd</sup> ed) pp. 23-64.

<sup>37</sup> Independent International Commission on Kosovo: *The Kosovo Report*, “Executive Summary” “The NATO Air Campaign”, available at: <http://www.reliefweb.int/library/documents/thekosovoreport.htm>

The UK House of Commons Foreign Affairs Select Committee said of the same incident, “we conclude that NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds.” *Fourth Report*, para 138, available at: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm>

This functions as both an empirical assumption and a normative motor within my analysis of PIL. Obviously, it cannot be positively proven, no absence can.

Nonetheless, I would contend, at the very least, that no moral system proposed to date as universal or unifying has in fact proven to be so. Consequently, I simply *assume* that there exists no system of morality or ethics which can be taken, *a priori*, to be 'true' or universal.

#### The Mechanism of Law as 'Link' from Assumptions to Purpose:

Of the various sources of PIL, I seek only to offer a theory of Customary International Law (CIL). This is because, as demonstrated in chapter 4, this is the area most in need of consistent theorising. Consequently, the ideal theory of CIL must function as a mechanism within which the purpose pursued by PIL – the provision of neutral, agreed, determinate rules against which State conduct can be evaluated – can be realised within international society understood in terms of these empirical assumptions. What is required is a technique for the 'articulation' and recognition of agreed common standards from anarchy; the identification of 'true universals' without recourse to moral theory.

I believe that this can be achieved only by means of a variant of the classic synthesist theory of CIL. We must adopt a technique whereby we can select between state actions, and determinately identify those which effect legal change; i.e. those which exist not only as 'empirical facts', but are *also* transposed onto the separate, and insulated, ontological plane of legality. Such a theory must adopt a revised understanding of *opinio iuris*, which blends the two classic candidates, allowing each

to ameliorate the weaknesses of the other. In short, *opinio* must be understood as a combination of the normative intent of the acting state, and the reaction to those actions by the remainder of the international community.

In this way, the classic theory can differentiate breaches of the law from moments of normative evolution; it does not trap the law in perpetual stasis, but nor does it deprive the law of normativity. At least at the level of ideal, such a theory *successfully* negotiates the tension between stability and change. Both the vicious circle of stasis, and the elimination of normativity are overcome by understanding the formation of CIL as a reflexive process (but, one which generates provisionally fixed and determinate rules) in which the law-maker is the International Community as a whole, understood as a virtual Sovereign.<sup>38</sup>

#### THE NECESSITY OF THE TEMPORAL AXIS:

##### The ‘Necessary’ Temporal Collapse:

The most important version of the Apology critique presented by Koskenniemi is the claim that law must inevitably be created at the point that it appears to be ‘identified’.<sup>39</sup> In other words, law *cannot* accommodate a temporal axis which distinguishes law *creation* from law *application*, and holds the former prior to, and insulated from, the latter. As a result, the ‘identification’ of legal rules, being constitutive of those same legal rules, will tend (always) to ‘perceive’ precisely the

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<sup>38</sup> On the idea of a virtual sovereign, see notes 84-7, and accompanying text, *infra*.

<sup>39</sup> *Supra*, note 2, p. 8.

rules the law-applier *wishes* to find; they will become apologies for his political utopia.

However, what is striking about this claim is that it is identical to the temporal collapse Dyzenhaus perceived as undermining positivism as a whole. Both posit an inexorable identity between the identification and the creation of law. Moreover, in both cases, this appears to be predicated on a necessary connection between the identification of the law and the duty to obey the law. From this perspective, law can only be that which we do, or ought to have a duty to obey. Koskenniemi is less clear on this point than Dyzenhaus,<sup>40</sup> but this may be because his critique is one of indeterminacy, contrasted to the *utopian vision* underpinning Dyzenhaus' postulation of the collapse.

Like Dyzenhaus, Koskenniemi focuses on the identification and application of the law, under the condition that this is synonymous with the duty of obligation to the law, the reason for obedience to, and/or the authority of law as such. Thus for whatever reasons, Koskenniemi remains fixated on the 'necessary' authority of the law. He appears to assume that law must, by definition, be a socially central and authoritative discourse. This leads him to a variation of Dyzenhaus' conclusion: that the law must reach *correct*, rather than merely determinate, conclusions.

This may well be an intuitive recognition of what Motha has termed "the repetition of the sovereign moment" within the act of judgment, namely the originary violence of the self-positing of the law and the claim to authority<sup>41</sup> If so, Koskenniemi's error is

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<sup>40</sup> It is, however, necessarily implied in his ESIL paper, see, *supra* note 10, p. 119.

<sup>41</sup> S. Motha, "The Sovereign Event in a Nation's Law" 13 *Law and Critique* (2002) 311.

to fail to realise that this is a mediate, not an immediate, function of judgement.<sup>42</sup>

Moreover, it is a function mediated precisely by the relationship between the decision (the judgment) and the law (the rules structuring judgment). The sovereign repetition merely restricts the options available within judgment, as the judge cannot question the authority of law without undermining his own jurisdiction, and so removing his capacity to judge. The temporal collapse on the other hand, itself denies an independent existence to law. The argument is circular; the collapse is predicated on its own conclusion.

Koskenniemi's theory is not drawn from observation, but instead imposed onto observation, in support of the very Schmittian decisionism Koskenniemi purportedly sets out to "unmask". The theory becomes a self-fulfilling prophecy, precisely because it legitimises methodologically incompatible arguments as each being "professionally competent", as each being *valid legal arguments*. From this perspective, Koskenniemi can surely offer no sound reason why lawyers should adopt consistent methodological structures even within the same argument. Far from castigating synthetic approaches to CIL, far even from demanding that theorists, academics, or practitioners refrain from moving between theories to justify their

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<sup>42</sup> To some extent the actual immediacy of a relationship *portrayed* as mediated is precisely the point of Motha's critique of the *Mabo* case in this article. Motha deploys the idea of *anamnesis* to bring into relief a judicial technique of reconstructing, or more accurately re-constituting the law *within* the judicial decision. *Anamnesis* in this sense is the false portrayal of a new concept as a memory, a reminder, of an already extant concept, the construction of a "future anterior" which can then be recalled within the judgment. This passes off change as continuity and disguises the political moment in judgement. However, the open question remains, is this an integral feature of the functioning of judicial decision-making, or is it rather a perversion of judicial decision-making? Motha appears, albeit only implicitly, to support the latter understanding, see *ibid.* On the deployment of *anamnesis* in scientific thought see Feyerabend P. *Against Method*, esp. at pp. 73-7, on Galileo's reliance on *anamnesis* as a rhetorical tool in the production, and *legitimation*, of scientific "truths" at odds with the orthodox scientific paradigm of his day.

personal or state preferences, Koskenniemi defines their professional competence precisely by their ability to do so.<sup>43</sup>

Naturally, from such a perspective, the temporal axis is both irrelevant and impossible. This axis is a product of ‘pre-theoretical’ commitment to *making* the very choices in whose *refusal* Koskenniemi locates professional competence. The temporal axis can only work to the extent that there is a commitment to the production of an internally coherent *and authoritative* (i.e. orthodox) theory of law in any given area of legal practice. Condoning the deployment of inconsistent theories is *both* an act of choice, *and* a preclusion of the possibility of the temporal axis; because the law ‘identifier’ must choose between these theories at the moment of identification, only then does the specific norm come into being. However, it is *only* by reference to this axis – and the reduction in complexity entailed by its presupposed adoption of a orthodox theory – that an operative and determinate legal system can be envisaged.

To understand law as a social practice, it must be given empirical features by which it might be identified. This entails perceiving law as authoritative, which entails linking the content of law to the obligation to obey the law. In turn, this involves ‘fudging’ the reason for this obligation of obedience, so that all may still agree that the law remains socially central (and authoritative). However, if the content and the obligation for obedience are linked, and that obligation is then ‘fudged’, then the content will also be ‘fudged’; it will be indeterminate until the decision is made on why the law is authoritative in this instance. It is *that* decision which manifests the temporal collapse,

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<sup>43</sup> *Supra*, note 5, p. 38.

because all the key questions must be answered at once and anew in each ‘legal judgement’.

Once the temporal axis is reintroduced to analysis, the apparent oscillation in the identification of law and the obligation to obey law – which is functionally analogous to Dyzenhaus’ inexorable slippage from identification to separability theses – is itself unmasked and disappears.

The key is to separate these questions: what does the law demand in this situation? And, (why) is the law obligatory in this instance? It is in *reconciling* the answers to these questions that the purposive understanding of law comes to the fore. We must be sure that the demands of law do not subvert the purpose of law, either in the instant case, or in the creation of a given class of future possible cases. This entails rigidly *separating* and not conflating questions regarding the duty to obey law and those regarding the content of legal demands. Otherwise, the reason for obedience becomes, *in itself*, the content of law – do that which furthers law’s purposes. This is where the abuse Koskenniemi predicts manifest itself, because conduct and evaluation can no longer be separated, law must become either apologetic or utopian. To combat this tendency, law as a whole should be understood purposively, but individual rules should be identified positivistically.<sup>44</sup>

#### The Possibility of the Temporal Axis:

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<sup>44</sup> This may actually be a point on which Dyzenhaus and Fuller would have disagreed, as it seems probable that Fuller would have separated the two questions, albeit subsequently re-uniting them in the conclusion that the rule in question was not a legal rule, as law could only demand that which furthers



The temporal axis is a product of pre-theoretical commitment in the sense that some theories rely on it, while others preclude it. Consequently, the existence or denial of the axis depends on which theory is adopted. That is, the functioning of the axis is an act of choice, and making the axis function pre-supposes a commitment to *making* the ontological decisions which in turn form the first stage in the operation of the axis itself. In other words, the axis only comes into relief when one engages the question: what is (customary international) law?

Empirical (i.e. social practice) and value-centric, theories of CIL (and, in fact of law as such) are predicated on a temporal collapse; they do not acknowledge the temporal dimensions of law creation. That is why all such theories tend toward the creation of law at the point of its application. Classic, or positivist, theories generally abhor that outcome. Thus the temporal axis in the analysis of law must be emphasised. This axis has five distinct stages: the choice of purpose for law; the choice of mechanism to implement that purpose; the period of law creation; the period of *potential* normative evolution; and the period of law application. The first two stages represent the identification of the legal system, the latter three the functioning of that system. The latter three are immediately relevant to legal reasoning. These must be held rigidly separate and, more importantly, the role of values at each stage must be distinguished.

The first step in legal reasoning (stage three in the axis), law creation, must and ideally should, be value-centric; this should be beyond dispute. The only question here is to determine *how* to recognise particular values as legally relevant (as the basis of norms). That is, under which conditions is an empirical action *also* transposed to

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its purpose. However, it seems clear to me that for Fuller, the purpose of law does place effective limits on the scope (though not the content) of law.

the normative plane; which “acts of will”, under which conditions, are to be recognised as law-creative. At this stage, law, or at least CIL, *ought to be apologetic*. That is, good law *ought* to reflect the values of its subjects *at the point at which it is created*. However, the following two stages of the temporal axis ought to be value neutral. This allows a law to reflect State will and interest at the point it is formed (i.e. to be *concrete*), and yet ignore State will and interest at the moment of application (i.e. to be *normative*). The middle stage is the most awkward, and the central question is whether *at the moment of application* the norm has evolved or not. If it has, then in effect stage one is repeated; if not attention moves automatically to stage three.

The structure of the temporal axis can be summarised thus:

- fixing the ontology of law
- applying that ontology: creating norms
- altering norms
- identifying (‘recognising’) relevant norms
- applying those norms

Functioning of the Temporal Axis:

With the temporal dimension providing a mediation of the decision through law, positivism, especially within the (properly) anarchic conditions of (ideal) PIL, has a solid foundation on which to build. This is because the apology pole of Koskenniemi's critique is conceptually dependent on the inevitable creation of law at the point of its application, an understanding of adjudication which positivism dogmatically rejects. The point which Koskenniemi's collapsed analysis misses is that – because laws or any other norms are embodiments of value – at the point of their formation norms *must* represent someone's values. In Kelsenian terms, the “act of will” which constitutes a positive norm is, *itself*, the embodiment of a value. This is neither controversial<sup>45</sup> nor problematic as long as the temporal axis is respected. Laws embody values; they are value laden from the moment of creation. As long as the law itself does not alter at the point of application, the rule does not serve as an apology for the politically motivated action of those it evaluates; or at least not in the sense that Koskenniemi suggests.

The legal decision would be based on the rules, and would be apologetic (in Koskenniemi's second, and especially *third* senses) only to the extent that the rules themselves sanctioned and legitimated ‘abhorrent’ activities or ‘unfair’ practices, *before, during, and after* the incident under analysis. The law is not apologetic in Koskenniemi's first and important sense unless it changes at the point of application, though here the poles of his critique may meet, as the law would remain apologetic whether it changed simply because a state had transgressed (and thus formed a new rule), or because the particular transgression was mandated by an external moral code (whichever one happened to be symbiotically linked to the law by that author), and so

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<sup>45</sup> In none of its guises does positivism masquerade as a theory for the value free *creation* of law, but only ever as a theory for the value free *identification* of norms whose creation is always already

could not be perceived as transgression at all. Thus Koskenniemi's critique of apology is best understood, and of fundamental importance, as a critique of form not of substance.

The temporal axis provides the bulwark against this manifestation of the apology critique. Once the temporal axis is reintroduced, it becomes apparent (at least analytically<sup>46</sup>) that law creation, normative evolution, and legal interpretation and application are distinct events. This does not rule out the possibility that the duty to obey the law is determined by the purpose of law, nor that the purpose of law can affect or limit the substance of the law. But it does undermine the claim that the purpose of law (as such) has to determine the identification and application of the law to the extent that these become synonymous with renewed law creation. The task for a positivist theory of international law is to create a technique for identifying law (the actual norms governing the conduct in question) and applying law which *both* recognises the anarchistic nature of lawmaking in PIL *and* is capable of determinately distinguishing lawful actions from transgressions, and transgressions *simpliciter* from those illegalities containing "the seeds of a new legality".<sup>47</sup>

Moreover, in reintroducing this temporal dimension we can better identify and analyse the artificial collapse between the (holding of) transgression of the law and the imposition of a sanction. This is important for two reasons; first, it allows us to analyse the applicability of law as such to the "situations" under dispute. The applicability of law can be considered and evaluated *before* the demands of the legal

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presupposed.

<sup>46</sup> This is important, as Koskenniemi's critique is posed at the conceptual rather than the empirical level.

<sup>47</sup> D'Amato A. *The Concept of Customary Law*, p. 12.

rules, and the parties' obedience or disobedience to these, are analysed. The duty actually imposed by the norms of law, and the background duty to obey the law can thus be more easily separated.

Secondly, the duty also undermines claims to legality through motive, especially the neo-Austinian claim "we were merely enforcing the law, and in upholding the system we can hardly be claimed to have transgressed it" (i.e. law must have teeth to be law; to provide an obligation to obey). *Four* separate questions can now be identified: what did the law demand of state A?; how did A's conduct compare to this demand?; what did the law demand of state B?; and how did state B's conduct compare with this demand? In other words, *what the law demands*, is clearly differentiated from why or whether those demands should be followed, in other words why the law should be obeyed. This is particularly important in relation to those theories (perhaps in fact all legal theories<sup>48</sup>) which root the obligation to obey law in the fear of the consequences of disobedience.

In summary, the temporal axis serves three distinct functions:

1. It mandates us to determine the orthodox theory of law.
2. It allows us to distinguish the three vital periods of law creation, normative evolution, and law application.
3. It allows us to distinguish legal demands from law enforcement.

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<sup>48</sup> See Chapters 1 and 2 *supra*.

This leaves any successful theory of (legal positivism in) PIL with the burden of demonstrating (and so, in a sense effecting) a system for the creation of law which does not conceptually, i.e. necessarily, impose the specific values of some onto the others, but which also avoids uncritically reflecting all that states do in the “rules” of law; a law which is both concrete and normative. It is to the elaboration of such a procedure, and the demonstration of its immunity from *both* the negative version of the apologist pole and the utopian pole of Koskenniemi’s critique that attention must now be directed.

#### THE IMPACT OF KOSKENNIEMI’S CRITIQUE:

The present thesis *assumes* the validity of Koskenniemi’s critique – that both apologetic and utopian theories are unworthy of the name of law – but *denies* its comprehensiveness; there is a theory of law, even of CIL, which can be immunised from Koskenniemi’s destructive dialectic oscillation. Those theses which treat state practice and *opinio iuris* as entirely separate entities *must* tend toward one pole or the other, either descriptive or arbitrarily value-centric.<sup>49</sup> The same is true of any theory which conceives of law in social practice or social fact terms. This is why state practice must be *idealised*, moved out of the realm of mere conduct, but not into the jurisdiction of specific socio-political theories. State *practice* must be moved into an ideal deontological plane.

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<sup>49</sup> See chapter 4, note 82 and accompanying text, *supra*.

It is precisely the move to such an idealised plane that allows for the re-introduction of Sovereignty to international legal theory. The poles identified by Koskenniemi represent the absence and the presence of a unitary vision of sovereignty, considered to be constitutive of the field of sovereignty as such. Koskenniemi does not consider the possibility of the real virtuality of the sovereign,<sup>50</sup> that is, the possibility of the duality of role between sovereign and subject being internalised within the same actors (states). This oversight – alongside the social practice (empirical) methodology to which it leads – precludes, for Koskenniemi, the possibility of the idealisation of practice as a normatively separate modality.

Moreover, the Utopian pole – as portrayed by Koskenniemi – is doubly dangerous, as it represents unjustified moral imperialism, and also can provide no criteria to determine *which* morality to imperiously impose. It is therefore unjustified *and* indeterminate, and yet it is absolutely vital in order to prevent theories of CIL based on the separation and aggregation of practice and *opinio* from becoming apologetic. However, the Utopian pole could be rescued by the discovery or advent of a universal socio-political morality. This would, in effect, become a Kantian defence of value imposition. For the imposition of “true values” cannot really be an imposition, but must rather represent *freedom*.<sup>51</sup>

With the values themselves defined into law, the alienation of power would be to law as such, and not to a transcendent sovereign. Alternatively a named sovereign could be accepted as legitimate – as Tasioulas implied when admitting anti-pluralism was

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<sup>50</sup> See notes 84-7 and accompanying text, *infra*.

<sup>51</sup> This, in fact, is precisely the aim, though in my opinion manifestly not the outcome, of Teson’s *Philosophy of International Law*.

the deeper charge than indeterminacy.<sup>52</sup> This would be tantamount to contemporary theories of US, or “liberal-West”, hegemony. At a properly constructed utopian pole (effecting either or both law creation and application; simultaneously or consecutively) law can work determinately and normatively; all that is lost is that one strand of justification which Koskenniemi terms “social context”. This is a vision of law analogous to Simpson’s notion of “liberal anti-pluralism”;<sup>53</sup> what is lost is the essential pluralism of the world community. The extent of this loss is clearly and openly a question of purpose and preference only.

Koskenniemi’s critique covers and undermines all contemporary theories of PIL; it is a destructive, nihilistic analysis denying to each of them the dignity of law.<sup>54</sup> It is vital to realise that this is only important *if* one adopts Koskenniemi’s underlying assumption of the necessarily normative nature of law *and* the necessarily consensual nature of PIL. To perceive Koskenniemi’s critique as valid – as in any sense efficacious – one must adopt Koskenniemi’s understanding of law. Whether this condition is met or not depends entirely on how one defines law, and this in turn depends on the particular purpose ascribed to law. Nonetheless, I accept Koskenniemi’s challenge, and shall endeavour to outline a theory of CIL as law making in anarchy which avoids both poles and instead posits a consensual, but nonetheless normative, legal system of CIL.

What is required is a consensual theory of law which can nonetheless provide a normative perspective for the evaluation of the conduct of states. This is not

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<sup>52</sup> Tasioulas J., “In Defence of Relative Normativity: Communitarian Values and the *Nicaragua Case*” 16 Oxford JLS (1996) 84 at p. 116.

<sup>53</sup> Simpson G., “Two Liberalisms” 12 EJIL (2002) 537.

<sup>54</sup> See ch. 4, *supra*.



necessarily as paradoxical as it may seem; although the *prima facie* clash between states creating law through their conduct, and yet that very conduct being legally evaluable, is a serious one, it is not irreconcilable. What is required is a process of consensual law creation which also provides a technique for norm identification.

We require a technique by which we can identify *which* political products to recognise as law. However, this will be manifested as an epistemological point, as we must determine which conduct to idealise, to recognise as legally relevant, and thus to transpose to the insulated ontological plane of normativity. This can be achieved by adopting a neo-Hartian Rule of Recognition, but only once it is realised that this rule is at once a power and a duty; that it applies as both power and duty to the same actors, *but* that this is possible because each individual actor (State) is the bearer of two different identities (subject and official); and that it is the *form* – *not the substance* – of their conduct which differentiates these roles.

#### SUBSTANTIVISING AND DEFENDING THE PLAUSIBILITY OF THE IDEAL OF CIL (IDENTIFYING THE LEGISLATOR-TEXT):

##### The Existence and Legality of Law: PIL and The Rule of Recognition.

In order to identify the norms of any given legal system, we need a technique for distinguishing norms from other statements, and legal from non-legal norms. This is true regardless of the legal theory one adopts. That is, one needs a rule for recognising laws (of the system), a Rule of Recognition in Hart's useful terminology. In effect, the *grundnorm* plays or rather facilitates this recognisory role, but it also does much

more, by underwriting the very existence of rules or norms at a conceptual level. The rule of recognition on the other hand simply tells us how to identify legal obligations; as a duty, it tells us that we must identify legal obligations, and how to do so.

As Bos has noted,<sup>55</sup> Hart's theory of law appears at face value far more open to transposition to PIL than Hart himself assumes; there seems to be no reason why a Hartian methodology cannot recognise *forms* of law, rather than institutional manifestations of law. However, this is overly simplistic. Hartian *terminology* can be transposed to PIL, but Hartian *methodology* cannot. Thus, to transpose<sup>56</sup> the rule of recognition to PIL, we must first fundamentally re-work the very idea of the rule of recognition itself. Hart is in fact correct to say that there is no rule of recognition in PIL, at least not in a *fully* Hartian sense. This is because the rule of recognition can exist *only* as a product of *actual observation*. That in turn presupposes centralised judicial institutions whose behaviour and rhetoric could be observed in order to identify the real existence *and content* of the rule of recognition.<sup>57</sup>

Such centralised institutions are manifestly absent in PIL. Thus we must adapt the concept of the rule of recognition to the new environment (international society) to which we intend to transpose it. For such a transposition to function to produce insulated *legal* rules and argumentative practices, the rule of recognition must be understood counter-factually; it then becomes a substantivised version of the *grundnorm*. In short, I use the rule of recognition to signify the rules by which

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<sup>55</sup> See "Will and Order in the Nations-State System" in *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* Macdonald and Johnston (eds.) 58 at p. 72.

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

<sup>57</sup> Again, it is worth noting, that it is because of an analogous methodological commitment that Koskeniemi is led inexorably to the conclusion of necessary indeterminacy.

international courts (and all other international actors) *ought* to recognise (identify) legal norms. This has a similar *effect* to Hart's understanding of the rule of recognition, but no longer relies on the actual practice (and *a fortiori* the actual centrality) of judicial institutions; nor does it collapse into a description of indeterminacy and discretion, *a la* Koskenniemi.

### Theoretical Vulnerability:

Nonetheless, even understood counter-factually, the rule of recognition does have problems; even as a theory or technique, it remains analytically vulnerable, and is not without its critics. Fuller<sup>58</sup> offers a standard, but apparently devastating, critique: Hartians cannot tell whether the rule of recognition is power-conferring or duty imposing; they cannot tell us the status of their most basic norm. This, we are told, is a problem which has plagued Hohfeldian analysis from its inception; and the centrepiece of the Hartian project is precisely a neo-Hohfeldian distinction between primary and secondary rules – duties and powers. Thus this apparently illuminating intellectual torch turns out simply to darken in practice; to obfuscate rather than elucidate.

Fuller's critique is powerful, but fortunately it is based on a simple mis- (or perhaps non-) understanding; it does not recognise the fact that all exercises of powers *entail* duties. A power is only a power for those entitled to exercise it, while others are under the *duty* to recognise its exercise, as the exercise of a power re-arranges rights and duties. Indeed even those entitled to exercise a power will, in the normal run of

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<sup>58</sup> Fuller L. *The Morality of Law* pp. 237-8. For Fuller this critique has especial force as it entails his claim that as the rule of recognition involves duties it can be lawfully revoked on breach (*ibid*).

events, tend to find themselves placed under duties entailed by its exercise. This is easily illustrated by the paradigm case of a private Hohfeldian power, the power to alter another's legal relations unilaterally by concluding a contract through the acceptance of an offer. Before the offer was accepted, neither party owed any duties to the other. However, the acceptance of the offer, which was the exercise of a power, *directly entailed* the creation and imposition of duties on both parties – offeror and acceptor – to the new contract.

This may not be acceptable in the strict Hartian model, especially as reformulated by Raz. Hart seems at best ambiguous about the status of the rule of recognition, he is quite clear that it is not duty imposing in the normal sense as compliance with its demands "would not amount to obedience in the normal sense of that word"<sup>59</sup> and so, as Fuller notes, within the bivalent power/duty schema adopted by Hart, the rule of recognition *must* be power-conferring. Raz disagrees. For Raz, "as Hart himself has confirmed" to him:

There is no sense according to [Hart's] theory, in which power conferring laws can be customary laws, unless they are part of a system of which they are not the rule of recognition. Consequently it must be concluded that the rule of recognition is a duty-imposing law. The rule of recognition should, therefore, be interpreted as a D-law addressed to officials, directing them to apply or act on certain laws.<sup>60</sup>

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<sup>59</sup> Hart *Concept* p. 113. This is true, for Hart, of all legal powers, see *ibid* p. 28.

<sup>60</sup> Raz *J. Concept of a Legal System* p. 199 paragraph breaks suppressed, footnote omitted.

This is confirmed by Raz's acceptance of the bivalence of powers and duties in Hart's scheme.<sup>61</sup> As the rule of recognition cannot be a power, it *must* be duty imposing ("a D-law"). This analysis seems to miss the question of who can *activate* the rule of recognition; the question of who can give *content* to the duties owed by the system officials, and under which conditions this could be accomplished, namely *which* empirical occurrences (manifest objectively relevant acts of will, and therefore) *also* give rise to legal rules.

#### The Rule of Recognition as Power and Duty:

There is a tendency amongst neo-Hohfeldian scholars to seek an absolute individuation of rules, and therefore to impose a bivalence between the two primary Hohfeldian sets, the bivalence Hart sanctifies in the separation of primary and secondary rules. This may be motivated by a desire to retain purity, by showing that neither set reduces to the other; even *if* this claim were correct, a central point it overlooks is that neither category makes sense in isolation, but rather they reciprocally provide each other with context and intelligibility. There is a duality of role between powers and duties, and this extends with increased intensity to the rule of recognition.

Naturally, the duality of *role*, as power and creator of duty, also applies to those interacting with the rule of recognition. For those vested with law-constitutive powers, the rule of recognition is a power – it is precisely the manifestation of those law-constitutive powers; for others (especially lower system officials – e.g. judges,

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<sup>61</sup> *Ibid.*

administrators, the police, etc. – within Hart’s, tri-partite, classification<sup>62</sup>) it imposes a *duty to recognise the exercise of this power*. The exercise of the *power* (the rule of recognition) entails a *duty* to recognise and thus apply, within the bounds of (the authority of) the law, the rule(s) created by that exercise.

In a truly advanced system, as portrayed by Hart, the rule of recognition does not stand in isolation, but exists in a complex interrelation with the rules of adjudication and change. The rule of recognition authorises the rules of change, yet the rules of change affect the content of the duties imposed by the rule of recognition. Both thus impact immediately on *both* system officials and the general populace.

Rules of adjudication form the third point in this triangle; these empower judges to apply the norms determined by the other two rules, and place them under duties in the exercise of this power, should it be exercised. However, judges also have limited powers to change or evolve the law, and therefore influence the rule of recognition which ‘controls’ their activities. Moreover, the rule of recognition is itself distilled (identified) by reference to judicial conduct, and the rules of change *recognised* by the judiciary. Indeed MacCormick recognises:

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<sup>62</sup> That is a distinction between law makers, law appliers, and subjects. It should perhaps be noted here that Hart’s distinction between system official and subject is too rigid, both components are necessary to a concept of law, but that they be held by discrete actors is not. Moreover, as Kramer shows, Hart’s minimum is not in fact the minimum level of commitment required for the operation of a legal system; rather system officials could be motivated purely by prudential self-interest, i.e. a belief that they are well off under the system could in fact supplant *any* necessary belief in the system. See Kramer M. *Law Without the Frills: A Defence of Legal Positivism*. Interestingly, Hart would actually appear to have considered and (incorrectly) dismissed this idea, see *Concept* pp. 115-6. An alternative possibility, however, would be to view this criterion as a minimum *empirical* demand for a *functioning* and consequently *identifiable* rule of recognition. It is only if judges are committed to the system that we will be able to discern sufficient similarities between their decisions to empirically identify a rule of recognition; judicial commitment guarantees the stability of the legal system.

A problem of seeming circularity in the interrelationship of secondary rules of “recognition, change and adjudication”, [which is] damaging to it even as an analytical model ... [because] the rule of recognition presupposes “judges” and “judges” presuppose a rule of adjudication. Which member of this logical circles of rules is the ultimate rule of recognition?<sup>63</sup>

Even analytically, the three cannot be separated, nor even brought into hierarchical relation. So which are powers, and which are duties, and who cares? When it is realised that the rule of recognition is *both* power and duty, the need for the other two forms of rule, and their complex, unwieldy, and unmappable interrelations is eliminated.

This point is particularly important to the understanding of PIL from a Hartian perspective. Hart believed PIL to be a primitive set of primary rules, rather than an advanced system of rules unified by a rule of recognition into a recognisable *legal system*. This did not, for Hart, make the individual rules any less “law”, but simply precluded the possibility of its being a legal system.<sup>64</sup> Only systems need unifying rules, while:

The rules of the basic structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such. These simple truths about different forms of social structure can, however, easily be obscured by

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<sup>63</sup> MacCormick N. *HLA Hart* pp. 108-9 paragraph breaks suppressed. Adding the rule of change further complicates matters, and MacCormick despite his best efforts in the ensuing pages fails to untangle the riddle bequeathed by Hart satisfactorily. Indeed MacCormick concedes that “the *concept* of a judicial duty does not in fact depend on the pre-existence of a ... “rule of adjudication””, *ibid* p. 111.

<sup>64</sup> For the contrary proposition, that for Hart we can have no ‘law’ without a legal system, see ch. 1 note 87 and accompanying text, *supra*.

the obstinate search for unity and system where these desirable elements are not in fact to be found.<sup>65</sup>

Obviously, this is fundamentally at variance with the Kelsenian position which equates the existence of norms with their validity *and* makes validity an inherently systemic quality. Indeed, Hart perceives “something comic” in attempts to find a basic rule for primitive legal orders.<sup>66</sup> Norms, in the Hartian model *can* be derived from facts alone, from mere empirical consistency, so long as this supports an “internal point of view”. This is innate to Hart’s concept of a rule; from this perspective a non-functional basic norm, a *Grundnorm*, is tautological and unnecessary:

For it says nothing more than that those who accept certain rules must also observe a rule that rules ought to be observed. This is a mere useless reduplication of the fact that a set of rules are accepted by states as binding rules.<sup>67</sup>

Deontologically, this claim is open to serious doubt, but it does provide a key insight into the Hartian model: the rule of recognition must have a substantive (as opposed to merely formal) *function*.<sup>68</sup> It must tell us *which rules* are rules of the system, as opposed to merely telling us that the rules are valid. For Hart, this is lacking in PIL; there is no way of telling in advance whether a given claim will or will not become a

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<sup>65</sup> *Concept* p. 230.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> In fairness, this point is implicit in the entire Hartian architectonic, as the rule of recognition could not be a logical hypothesis, nor could it be substantively redundant. These points are simple entailments of the fact that the rule is discovered by observation, and not deduced from principle. To be observable, the rule of recognition *must* perform a unique function.



rule of law. The rule of recognition fails to serve this purpose, and therefore cannot exist. PIL is merely a set of rules, governing a primitive society:

In the simpler form of society we must wait and see whether a rule gets accepted as a rule or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition.<sup>69</sup>

The rule of recognition is designed to bring *certainty* to the system, and this probably explains why Hart tended to seek it out *within* institutional structures capable of delivering determinate answers. Hart is *both* factually and conceptually inaccurate in his analysis of PIL on this point. Paradoxically perhaps, this confusion, which is the result of Hart's quest to separate the three major secondary rules, can be best explained in terms of that very division. The problem is that Hart confuses the rule of recognition and the rule of change. This problem is easily avoided once it is realised that these are simply the positive and negative manifestations of the same rule, as duty and as power. The rule of change identifies the *process* by which a new rule is formed; the rule of recognition merely confirms that successful completion of that process will lead to a valid rule of the system.

The source of the error lies in the relatively open and unpredictable nature of the rule of *change* in CIL. The rule of recognition is relatively clear: state practice plus *opinio iuris* creates recognised rules of CIL. Thus *if* a rule garners sufficient practice and *opinio* it *will* become a valid rule of the customary international *legal system*. Hart, by

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<sup>69</sup> *Ibid*, p. 229.

failing to separate the two rules as his system demands, himself confuses form and content. In both PIL and municipal law (understood as ideal ideas), we can clearly define a rule of recognition; it is in terms of change that the two types of system most differ. However, *contra* Hart, we do not know that any rule properly *posed* will become a rule of municipal law.

Only the *outcome* of the procedure can guarantee that. For example, there is no way of knowing, in municipal UK law, whether or not a white paper, or even a bill, presented to Parliament *will* become law, and this is exactly analogous to the fate of a claim under CIL. In each case we can say that *if* the process of norm creation is successfully completed, *then* the rule will become law, but in neither system can we say that the process *will* be successfully completed. Nonetheless, in both systems, we *do* know what successful completion would look like, and of course we know what effect it would have. Thus, CIL clearly could have a rule of recognition, albeit that the detailed content of that rule is still subject to dispute.

Understood in this way – which is *necessarily* incompatible with the strict or orthodox Hartian project – the rule of recognition becomes analogous with the first rule of a legal system, the rule *immediately* below the *Grundnorm*. In effect it becomes the ‘sources’ norm, the substantivisation of the *Grundnorm*. The rule of recognition *as power* identifies the conditions under which mere conduct is transposed to the plane of normativity. The rule of recognition defines the conditions under which an act of will must be expressed in order to have “objective effect”; to *signify* (and so, effect) law-creation or alteration.

Differentiating Change from Breach (1), Identifying Customary International Legal Rules, the Subject/Official Dichotomy:

The evolution of the law, and the stability of its historical narrative, form a key tension in any living legal system. Law must be stable if it is to be normative, and to form a basis of action and source of expectation; yet it must also be dynamic if it is to keep pace with any contemporary society. Thus a legal system must have the ability to recognise and incorporate change, but must simultaneously be immune from instant change in the face of breach; breach must be distinguishable from evolution.

In a centralised legal system, this tension is easily dissolved, or at least hidden, as there is a clear demarcation between the officials and the subjects of the legal system, albeit a demarcation which is often hidden behind the fiction of democratic identity in some form. "We the people" who make and obey the laws, do not actually exist as the singular univocal entity democracy portrays, despite democracy's conceptual dependence upon us. This leads to the requirement that "we the people" be created as a fiction, the fiction of democratic identity. The demarcation remains important as officials *qua* officials effect evolution and change, while subjects provide obedience or breach. The roles, and the effects of the actions, of each are clearly defined and distinguished.

The difference in PIL is that democratic identity is a fact, not a fiction, and the demarcation between official and subject is far more fluid, if not absent altogether.<sup>70</sup>

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<sup>70</sup> Generally the demarcation is fluid, the state *qua* state is subject, but *qua* member of the international community official; however, it may be entirely absent when the individual state acts as a persistent objector. Only the international community can exercise the rule of recognition as a constructive power, but the rule of recognition method can also take account of the doctrine of the persistent

This dual role is mediated *internally* rather than externally; the duality is *real*, but the “modern” tendency to separate the roles physically, and then subsume this separation under an evolving fiction – transcendentalism in Negri’s sense<sup>71</sup> – is *not* necessary.

This actual identity of sovereign and subject creates difficulty in the identification and elucidation of the rules of PIL, as these must be allowed to evolve, but at the same time must incorporate mechanisms to identify and react to breaches; yet the activities of the same actors both define or evolve *and* breach the rules.<sup>72</sup> The key problematic of customary international law is that an act can be *at the same time* both a breach of extant customary rules, *and* the foundation of a new customary rule. The solution is to construct a rule of recognition capable of recognising this possibility, *and* of distinguishing situations of norm evolution from those of (mere) transgression.

Method (1): Making the Choices Koskenniemi has Identified: *Eradicating*

Commitment (*within law*) to Competing Values.

Koskenniemi is clear that the indeterminacy – and sometimes the value – of PIL flows from its commitment to competing values, its internalisation of value conflicts:

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objector. This is a controversial doctrine within PIL scholarship, but is firmly supported by the neo-liberal foundations, and voluntarism, of the international legal system. Thus as a persistent objector a State may (under certain circumstances) act as a system official *despite* acting individually, but this role is limited and non-constructive in the sense that it does not create rules, but allows for exemptions from rules in the process of being created. On the disputed existence of the persistent objector rule, see Stein T., “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law” 26 *Harvard International Law Journal* (1985) 457 Charney J., “The Persistent Objector Rule and the Development of Customary International Law,” 56 *BYBIL* (1985) 1

<sup>71</sup> Hardt M. and Negri A. *Empire* pp. 74-8.

<sup>72</sup> An asserted conceptual inability to cope with this collapse of the distinction between system official (sovereign) and subject seems to lie at the heart of Koskenniemi’s pessimistic analysis of the possibilities of an effective PIL. See e.g. *supra*, note 2, p. 7. A similar proposition - this time drawn *inter alia* from Hobbes and Sieyes - forms the cornerstone of Loughlin’s recent work on the necessarily *representative* (rather than direct) nature of democracy; see Loughlin M., “Representation and Constitutional Theory.” In *Law and Administration in Europe*. Craig, P. and Rawlings, R. (ed.s) 47.

It is possible to give a full description of international law from the perspective of what I call *doctrines of sovereignty* and *doctrines of sources*. The former start from the assumption that international law is based on sovereign statehood, the latter derive the law's substance from the operation of legal sources. ... The story about international law's basis in statehood is a “hard”, historically-inclined narrative that assures the reader of the law's suave realism, its being not just a compilation of the author's cosmopolitan prejudices. To think of international law being generated by “sources” opens the door for a “softer”, cosmopolitan vision focusing on the present “system” constituted of treaty texts, UN resolutions, peremptory norms or general principles. Where diplomacy provides the professional horizon for the former, the latter's focus is often on formal “system” or notions of “community”: where the former appears “ascending”, the latter seems “descending” in the image of this book.

Both approaches are correct; each has resources to ground and explain the law. Yet each is vulnerable to criticisms from its opposite ... Much of 20th century international jurisprudence may be described as tidal fluctuations of emphasis between sovereignty and sources, sociological approaches and formalism: the mainstream may have been grounded in a humanitarian (“sources”) critique of sovereignty - but that critique has been always followed by a sobering rejoinder about the continued centrality of state power (“sovereignty”). ... As the century grew old, a pragmatic eclecticism set in. The two merged into one another: what “sovereignty” means and when what it creates amounts to “law” can only be determined through an external criterion - sources; what “sources”

are and how they operate must depend on what is produced by “sovereignty” ... And so finally, in the new millennium everyone is both “idealist” and “realist”, in favour of “rules” and “facts” simultaneously, learning with every position also the critique of that position ... As sovereignty and sources remain the two grand trajectories through which lawyers come to legal problems, each is internally split so as to allow the articulation of any adversity as opposing legal claims.<sup>73</sup>

In short:

As "sovereignty" and "sources" merge into and yet remain in tension with each other, their relationship will ensure the endless generation of international legal speech - and with it, the continuity of a profession no longer seeking a transcendental foundation from philosophical or sociological theories.<sup>74</sup>

From my perspective, that is precisely the problem. Indeterminacy is an inevitable consequence of the internalisation of value conflicts. To facilitate a determinate PIL these value conflicts must be resolved. However, that cannot be accomplished by a technique of synthesis, nor by reference to the ‘correct’ resolution of the conflicts. Value conflicts can be resolved *only* by making *choices* between the competing values; by privileging one set of values (one purpose for Public International Law) above all others. Moreover, and this is precisely the weakness of Koskenniemi’s

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<sup>73</sup> *Supra*, note 5, p. 13.

<sup>74</sup> *Ibid.*

thesis, these choices *must* be made by reference to a grounding in the purity of a philosophical perspective.

Method (2): Discriminating Normatively Relevant from Irrelevant Actions:

Ontological Insulation

On first reading his critique, I responded by suggesting that Koskenniemi's understanding of normativity was fundamentally inaccurate; that normativity actually presupposed *consonance with*, rather than difference from, State practice:

Thus a norm is a rule directive of state behaviour, regardless of will or interest. In other words, normativity actually ought to pre-suppose consonance with, rather than distance from, state behaviour, as the rule should direct this behaviour, or, at least, compel justification or sanction for deviant behaviour.

It is, however, vital to realise the temporal element in the evolution of rules: although a rule grows initially from state practice, it must – to retain its normativity – ultimately direct, rather than merely reflect, *subsequent* practice.<sup>75</sup>

I continued:

although normativity and concreteness are separate qualities, they are intrinsically linked: normativity evolves *from* concreteness, it does not

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<sup>75</sup> *Supra*, note 4, p. 646.

contradict it. Thus state practice gives rise to the rule, but once this rule has entered the legal system – has *become* normative – its normativity attains self-sufficiency. This is what provides the stabilising force of the norm, it has become a rule of conduct which states ought to obey. In this way it is the normativity of the rule which provides a standard by which subsequent conduct may be judged; be this compliance *or deviance*.

In short, the flaws in Koskenniemi's argument become apparent when normativity is given its proper meaning, directive of behaviour, which in turn presupposes consonance<sup>76</sup> with behaviour and illustrates the illusory nature of the alleged paradox.<sup>77</sup>

This, while not inaccurate, is not entirely accurate either. Koskenniemi is in fact correct in his suggestion that normativity presupposes difference from state action, will, or interest, *but* this is a difference in kind, not a difference of substance or manifestation. As understood by the theory of positivism, normativity resides on a different level of being from activity; it is elevated and insulated from the modalities of international life. In other words, the similarities and differences between the normative rules and empirical reality are irrelevant to questions of the rules' normativity, and even to their content. This is perfectly encapsulated in Luhman's celebrated observation that law "counterfactually stabilises" normative expectations even in the face of cognitive disappointment.<sup>78</sup>

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<sup>76</sup> Though not, of course, absolute conformity, as law is a normative, not a natural science. On this distinction, and its consequences, see Lauterpacht H. 'Kelsen's Pure Science of Law' in *International law: being the collected papers of Hersch Lauterpacht* edited by E. Lauterpacht 404 at pp. 404-9.

<sup>77</sup> *Supra*, note 4, p. 647.



The critical question then is to identify which acts (appearing on the empirical plane) are *also* transposed to (recognised as extant within) the separate ontological plane of validity (the ideal plane). Any normatively relevant act then has *two ontologies* as empirical occurrence, *and* as normative fact. Rules can be created, amended, or repealed *only* through the cumulation of normatively relevant acts. Even when the two are the same, the ontological distinction remains important; as Kelsen has noted “equality is not identity”.<sup>79</sup> This is the distinction between State Practice and mere state conduct: State Practice is normatively relevant. It is the cumulation of State Practice (as opposed to the mere actions of states) which generates the rules of CIL. These rules are then free to evaluate mere actions (empirical occurrences) and are *not* bound to recognise these, or adapt to accommodate them.

Differentiating Change from Breach (2): Identifying Normatively Relevant Acts, the Discriminatory Role of *Opinio Iuris*:

The critical issue then is how we can realise this ‘ontological insulation’ in practice. How can we discriminate between mere conduct, the things states just happen to do, and conduct which is, or may be normatively relevant; i.e. conduct which tends toward *change* in the international legal system?

The mechanism deployed to manage the tension between stability and change in CIL is *opinio iuris*. The presence of *opinio* identifies the transformation of conduct into State Practice, and therefore *indicates* its transposition onto the ontological plane of normativity. This is the primary movement of complexity reduction; the *selection* of

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<sup>78</sup> Luhmann *Law as a Social System*, pp. 149-51.

<sup>79</sup> *Pure Theory of Law*, p. 6.

the additional characteristics particular actions must possess to be deemed relevant to law creation; the identification of the particular circumstances under which politics can congeal into law.

As noted, the meaning of *opinio iuris* is far from clear. There is a core of agreement that *opinio iuris* is a manifestation of normative intent, that emanates from states, it is the normative intent of states, their belief in the bindingness (or ‘legalness’) of rules. Customary PIL is formed by the mixture of state practice and *opinio iuris*; it is evolved by the actions of states, and yet it can be breached by the actions of states.

From the positivist perspective, however, not all actions of states have equal normative value, and it is in their differentiation that *opinio iuris* comes to the fore. Only those actions motivated by the requisite *opinio iuris* – on the part of the state actor and/or perceived by its peers – form part of the process of norm creation or evolution.<sup>80</sup> In this regard wilful breach must be distinguished from *opinio iuris*. This is of crucial importance, as it is from here that the normativity of a rule flows. Once *opinio iuris* is distinguished from will or interest it becomes apparent that not all state actions amount to state practice in the normative sense which tend toward norm formation or variation; some state actions are simply breaches of extant norms of PIL. In this sense, normativity resides on a different ontological plane from that inhabited by (State) activity.

This *ontological* separation is central to my model of customary international law. Indeed the recognition of this difference seems to be precisely what inspired Kelsen to

establish a separate ontological state for law, validity. This allows law to be understood as a separate category from fact, and yet as one which has empirical identifiers. These identifiers are peculiarly legal in nature, and the existence of a category of valid norms – of a normative science and the idea of “normative imputation” – is explicitly predicated on a difference between the legal “ought”, and the “is” of practice.

One way of analysing this distinction between action and state practice would be to see in it a (partial) reintroduction of the demarcation between system officials and subjects which plays such an important – if unarticulated and/or under-theorised – role in domestic law. This divide is also manifested PIL, where, although the actors remain the same, each has two different roles, as official and as subject, and these are distinguished by the presence or absence of *opinio iuris*. When acting with *opinio iuris* (state practice proper) states (either singularly, or as part of the ‘international community’<sup>81</sup>) take on the role of system officials; when simply acting (i.e. without *opinio iuris*) they do so as subjects of the system. In this way, the effects of each form of conduct become analytically identifiable, or at least distinguishable.

#### The Nature of *Opinio Iuris*:

It should not be assumed that *opinio iuris* is the sole prerogative of individual states; it is not. Acting individually, states can perform the functions of system officials only to a limited extent; it is only as a collective body ‘the international community’ that they

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<sup>80</sup> This was implicitly recognised by the International Court of Justice in the *Nicaragua* case 1986 ICJ Reports 14; the assertion that deviations must have been *treated* as breaches, (para. 186) is reference to *opinio juris*, and its effects on the normative status of state actions.

<sup>81</sup> See note 69 *supra*.

fulfil this role absolutely. Thus *opinio iuris* is only fully operative as a general, or community, standard. This is brought clearly into relief in a key passage of Judge Shahabudeen's dissenting opinion in the *Nuclear Weapons Advisory Case*.

Considering the possibility of a rule of CIL *expressly* regulating nuclear weapons, he stated:

In view of the position taken by the ... proponents of legality ... over the past five decades, it will be difficult to argue that the necessary *opinio iuris* later crystallised if none existed earlier.

[T]he position taken by the proponents of illegality would bar the development of the *opinio iuris* necessary for the subsequent emergence of any such permissive rule.

[It] is reasonably clear that the opposition shown by the proponents of legality would have prevented the development of a prohibitory rule if none previously existed, and that the opposition shown by the proponents of illegality would have prevented the development of a rescinding rule if a prohibitory rule previously existed.<sup>82</sup>

What Shahabudeen was adverting to is the *impossibility* of the stage of normative evolution if there is a divide in state attitudes. More abstractly, an individual desire for change, or even belief in change, does not turn a breach of PIL into an official action varying the law; only a general acceptance (be this positive endorsement or silent

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<sup>82</sup> *Nuclear Weapons Advisory Case* 1996 ICJ Reps. p. 225 Dissenting Opinion of Judge Shahabudeen, p. 375, at pp. 379-80.

acquiescence) can perform this miracle of transubstantiation. This sets the obvious and necessary limit on the voluntary nature of PIL, and allows the maintenance of normative expectations in the face of cognitive disappointment. This can best be understood in terms of the temporal axis. If states disagree, *opinio* cannot be formed; consequently, the rules cannot evolve, and we must consider the situation *before* that divergence arose, to identify the legal rule then, as that *cannot* have changed. It is for this reason that the temporal dimensions of law – formation, evolution, and application – must be considered, and held, separate.

### The Nature of the International Community (as Virtual Sovereign)

The international community is the true system official, the law creator, or sovereign. However, the international community is a virtual sovereign, rather than a physical sovereign. The international community becomes a virtual sovereign in the sense that it is always there, but not always actual. The community as a whole is the sovereign entity, and its values are reflected in the rules. Deleuzean ontology – from which the ontological understanding of the international community (as what Deleuze would call a rhizome) articulated above is developed – postulates a doubling of the Platonic categories of the Potential and the Real to incorporate also the Virtual and the Actual.<sup>83</sup> This is a profound alteration in the conceptual terrain, but one which must be accurately understood *before* the virtual presence of the (Sovereign) international community can be properly appreciated.

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<sup>83</sup> See, e.g. Deleuze G., *Difference and Repetition* pp. 208-14.

The potential is *not* real, but contains the seeds of many incipient realities. Once realised the potential loses its potential to be other; it becomes fully real. For example, a block of stone has the potential to be crafted into part of a building, or carved into many different types of statue, *but* once this potential is realised (the block is carved into a particular statue) it is also lost (the block cannot then be crafted into a building, nor used to create at least some of the other statues it had the potential to become).

The virtual is different, because the virtual *is* part of the real.<sup>84</sup> In being real, the virtual does not lose its potential; it is (in a sense) real and more than real. The virtual is counterpoised to the actual, but it is not so much a virtual reality as a real virtuality. The virtual has a real presence, rather than a virtual presence masquerading as real, as virtual reality might, but that this presence is generally ephemeral. The virtual always (really) exists, but comes into perception (or tangible being) only as it is actualised. Deleuze and Guattari offer the rhizome of the wasp and the orchid as their primary example.<sup>85</sup> The wasp and orchid exist as a symbiotic entity *always*, but this relationship is only *actualised* at the points of contact; here the wasp feeds and the orchid pollinates. However, the rhizome thus formed does not lose its potentiality during its actualisation, the wasp could (and can still) pollinate other orchids, and the orchid can feed other wasps.

The virtual loses nothing in its actualisation – in a sense it retains its potential (to be other) – and continues to exist, even when it is not (currently) actualised. This is how the ‘international community’ exists and operates. The community is the collective of States, and it always exists as such. However, the community is generally virtual, and

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<sup>84</sup> *Ibid* p. 208.

<sup>85</sup> Deleuze and Guattari, *A Thousand Plateaus*, pp. 9-10.

is actualised only at the points when it is required, e.g. to legislate. It is in this sense that the international community can be understood as a virtual sovereign. The authority of the law is rooted in the actual sovereignty of the international community. However, the power to legislate is held exclusively by the community itself – rather than the states of which it is comprised. Only at the moments where the community is actualised does sovereignty become active. Only at these moments can the sovereign create new law.

Metaphorically then, we could see state action (if motivated toward normative change) as (virtually) summoning, and hence (re)constituting the international community in its law-constitutive role. The system then functions by the community calling itself into existence when it is needed – the plurality existing over the singularities – to act as a system official, effectively at the behest of a system subject, and thus subject and official are separated and the system can work without paradox.<sup>86</sup> This can happen because the community is real; it is always in existence, rather than being mere potential(ity), yet the community is *not* always actual, but rather virtual. It is the virtual presence of the community which must be actualised (as opposed to a potential which would be realised) which allows the community, in effect, to flit in and out of ‘physical’ (in the sense of ontological, actual) existence, and normative activity.

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<sup>86</sup> It is worth noting that this is not at all the same as saying the system can *exist* without paradox, but only that it can work on a day to day basis by hiding and evading its originary paradox: the creation of legality as a category with the initial claim “I am legal” and legal is good. The legality of the legal system cannot subsequently be evaluated, nor indeed the legality of the legal/illegal divide. But as Luhmann observes, all systems are based on (and productive because of) such an original paradox. See Luhmann N. “The Third Question: The Creative Use of Paradoxes in Law and Legal History”, *Journal of Law and Society* 15 (1988) 153.

Individual states are no longer law makers, thus their *individual* consent to the rules is no longer required; consequently it cannot effectively be unilaterally withdrawn: as a result, the system is not apologetic in the important sense of descriptive. Moreover, *opinio* can be fully divorced from morality, and it need not differ between classes of states. Because *opinio* is returned to the realm of factual observation, the system is not utopian in either sense.

### Differentiating Change From Breach (3) *Opinio Iuris* and the Subject/Official

#### Dichotomy:

The rule of recognition in customary PIL states that "state practice plus *opinio iuris* creates law". It is in the interpretation of this basic rule, and the definitions of its constituent parts that old and new approaches to PIL clash. From the perspective offered here the rule means that state *action* offers an explicit moment of reflexion in a thoroughly reflexive process of norm creation. It must be stressed that *opinio iuris* is a *general standard* and therefore quite distinct from *estoppel*.<sup>87</sup> It is the action-in-context (in a wide and temporal sense) which is normative.

The central point here is that sovereignty does not require a single, timeless bearer, a sovereign who is always sovereign; sovereignty itself can be (recognised as) either dissipated or relocated. This allows PIL's totally democratic underpinnings to be followed through, and something quite interesting happens, the virtual presence of the international community comes into relief.

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<sup>87</sup> See chapter 4, note 80 and accompanying text, *supra*.



The manifestation of this community must be properly understood *before* its functioning can be appreciated. The international community is not (necessarily) a gathering of all states as it might be at a conference designed to create a treaty. Instead, it is the cumulation of a 'sufficient' number of examples of like conduct, each recognised as bearing *opinio iuris*, and so as state practice. The community is the recognition of this congruence of interests and desires over time. Consequently, the international community is also a type of ideal idea; it is the actualisation of the desire to conceptualise (understand) certain actions as law-constitutive. Thus, the international community represents the embodiment of a certain type of politics – the cumulation of enough actions, politically defined as legally relevant, to constitute a new legal norm. The community 'exists' during the formation of this norm. The community *is* the definition of what makes conduct legally relevant.

Therefore, when a state acts, its motive – or at least the international perception of its motive – *is* important, if this includes (even implicitly), or has imputed to it, a claim of right, then it seeks to activate the rule of recognition. *But* no state can activate the rule of recognition alone; as a *power*, the rule of recognition can only be exercised by the international community, as the community alone is the law creating body.

Therefore, it is the *reaction* (the reflexively determined intention) of the international community which is vital. Each individual state, plays a dual role<sup>88</sup>: *qua* individual, and *qua* constituent component of the community. Only *qua* community is the rule of recognition power conferring; *qua* state it is duty imposing. Thus a counter is offered to the suggestion that distillation of *opinio iuris* from state practice:

Necessarily implies a vicious circle in the logical analysis of the creation of custom. As a usage appears and develops, States may come to consider the practice to be required by law before this is in fact the case; but if the practice cannot become law until States follow it in the *correct* belief that it is required by law, no practice can ever become law, because this is an impossible condition.<sup>89</sup>

There is no vicious circle, there is a reflexive movement within which *opinio iuris* and state practice constitute one another. The apparently paradoxical status of *opinio iuris* and of the rule of recognition is explained by the fact that states, as members of the international community, are *simultaneously* sovereign *and* subject.

Therefore, state action gives rise to the reflexive movement which validates, and in doing so *constitutes*, state *practice*. This reflexive movement consists of the purposive activation of the rule of recognition, or at least the implicit questioning and/or recision of the 'duty' to enforce the law under the old law (i.e. the immediately preceding "momentary legal system",<sup>90</sup> or body of norms). Therefore, state practice and *opinio iuris* are mutually constitutive and *together*, at a certain threshold level, create customary PIL. In other words, state action becomes *state practice* through contextual endorsement, as it is precisely this contextual endorsement which creates the *opinio iuris* which transforms the former into the latter.

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<sup>88</sup> It is precisely the internalisation of this duality which separates the multitude from a 'people' (etc.) and allows for its return to the "ontological plane" as Negri sees it, to (re)produce itself and its normative universe.

<sup>89</sup> Thirlway *Customary Law and Codification* at p. 47.

<sup>90</sup> Raz J., *Concept of a Legal System* pp. 34-5.

Thus it is likely that the initial reaction to conduct intended (or putatively classified) as state practice (if favourable<sup>91</sup>) will be that the action is tolerated and emulated. It is in *this* period that the norm is created, and therefore, in a sense, the rule of recognition (as duty) really does just *recognise* an underlying (i.e. already present) commonality – a norm. However, the idea of custom linguistically connotes repeated practice, and CIL also requires repetition conceptually. This is because the creation of a new norm does not occur in isolation, but within the confines of an extant legal system, an extant body of norms. This entails that the new norm also has an effect on existing norms, and indeed that the new norm must ultimately constitute a derogation from an existing norm.

This derogation could be either permissive or prohibitory in nature, but analytically the formation process would be identical, albeit in mirror image. I shall focus on the generation of a customary exception to an extant legal prohibition. As noted above, state practice is constituted by a synthesis of action and *opinio*, to which must also be added the response of others. However, again as noted, the problematic is that an unlawful action *could* be the “seed of a new legality”,<sup>92</sup> but it *need not be*; it could equally be a simple transgression of extant law. In *both* cases, however, the action will breach the extant legal order. Moreover, in the event of norm evolution, this could result in *either* the extinction *or* the mere limitation of the old norm. As a final complicating factor, in the event of non-evolution, the illegality could be either condoned or condemned. Not every condoned illegality need necessarily lead to the

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<sup>91</sup> There are of course two mutually exclusive possibilities of initial reaction, either endorsement (to some degree) which may lead to activation of the rule of recognition - and hence legal change - *or* rejection, classification of the action as breach. In the latter event, there is no normative evolution, but rather an application (and hence implicit endorsement) of the current law, and so a finding of transgression.

<sup>92</sup> D’Amato, *supra* note 47.

formation of a new norm – or at least not of a new general norm, or law. The task remains that of distinguishing illegal activities from actions tending toward norm evolution.

The initial focus then must be the conduct itself, and any claims of *opinio*, i.e. the actors' interpretation and justification of its actions. This is an important point; physical actions are not auto-interpretative, they are not susceptible of only a single interpretation, or at least they need not be. Acts can be every bit as ambiguous as statements.<sup>93</sup>

Next comes analysis of the response to the action, and this must be undertaken at *both* the empirical and the conceptual level. What do other states actually do, and why do they do so, or what does their response mean (legally)? Again, Kelsen's analytic topography is elucidating here. Under the theory of normative imputation, a breach of a norm is the condition of a sanction, and therefore a sanction ought to occur.<sup>94</sup> If the act in question is intended, and accepted, as law creating (rather than a breach *simpliciter*) then this sanction is unlikely to occur, but, the absence of enforcement is endemic in certain areas of PIL. Thus a distinction must be drawn *within* examples of the non-occurrence of the sanction demanded by normative imputation. The non-occurrence could be a result of either efficacy problems or it could be a conceptual issue. The norm concretisation demanded by Kelsenian theory (the highly concrete norm imposing the sanction) could be *either* simply ignored *or* actually suspended.

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<sup>93</sup> See discussion of IHL, chapter 4, note 77 and accompanying text, *supra*.

<sup>94</sup> Kelsen H., *The Pure Theory of Law* pp. 76-82. However, as noted above, I do not adopt Kelsen's definition of law as empirically identified by its relationship to force. This position is not precluded by my definition, but neither is it entailed. Thus normative imputation could be read as simply demanding that a finding of transgression ought to be made, *without* necessarily leading to the conclusion that a

In the event that the normative imputation is suspended, the process of norm formation is *initiated*. The process is *not* thereby completed, “instant custom” does not result. In Hartian terminology, the rule of change (the rule of recognition as power) is activated, but no obligation has yet arisen under the rule of recognition (as duty); as the process of change has not been completed, there is as yet nothing new to recognise. There has been an attempt to activate the rule of recognition as a power, but the extent and success of that attempt are as yet uncertain. Thus we could perceive the initial practice as condoned illegality from a positivist perspective, *or* as an example of particular legality from a realist perspective (i.e. the law was not apparently applied, thus the law which was applied must have been different as law *is* what is in fact applied). However, the positivist perspective brings far more analytic clarity to the elucidation of the norm evolution process of CIL.

This is because the realist perspective creates the new norm too quickly, and the resultant norm is utterly indeterminate; it has no *generalisable* content. Then again, this is precisely the realist claim about rules as such. Nonetheless, from the positivist perspective, condoned illegality is merely the suspension of the demands of normative imputation. It is, at this point, *neither* the abrogation, nor the limitation, of the general norm in question; in fact, it is not even the suspension of the general norm. General norms need classes of cases to which they apply and, as yet, no class of case has been defined or endorsed as that governed by the putative new norm. It is in the generation and delimitation of new classes of cases that the repetition of practice plays its most vital role.

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sanction ought therefore to follow. This last step is necessary *only* because of Kelsen’s dogmatic definition of law, see *ibid* pp. 50-4.

There are two issues of particular importance here. The first is that repetition will be non-identical; the second that repetition will not be formally guaranteed acceptance during the process of norm formation. Formal claims to legality presuppose membership of the requisite class of cases, the identification of ‘like cases’. In the process of norm formation, it is the class itself which is being constructed alongside (or within) the rule which governs it. The first time that the concretisation of a norm (be it permissive or prohibitory) is suspended tells us little about any new norm in the process of evolving. All that can be said with certainty, is that in any subsequent *identical*, rather than merely analogous, situation, the (same) demand for norm concretisation ought to be suspended again.

The non-identity of putatively analogous cases allows for the construction of a class of cases to which a new general norm applies. This is why repetition of action is a constitutive element of customary norm formation at the *conceptual* level, as opposed to merely from linguistic usage.<sup>95</sup> Subsequent appeals to the evolving norm may be met with disapproval, i.e. rejected as transgressions of the original norm which ought to attract sanctions, or at least be registered as transgressions,<sup>96</sup> and these would bring the outer limits of the new class of cases into relief. On the other hand, a subsequent claim may be perceived as *functionally* analogous to the previous claim(s), and thus as fitting within the class under construction. In this event, we learn more about the sufficient and necessary features for class inclusion. In both cases, the acts remain technically in violation of the old norm. It is only when the suspension of normative

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<sup>95</sup> Among others, Thirlway, Charney, and Tasioulas have all recognised the linguistic necessity of repetition for the formation of *custom*, but none of them, so far as I can tell, have related this to a non-semantic *conceptual* dependency.

imputation itself gives way to legality that we can talk of the new norm having crystallised into an extant norm of CIL, *lex lata*. At this point, the process of evolution (the rule of change) will have been completed and a valid new norm will exist, whose authority is mandated by the rule of recognition. The rule of recognition then only (re)constitutes the norm as a *legal*, or *juridical*, norm.

Amongst the neo-liberals, it is actually the Hayekians who are correct to this point, or at least, are close to the truth. International law does not have a unitary sovereign to create and impose norms, rather the law itself recognises underlying commonalities which are constituted as legal norms by the actualised presence of the international community. The creation of these underlying commonalities *is* purposive; it is the outcome of directed human endeavour – this is Fuller’s advance over the Hayekian framework. Commonality should not be imposed, as the relative normativists might wish, but this need not mean that it cannot be agitated for, created and constituted, rather than merely discovered, or more often than not, not discovered, as the Hayekians argue. This process of agitating for the recognition of underlying commonality is indeed intrinsic to the rhizome as an active analytic model.<sup>97</sup>

It is also worth noting that the paradox of self-reference inherent in the concept of authorising authority is largely circumvented here. Quite simply, the law is not authoritative, and the international community preceded society and the law even although the location of authority in the international community, and the current composition of the international community require analysis, and critique or justification. Given the extended temporal process of law creation, and its conclusion

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<sup>96</sup> In this event, the law, having been violated, would not perform its secondary function of legitimating (morally immunising) the deviant conduct.

in *ex post facto* recognition, the (pre)existence of legal institutions to the law that (re)created them is no longer paradoxical. The important critique of Benthamite or Hartian positivism – that the rules conferring power must pre-exist power, and yet be authorised by power – is largely met by the present model.

#### The Role of the Temporal Element:

It is, however, also vital to realise the temporal element in the evolution of rules: although a rule grows initially from state practice, it must – to gain and retain its normativity – ultimately direct, rather than merely reflect, *subsequent* practice:

According to the requirement of normativity, law should be applied regardless of the political preferences of legal subjects. In particular, it should be applicable even against a state which opposes its application to itself. As international lawyers have had the occasion to point out, legal rules whose content or application depends on the will of the legal subjects for whom they are valid are not proper legal rules at all but apologies for the legal subject's political interest.<sup>98</sup>

Again however, it is the role of *opinio juris* – the sense of legal duty – which should safeguard the rule's normativity. The simple fact that a, or all, state(s) agree with a given rule *does not reduce that rule to a descriptive apology*. Indeed there is no problem with rules, at the point of their formation or inception, reflecting state

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<sup>97</sup> See *Empire*, pp. 206-8.

<sup>98</sup> Koskenniemi, *supra* note 2, p.8. However, content at the point of formation – which does depend on the will and interest of the aggregate of legal subjects – must be differentiated from content at the



practice (even uncritically<sup>99</sup>), and so embodying state desires. All rules, all norms, are codifications of desire, manifestations of values.<sup>100</sup> The voluntary nature of PIL should, in this regard, be celebrated not lamented. A legal system *should* seek to embody the values of its host society, rather than attempting to impose its own values in order to homogenise – and thus effect – that society. This point is particularly vital in a society as decentred and heterogeneous as international society, whether that is perceived as a society of states or of people(s). Moved beyond the temporal collapse on which it is predicated, effectively, that the law has no content until it is applied, Koskenniemi's critique of apology can be more readily comprehended as a celebration of democracy, the collapse of the subject/official distinction in the *creation* (but *not* the application) of law is an inherently good thing.<sup>101</sup>

What makes focus on the temporal dislocation of laws and normativity so important is that fact that the test of normativity does not arise when states agree with a rule, but

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moment of application – which is disinterested in the will of the subject(s) in question; this distinction is not apparent in Koskenniemi's argument.

<sup>99</sup> No reflection will ever be truly uncritical or objective of course, as it will always remain a description, and so an incomplete abstraction, there will therefore always be some degree of modification. This is simply inherent in the reconstruction of action which underlies customary norm formation, and which reappears (with greater force) at the point of articulation of the new norm.

<sup>100</sup> A point acknowledged even by those (legal) positivists (still) "in their right mind"; see MacCormick N., *Legal Reasoning and Legal Theory*, pp. 233.

<sup>101</sup> However, as Higgins noted, Koskenniemi's critique may be of a far deeper nature here. It is not the nature of agreement in law formation as such, but rather the nature of *those whose agreement counts* (states) which determines that PIL must be apologist. If states will only agree to that which (as a body) is in their interests, then other interests are *definitionally* excluded from the substantive body of PIL. In a sense then it is not PIL, but an(y) international system based on states which is apologist. Hence the desire for Utopian normativity for those seeking to speak for subaltern bodies, groups, or individuals. This then really does amount to a critique of substance, linked to the critique of form only by the question of *why* (rather than *how*) states make law. This must then be based on a presupposition of the illegitimacy of states as such, but this renders Koskenniemi's theory vulnerable to charges of irrelevance in a world dominated by states. The standard response to this comes not from critical lawyers as such, but from more traditional natural lawyers, who privilege the beliefs and actions of certain *states* in their analysis of PIL. That is, these authors (noticeably Teson, Slaughter, and those in the New Haven Camp) draw a distinction between good and bad states, and pursue a PIL based on the values (and thus legitimating even the traditionally unlawful actions) of those privileged states. Naturally this does not escape Koskenniemi's critique, but avoids (some) apologism by retreating to the normative pole of the dialectic and from there destroying the dialectic movement acknowledged as destructive.

rather comes into relief at the point of application, especially when one or more cease to agree. It is then that the objectivity, the autonomy, of the rule comes to the fore. A law's normative role will have been fulfilled if it has provided at least a consideration to be weighed against the desire to act, and against which any decision to act can be evaluated and criticised by other states and interested actors. This last is a very important point, law is not "the application of neutral rules"<sup>102</sup> because rules are not neutral; they are value-centric, the codification of values. Law is the neutral application of rules; it is the impartial application of the same rules to the conduct of all subjects which provides the neutrality of law itself.

A rule retains its independence and normativity provided that it does not merely change to accommodate deviant practice. Thus consistency, as well as change, in law is rooted in 'observable' fact, rather than being left dependant on external moral (ethico-political) standards; both consistency and change are internally secured and regulated. This does not undermine the roles of either normativity or validity, but is simply an argument that these must be empirically identified, and likewise any changes to extant rules must be (empirically) legally identifiable; breach does not equal change, because those actions with normative consequences can be empirically differentiated from those lacking normative impact. Again, this is clearer from a Kelsenian perspective. A norm's existence is attributable (solely) to its validity, and so is ontologically separate from *both* the manifestations of practice to which it corresponds, and so from which it is derived, *and* from those it is intended to regulate.

#### A Final Incentive for Lawful Action: Democratic Identity.

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<sup>102</sup> A suggestion Higgins attributes to legal positivism, see *Problems and Process* p. 7.

Law *creation* is vitally important to my understanding of PIL. This is because law creation in ideal PIL is the *enunciation* (iteration) of the common standards of judgement. The central purpose of this chapter is precisely to define and defend a particular vision of law creation which I see as the ideal image of CIL. This purpose of law is to provide a common position of (legal) evaluation. Consequently, the creation (as opposed to merely the form or substance) of legal norms is the primary point of concern and potential legitimacy.<sup>103</sup> It is the fact that the standards are common (are agreed upon and not imposed) that promotes my conception of law; even though it is unenforced (or sporadically enforced) law nonetheless demands justification for deviation.

All lawbreakers have reasons for their actions. Some of these reasons may be good reasons, others may sound good regardless, but it is nonetheless more politically awkward (at home and abroad) to say, as a state leader, “I am breaking the law because ...” than it is to say “we are not really breaking the law, which, properly understood actually demands ...”. The status of the conduct (legal/illegal) and the excuses/justifications offered for it are more clearly analysable when separated. However, sometimes action outside the law will be legitimate, will prove necessary, and even beneficial. This is not problematic, as long as such action is legitimated by reference to other discourses which do not suffer from law’s inherent limitations<sup>104</sup> (though of course they may not possess law’s strengths in clarity and determinacy

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<sup>103</sup> C.f. Franck T. *Legitimacy*; see also his *Fairness in International Law and Institutions*.

<sup>104</sup> This would also provide an additional defence against the reduction of CIL into *Kitsch*.

either, nor its universality) *and* the legitimation covers not only the action and intention, but also the *outcomes* of unlawful action.<sup>105</sup>

One final but important caveat, is to emphasise that I am adopting, promoting, and justifying, a particular *structure* of CIL. I am attempting to show how CIL *could* work, and so the ideal against which actual CIL should be critiqued. I am not (necessarily) defending the actual practice of CIL, let alone the outcomes of its historical development (the actual substantive norms of CIL). The content of CIL may be good, it may be bad, more likely it will be mixed, but my present task is merely to offer a structure for identifying the particular demands of (contemporary) CIL which is a prelude to the interpretation and application of the rules. Only when the demands have been fully concretised in this sense can critical analysis of the content of CIL be initiated. My present task then, has been to define and defend an ideal of CIL from which ‘reality’ can be identified, against which that reality can be measured, and toward which it ought to aspire.

#### CONCLUDING THOUGHTS: THE COSTS AND BENEFITS OF THIS IDEAL:

##### Acknowledging the Complexity of Reality.

Law is often criticised for being out of touch with reality: “the law is an ass”.

However, law functions *precisely* by reducing the complexity of reality, by *not* taking

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<sup>105</sup> Kant I., *On a Supposed Right to Lie Because of Philanthropic Concerns* (reproduced in *Grounding for the Metaphysics of Morals* (Ellington J. (trans) 3<sup>rd</sup> ed. 1993) 63, at 65, “If you have adhered strictly to the truth, then public justice cannot lay a hand on you, whatever the unforeseen consequences.” See also, Korsgaard C., “Taking the Law into Our Own Hands: Kant on the Right to Revolution” in *Reclaiming the History of Ethics: Essays for John Rawls* (Reath, Herman, and Korsgaard ed.s) 297 at

everything into account. This can lead, as Koskenniemi (amongst many others) has noted, to laws, legal norms, which appear “over and under inclusive”. There are two bivalent responses to this charge, either we accept its truth and indeed necessity, or we attempt to understand law in a way which circumvents the charge of over and under inclusiveness. I am advocating the first approach.

What must be emphasised is that *all* perception is reduction: it is impossible to take everything into account. Consequently, there is no answer which will satisfy all; understood from this perspective, we can see that *all analyses* are “over and under inclusive”. This is equally true of politics, friendship, economics, ethics, prudence, pragmatism, and realism as it is of law. The complexity of reality is inescapable, and must be reduced. This means that the only valid question is how to go about this task of reduction. It is here that the distinction between law and these other discourses is most apparent. The distinction is not that law reduces – that law fails or refuses to take certain matters into account – and the other theories do not. Instead, the distinction is that law attempts to impose a *consistent structure* on this process of reduction, and the other theories do not.

That distinction is *both* law’s great strength and its Achilles’ heel. The attempt to impose a structured reduction does create instances where the chosen structure appears to be inadequate. However, it is vital to realise that this appearance of inadequacy is *itself* only visible from another, equally situated, perspective; and that perspective is just as reductive as the legal one. Moreover, in seeking a structured reduction of complexity, the law minimises the desire to pursue the ‘correct’ answer,

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p. 320; “For as Kant says, if you do more or less than the law requires, the consequences are on your head.”

and that is vital, because there is no correct answer. In the absence of a comprehensive grasp of reality (which is an impossible ideal) there *can be* no correct answer; only competing answers, based on competing analyses of relevant and irrelevant features. Finally, it is worth noting that the other discourses will tend to suffer from an infinite regression of questions, answers, and considerations. It is that which leaves them indeterminate and incomplete.

Law, like the other discourses, remains incomplete, but it need not be indeterminate.

Thus the demands of legality, and the reasons offered for ignoring those demands – legal evaluation and political expediency – must be strictly separated. What I believe angers many people – both within and outwith the so-called liberal alliance – is the hypocrisy of a governmental stance that applies strict rules to some, and less strict rules to others. This stance *assumes* the good faith (and legality) of Western action, and structures its definition of law around this basic assumption. This is problematic, because all law breakers have reasons for their actions, which are sometimes good, sometimes bad, but always there. However, when certain states, e.g. the US/UK axis, offer their reasons for action these reasons are presented as *part of* the law against which the conduct in question must be evaluated.

However, when others offer their reasons, these are portrayed as excuses for unlawful action. This leads to the creation of a two track legal system. In some manifestations (e.g. Teson or Slaughter), this approach distinguishes between those states who can circumvent the rules, and those who must simply obey them. In other manifestations (e.g. Tasioulas in his normative mode, or Higgins), the approach mandates a value-

centric identification thesis which serves the same function, but calls the first set of breaches “new rules” and the second illegalities. Both variants break with the notion of law as a universal order, the second more subtly, by reducing the right to import values (directly) into the identification of law either to certain values, or to values of certain actors (states, jurists, or writers).<sup>106</sup>

### Recapturing the Specificity of the Legal (the Rule of Law Exhumed)

We live, at present, in a uni-polar, hegemonic, world. Many legal theories accept this fact and alter either their understanding of law, or the hegemon’s relationship to law, to accommodate this fact while leaving undisturbed the dogmatic stipulation of law as enforced norms.<sup>107</sup> Once this dogma is given up, the ‘fact’ of non-enforcement against the hegemon (and indeed in PIL against many others) accrues significantly decreased significance. It is no longer an anomaly which has to be explained away so as to protect and continue the dogma. Non-enforcement, in itself, tells us nothing about legal demands.

Law, in my analysis, *need be* little more than an evaluative perspective (an epistemic grid, or way of observing the world), but this does not mean that it cannot be enforced, nor that it should not be enforced. My only claim is that the absence of

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<sup>106</sup> Hew Strachan describes this as being founded not on moral imperialism as such, but on a US (or western) “axiomatic belief” that their values *are* the universal values, if only the others would realise it. This was suggested at a lecture on the wisdom of invading Iraq, delivered to the Institute for Contemporary Scotland, 15 March 2003.

<sup>107</sup> See e.g. Simpson G. *great Powers and Outlaw States*. However, the notion of the non-universality of the allegedly universal law is not restricted to international law, but is also institutionalised in the enigmatic figure of the sovereign in municipal law and legal theory. The sovereign will always enjoy a special relationship with the law, be that in deciding upon the exception (Schmitt) or simply in its ability to alter the law to its wishes. Law perceived as authoritative command requires a figure of authority enjoying at best an ambiguous relationship to law. The sovereign figure (the law creator) is of

enforcement *per se* neither renders a normative system non-legal, nor adverts to the fact that no rule has been broken.<sup>108</sup> Enforcement then is a privilege for ‘good’ (e.g. appropriate, well situated, etc.) law, not a right for all law, let alone a/the constituent part of the very definition of law.

When Proudhon famously wrote “all property is theft” he offered a very important, if not entirely original, insight into the function of law. Behind the polemic, indeed presupposed by the polemic, is the legitimising function of law. Law conditions the way the world is perceived; in Kant’s terms (which do not go nearly deep enough<sup>109</sup>) law shields actions from moral scrutiny,<sup>110</sup> the outcome (be it good or bad) of that which is done according to public right (law) cannot be attributed to (held against) the actor. This legitimacy function underwrites, for example, the powerful rhetorical distinction between terrorism and authorised armed action (even where that includes the (usual) euphemistic “collateral damage”).<sup>111</sup> It is important that the legal and the illegal be clearly identified, because the condition of this clear distinction being maintained provides a powerful incentive toward lawful action.

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course vital to any theory of law, and in my conception of PIL this role is played by the real, but virtual, figure of the international community, in its moments of actualisation.

<sup>108</sup> In other words, the present approach directly counters the claim that those who thought a rule had been breached must have been mistaken, because rule breach leads to enforcement, therefore the absence of enforcement entails no rule breach, so the content of the rule must differ from that understood by those postulating breach.

<sup>109</sup> I believe Kant overlooks the way that law structures, or *constructs*, the situations it then subjects to analysis. Law is an inherently simplifying epistemic grid, it actively excludes many things from consideration, its most profound effects are not in the act of judgment, but in the imposition of its specific (distorted) understanding of the reality as being the totality of that reality. Law functions, in Feyerabend’s terms, as an observational language. This is crucially important in, *inter alia*, the evaluation of human rights discourse as an inherently good thing. See, e.g. Charlesworth, Chinkin and Wright "Feminist Approaches to International Law" 85 AJIL (1991) 613.

<sup>110</sup> *Supra*, note 105.

<sup>111</sup> It could also be argued that this function also heads off analysis of the 1.5 million or so Iraqi deaths caused by the UN sanctions regime coercively imposed upon Iraq from 1991-2003. Though of course an absence of media coverage and consequent knowledge deficit also play a role here.



The disincentive to unlawful action is the requirement to justify both the unlawful activity itself, and the totality of its consequences. This may be particularly important in relation to the liberal democracies of the world (as it turns out, by and large the hegemon and its allies) where such justification must be conducted at the level of domestic as well as international politics. From a certain perspective, this radically reduces the distinctions between my theory and those of many liberal-illiberal imperialists. We posit the same constraint, the tolerance of the citizens of democratic states. However, rather than calling this (often ignorant) tolerance law, I prefer to attempt to use law to structure the evaluations of the citizens of democratic nations, by refusing to their leaders the shield of legality as a “floating signifier”.<sup>112</sup>

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<sup>112</sup> A floating signifier is a word with no inherent content, but great rhetorical force; see Laclau E. and Mouffe C., *Hegemony and Socialist Strategy*. For an excellent analysis of “human rights” as precisely a floating signifier, see Douzinas C. *The End of Human Rights*, pp. 255-9.

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