Skills, Habits and Expertise in the Life of the Law

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Abstract

With this project, I set out to fashion an alternative to the dominant model of action and decision-making currently applied within legal thinking. In the dominant model, human agents are thought to act always in a self-conscious, deliberative manner. Within legal thinking, this translates into a view of ordinary citizens and judges always approaching the law with the law itself very much in mind. In practice, however, our experience contradicts this. As we move through the world, more often than not we do so in an unthinking, habitual manner. This is true even of judges, who appear to rely on experience and intuition much more than they do self-conscious, deliberative thinking. With this in mind, I have sought a model which places more emphasis on the unconscious processes which precede our self-conscious experience. With research material drawn from a range of fields, including linguistics, cognitive science, psychology, neuroscience, philosophy and artificial intelligence, the resulting model builds around the way in which the process responsible for consciousness operates primarily by acquiring embodied skills and habits. With this background in place, I go on to present a portrait of the law which is embodied rather than disembodied, and experiential rather than abstract and logical.

Declaration

I declare that this thesis was composed by myself, that the work contained herein is my own except where explicitly stated otherwise in the text, and that this work has not been submitted for any other degree or professional qualification except as specified.

(Sundram Soosay)

Acknowledgements

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Chapter One

The problem of legal theory

Legal theorists like to think of themselves as pursuing something like a scientific understanding of the law. While the study of law is for the most part a vocational matter, legal theorists seek to study the law as a social and psychological phenomenon. It is, of course, taken for granted that the law can be studied in this way. The law is a fairly determinate matter, after all – a straightforward, tangible social phenomenon – and should therefore be perfectly amenable to just such a study. This determinate, tangible existence not only makes the law a legitimate object of scientific study, though; it simultaneously sets out the criteria we must apply to judge success or failure for particular theories and for the discipline as a whole. Where the physical sciences are at issue, this notion of a practical test for theory is not the least bit controversial. Scientific study is always the study of something, after all. It comes as no surprise, then, that our efforts should stand or fall on the clarity and verisimilitude with which this "something" is explicated. Central, too, is the way in which the theoretical understanding gained feeds back into that practical experience. A theoretical understanding of such an object is most likely to be considered robust and worthwhile where the insights gained are indeed found to be robust and worthwhile by those undertaking more practical work within the field in question. A theory of gravity, say, is most likely to be accepted not only where it accords with our experience of gravity, but where the theory actually allows us to manipulate our circumstances in ways that are beneficial to us. This last practical test is a natural one,

as the investigations involved tend to be oriented around distinct problems, problems which have arisen in the course of practical life and which, when resolved, feed easily back into that practical life.

A second test we characteristically apply to scientific theories, one closely allied to the more basic practical test outlined above, is what we might describe as a test of dynamism. Once again, what I have in mind here is relatively obvious, particularly where the physical sciences are concerned. Put simply, a successful discipline is one which, well, moves forward. In such a discipline, we get a sense that the scientists involved are actually getting somewhere. There are a number of different factors involved in this. First of all, in such a discipline we usually see a great deal of consensus within the field as to what we might describe as "the basics"; that is, acceptance across the discipline of a particular way in which to view both the underlying nature of the object investigated, and the appropriate tools and concepts required to conduct the investigation. This consensus on the basics allows scientists within the field to concentrate on specific, relatively local problems, safe in the knowledge that their treatment of these issues will fit happily into that larger framework. This widespread concentration on specific local issues – and particularly, a high turnover in the treatment of such issues – is perhaps the most visible sign of a discipline that is moving forward in the sense described here. Successful resolution of local problems is impressive in its own right, of course. It has a wider importance, too, though, as it not only offers support to the background understanding accepted, but also ensures continuing contact with practical life, as scientists working within the field have to look again and again to practical life for new problems to address.

If legal theory is to be taken seriously as a scientific study of legal life, then, both the practical dimension and the dynamism described above should be evident. We should see both a fair degree of engagement between legal theory and the real life of law, and a good degree of the forward movement described above within the discipline itself. *What is notable about legal theory as it presently stands, however, is how little we see of either of these characteristics.* If a clear explication of our practical, real-life experience of the law is the point of the exercise, for instance, then we must sadly acknowledge that our investigations appear at present to have achieved the very opposite. Certainly, this is how work within the field must strike newcomers and outsiders. Students new to the field expecting to find at least some consensus on what the law is and how it works instead are presented with a profusion of competing theories, none of which appear to capture the reality of legal life very convincingly. As we will see a little later, one of the features characteristic of theories offered within the field is the way in which the theories explain the reality of legal life only very selectively, or alternatively, ignore this reality altogether. Given this lack of attention to real life, it goes without saying that legal theory has little to offer in the way of practical contributions. Though some attempt is made within this writing to engage with the real life of the law (the work of both MacCormick and Dworkin is admirable in this respect) we would be hard pressed, I think, to find an example of a particular insight gained within legal theory which has gone on to actually change the way in which the law is understood and applied in practical life.

The test of dynamism is perhaps the more glaring failure, though. For all the energy and vitality that has characterised discussion in legal theory over the past fifty years, it is clear that no agreement has been reached as to the very nature of the object under

consideration. As a result, discussion within the field appears to be bogged down in basic questions which appear, to all intents and purposes, to be irresolvable. For all this, there is little sense that legal theorists are themselves uncomfortable about this state of affairs. Indeed, the impression we are given is that those working within the field would be perfectly happy for matters to go on in this way indefinitely. As far as they are concerned, legal theory is mainly concerned with argument over a small set of basic questions. For them, a distinction between science and philosophy is useful. While science is hard-nosed and practical, philosophy is an altogether gentler affair, tolerant of endless, unproductive musing on the same handful of stock questions. As a species of philosophy, argument within legal theory can therefore indeed go on forever, for the questions asked are not the sort that can be answered definitively. This sense of stagnation – endless discussion of the same handful of questions without any hope of resolution – is, I think, the most striking aspect of the field to outsiders. From this external perspective it is hard not to come away feeling that legal theorists simply cannot see a way forward and have consequently given up all hope of actually getting to the bottom of the matter, let alone make a meaningful contribution to the practical life of the law.

While the assessment provided above might appear rather harsh, in fact my intention here is thoroughly constructive. From my point of view, it is worth creating an unfavourable comparison with the physical sciences[1] in the way that I have for the following reason: *it helps us see that legal theory is suffering from what Thomas*

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[1] This question as to whether or not legal theory counts as a properly scientific discipline does not really feature to any great extent in Anglo-American legal theory but it is taken seriously elsewhere. See, for instance, "Law and Language", edited by Anna Pintore and Mario Jori. My own intention in drawing the comparison is rather more limited, though. For an example of a more extended discussion, see Cotterrell, "Law's Community", pp. 45-49.

Kuhn describes as a "crisis"[2]. The word is of course a dramatic one, in keeping with the rather pessimistic portrait I have presented above. Within Kuhn's work, however, the word has a quite specific meaning. Indeed, it represents the diagnosis of a specific problem. According to Kuhn, when such a crisis is in evidence – indicated most notably by precisely the profusion of competing theories within the field and by the lack of progress on canonical problems described above – this is due not to some general failure on the part of theorists, but instead points to a deep, structural problem within the field as a whole. The problem is therefore found not in how particular theorists have addressed the various issues within the field – with this or that theory of legal reasoning, for instance – but rather lies with the shared understanding all of these theorists make use of when pursuing their particular accounts. It is a failure not so much of skill or insight in the most general sense, then, but arises instead from a lack of the "tools" required to produce the satisfactory explanation sought.

Reading Kuhn's description of this state of "crisis", the parallels with current legal theory are, I think, undeniable. Kuhn describes "a pronounced failure in problem-solving activity"[3], with theoretical understanding as it stands within the field proving increasingly less able to cope with observed experience. This breakdown in "normal technical puzzle-solving activity"[4] leads to many different versions of the dominant theory being elaborated to meet the challenge presented. Unable to grasp the true source of the problem, theorists produce ever more ingenious constructions, bolting on specific mechanisms to explain each of the many anomalies the basic theory fails to explain[5]. When even these elaborations fail, however, there is increasingly

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[2] Thomas Kuhn, "The Structure of Scientific Revolutions", Chapter 7.
[3] ibid., pg. 75.
[4] ibid., pg. 69.
[5] ibid., pg. 72.

acknowledgement that something has gone very wrong with the project as a whole. The term "crisis" describes the period of uncertainty and stagnation this realisation initiates, a period which sees normal technical puzzle-solving activity suspended while the field looks again at the underlying approach taken to the field as a whole, with a range of more or less radical approaches tabled as alternatives. This exploration of alternatives persists until one such proposal is found to be sufficiently convincing to win the confidence of a majority of those working within the field. It is only when there is this confidence in a single alternative that normal science can resume.

This view of the matter sets the stage for the line of argument I will pursue in this thesis. As noted above, the term "crisis" has a dramatic negative connotation. It is important, then, to take its use here in the right spirit. As I view the matter, this notion of a crisis in legal theory in fact represents a valuable opportunity, for it opens the way for us to address the problems of legal theory in a radical way. Indeed, it allows us to look for the *problem* of legal theory, a single structural defect in our approach to the field as a whole which stands in the way of the clarity and dynamism we seek. This, ultimately, is the approach that I will take in this thesis. Rather than address the various issues individually, then, I will instead seek a single global solution, a reorientation of the field as a whole that will allow us to address, in a stroke, the many seemingly intractable questions that continue to exercise legal theorists. Kuhn cites a passage from Herbert Butterfield's "Origins of Modern Science" that is particularly apt in this respect:

When the transition is complete, the profession will have changed its view of the field, its methods, and its goals. One perceptive historian, viewing a classic

case of a science's reorientation by paradigm change, recently described it as "picking up the other end of the stick," a process that involves "handling the same bundle of data as before, but placing them in a new system of relations with one another by giving them a different framework."[6]

This "picking up the other end of the stick" is precisely my aim in this thesis. Rather than elaborating the current framework in a dozen different ways, I will instead attempt to replace this framework altogether. I will seek a completely different way of looking at legal life – the same bundle of data placed in a new system of relations – a view chosen to capture our experience of legal life in all its complexity and apparent contradiction.

If I am successful in achieving this reorientation, the effect will be dramatic. Indeed, we will see a radical streamlining of the field as a whole, with many of the concepts now taken to be central to the field found, after the reorientation, to be superfluous. This effect is characteristic of the sort of reorientation Kuhn describes[7]. While the period leading up to crisis is characterised by an ever increasing level of complexity, the field sinking ever more under the weight of the special solutions proposed to answer the various anomalies, resolution of the crisis sees all of this clutter swept away as the framework itself is found to accommodate the anomalies in a manner that is both more elegant and natural[8]. This more streamlined view of the field as a whole is the solution I will pursue here. What is sought, then, is a way of explaining those aspects of legal life which motivated MacCormick and Weinberger to introduce their

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[6] ibid., pg. 85; Kuhn cites Butterfield, "The origins of Modern Science", pp. 1-7.
[7] ibid., pg. 78.
[8] ibid., pg. 78: "…these anomalies will then no longer seem to be simply facts. From within a new theory of scientific knowledge, they may instead seem very much like tautologies, statements of situations that could not conceivably have been otherwise."

theory of institutional facts, for instance, or Joseph Raz to introduce his notion of exclusionary reasons, but which explains these all at once, as it were, within a basic theory of law rich enough to do so without special elaboration or extension. Indeed, when this approach is taken, the problems themselves cease to appear as problems in the first place. Unlike MacCormick, Weinberger and Raz, then, I will not see these aspects of legal life as challenges to our present way of thinking about the law, challenges which have to be neutralised in some way. Rather, I will take them as providing us with glimpses of a better way to understand the law.

A failure of imagination

For all of this to make sense, we have to accept the role played by what Kuhn describes as a "paradigm"[9]. A more accessible way to express this would be to speak of a structure or framework. At this point, talk of a framework for theory-building should not present my reader with any great difficulty. Indeed, it is widely accepted now, I think, that our study of phenomena – natural or otherwise – is never a straightforward, objective undertaking. Though we are encouraged to think of our efforts in just this way – as exhausted by observation and measurement – there is in fact a great deal more to the process. We do not simply set up our instruments and record what we find. In all such cases, the scientist undertaking this work approaches his subject with a prior understanding, an established view both of the domain he investigates and of the procedures he employs in investigating it. To a large extent, it

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[9] This is, of course, Kuhn's famous term, used throughout his book. An introduction is provided in Chapter Two of his book. The term has been much abused by writers, though, and Kuhn himself subsequently felt the need to clarify his use of it. I will myself avoid use of the term wherever possible, preferring instead the more straightforward notion of a "framework".

is this framework that makes his investigation possible, allowing him to make sense

of what otherwise would be a too sizeable and inchoate pool of information.

Crucially, though, this framework also constrains the work that can be done, setting in

advance what the scientist will find and how he will receive it. This is where Kuhn's

notion of a "crisis" enters the picture. For Kuhn, a discipline is in crisis where the

framework adopted no longer facilitates the work scientists within the field seek to

carry out[10]. Indeed, the framework now impedes, rather than facilitates understanding.

In these instances, the help the framework offers in making sense of the evidence

actually renders inaccessible the very answer sought. The answer lies outside the

frame, as it were.

How, then, will we amend the current framework in place within legal theory? What

is the "framework issue" responsible for the current unhappy state of the discipline?

Clearly, the feature we seek here must be found to be pervasive, something that rarely

occurs explicitly, but in fact is assumed everywhere, standing as a fundamental

building block within all argument offered within the field. We would expect to find it

accepted uncritically prior to actual argument, among the points of understanding that

can be taken for granted before the "real" work of theory-building begins[11]. Indeed,

what we seek here is the sort of feature upon which even bitter rivals would agree,

with both sides of a perhaps quite fierce dispute finding common ground on just this

point. What, then, satisfies this requirement? In this thesis, the framework issue I will

pursue concerns *our tendency always to imagine that intentional action is carried out*

in a wholly self-conscious and deliberate manner, with explicit decision-making

included as an inevitable part of its structure. As will become clear, while this view

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[10] Kuhn describes this experience in Chapters Seven and Eight of his book.
[11] A good example is provided by Joseph Raz, in the introduction to his book, "Practical Reasons and Norms".

of the matter is not accepted whole-heartedly within all of legal theory, it is certainly true of dominant thinking within the field. It is true, particularly, of analytic and positivist legal theory, the view of law championed by the likes of Hart, MacCormick and Raz. Notably, though, it counts Dworkin, too, among its subscribers. And, as we will see shortly, even where it is not accepted, the sceptical theorists in question cannot really be said to provide us with a viable alternative. This failure to provide an alternative is critical, because it weakens their position considerably, leaving them unable to make the sort of challenge required to unseat the dominant model.

To illustrate the dominance of the self-conscious, deliberative model of intention and decision-making within legal theory, it helps to look at the role the model plays within the work of each of the theorists cited above. The first example we will look at is Neil MacCormick and Ota Weinberger's "Institutional Theory of Law"[12]. In proposing their theory, MacCormick and Weinberger sought to address the apparent "real existence of norms"[13]. This describes the rather curious way in which human beings – legal professionals and lay people alike – tend to refer to the law always in such a way as if to suggest that they see it standing before them in their physical environment. MacCormick and Weinberger describe this attitude in the following way:

> The fact that two people having made a certain agreement, there *is* now a legal
> contract; the fact that, two people having gone through a certain ceremony
> there *is* now a marriage which subsists between them until death or divorce;
> the fact that certain politicians have reached certain agreements and signed
> certain documents there *is* now a 'treaty' between the various 'states' they

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[12] MacCormick and Weinberger, "An Institutional Theory of Law".
[13] ibid., pg. 13.

now represent, and as a result all manner of acts may now be performed by

and in the name of 'The Commission of the European Economic

Community';[14]

This attitude is a problem for legal theorists because the "objects" in question clearly

cannot be perceived or experienced directly in the manner suggested. Legal contracts,

marriages and treaties are not found in the natural environment, after all, but exist

instead only in the realm of human practices. What we should see, then, is an attitude

much more in keeping with this state of being. What we expect is for more attention

to be given to the underlying legal rules which make the legal contract or the marriage

or the treaty possible. In practice, though, what we see is rather different. In his day-

to-day life, the ordinary man appears to think only rarely of the first part of each of

the examples above. Where we expect the ordinary man to say, "two people having

made a certain agreement, there is now a legal contract", what we find is only the

second part, "there *is* a legal contract", with the background to this legal contract

dropped from the picture altogether[15].

Faced with this incompatibility between what is expected and what is in fact

observed, MacCormick and Weinberger pointedly did not take this as an indication

that something might be wrong with their original expectation, an expectation which

arises from their acceptance of the self-conscious, deliberative model and the view of

deliberate, self-conscious rule-application that follows from it. Instead, they chose to

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[14] ibid., pg. 10.
[15] This failure to register the background to institutional life will be discussed more fully in the next chapter, when we look at the view of institutional facts taken by John Searle and Elizabeth Anscombe.

extend or elaborate this basic model to explain the anomaly[16]. To explain the apparent

factual existence of the law, MacCormick and Weinberger added a set of institutional

rules to the original legal ones, rules which, when wielded by the individual, serve to

transform the legal reality into a factual one[17]. *In other words, they sought to explain*

a lack of attention to rules by attributing to human agents just that attention to rules.

The remedy adopted is therefore both curious and perfectly characteristic. Presented

with evidence contrary to the dominant model but seeing no alternative to it[18],

MacCormick and Weinberger chose not to challenge the model but instead took it

even further. Having begun with an agent who should have reported an experience of

legal rules but in fact reported no such experience, they attempted to resolve this

anomaly by insisting on experience of a different set of rules, in this case, though,

with several rules rather than just one. That this is an unsatisfactory solution should be

perfectly clear. Indeed, it fails to address the very problem it is supposed to answer,

which is this: *Why is it that what are clearly rules are not actually experienced as*

rules in moving, day-to-day life?[19] It is no answer simply to pile further rules on top

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[16] Kuhn, pg. 78, on what scientists do when confronted by anomaly: "They will devise numerous articulations and ad hoc modifications of their theory in order to eliminate any apparent conflict."
[17] MacCormick and Weinberger, pg. 10: "That such a fact exists is "true in virtue of an interpretation of what happens in the world, an interpretation of events in the light of human practices and normative rules." And later, in pg. 11: "If the relevant rules are in force, it does, and if not, not."
[18] This is an important part of their solution. In offering their solution, MacCormick and Weinberger were motivated by a feeling that the realism they were addressing could not really be addressed by Natural Law or Legal Realism. They sought to "avoid the traps of idealism to which realists and materialists have always rightly objected but which on the other hand avoids the pitfalls of reductionism to which realist theories have always tended" (pg. 6). Their proposed solution therefore had a great deal to do with the fact that they could simply not see any way in which Natural Law or Realist theories could be made reputable and worthwhile. This is what I mean by a failure of imagination. Indeed, as we will see, the dominant model and everything that attends it often is equated with rational, scientific inquiry itself. To deviate from it, to investigate alternatives, often is seen as a deviation from science itself. In this case, it was felt that to follow the Realists was effectively to surrender all hope of truly understanding the law: "If this critique is well-founded, it entails an intellectual and moral crisis for those professionally engaged in the practice or the teaching of law" (pg. 3). We will look at this charge of nihilism when we look at the Realists themselves shortly.
[19] That there is a failure here is brought home, particularly, by repeated claims of presenting a "socially realistic development of normatism" (pg. 6): "ITL offers to the sociology of law (and to sociology more generally) an ontology which we claim to be essential for any realistic analysis, explanation or description of the legal sphere and indeed of all those distinctively human and social institutions and phenomena which correlate with, depend upon, or presuppose legal or other rules or norms." (pg. 7)

of the original ones in the hope that a sufficient quantity will somehow make the problem go away. What is required, rather, is a different way of looking at the problem, one that doesn't rest so heavily on rules. The different way of looking at the matter required is simply inaccessible to MacCormick and Weinberger, though, so great is the hold the dominant model has over them. I will return to this issue in Chapter Two.

Much the same unspoken adherence to the self-conscious, deliberative model can be seen in Joseph Raz's notion of "exclusionary reasons"[20], to much the same effect. Once again, the problem Raz seeks to address is only a problem, really, because of his prior assumption of a thoughtful, self-conscious attitude on the part of human agents. For Raz, all intentional action is by definition self-conscious and deliberate. It is always and invariably action taken for reasons[21]. Against this background, however, Raz notes that there are occasions when decisions are made and action is taken where reasons do not appear to play the role we expect. In these instances, there is no careful weighing up of reasons. Indeed, the human agent does not appear to reason at all. Instead, he simply picks a course of action and pursues it, even where it appears contrary to his interests. To explain this anomaly, Raz chose not to depart from his scheme of reasons, though. Instead, he opted, as MacCormick and Weinberger did, to extend or elaborate the basic view taken. With this in mind, he introduced his notion

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The criticism made here, however, is that the view offered is not realistic at all and therefore has nothing to offer sociologists or anyone else. While it is true that institutional backgrounds are central to our experience of institutional facts, and that rules are an important part of this background, it is simply not true to suggest that in day-to-day life we operate *with an awareness of these rules*. Accounts of institutional life which neglect this perfectly obvious fact can therefore make no claim to realism. Before such a claim can be made, justice must be done to the human agent's immediate experience, the way he sees the world as he acts ("we should understand matters human and social in the terms in which they are intelligible to relevant human subjects", pg. 15). Where the rules themselves are placed at the centre of the account, this requirement simply is not satisfied.

[20] Joseph Raz, "Practical Reason and Norms", pg. 35.

[21] Raz, "Practical Reasoning", introduction. We will return to this emphasis on the reasons themselves in Chapter Four.

of an "exclusionary reason". The idea here is that among the reasons the individual has to work with, a special class of reasons exists which operates not by contributing to the process of reasoning, but by shutting the process down altogether. It is this that gives us the impression that the individual is not making use of reasons. According to Raz, he is still acting on the basis of reasons, it is just that in this case he has a reason not to reason[22].

The problem Raz sought to address was not merely a general one, though, for Raz envisioned a specifically legal application for his theory. Raz offered his notion of exclusionary reasons in his book "Practical Reason and Norms", and as the title suggests, Raz was motivated by a desire to incorporate action under norms, and under legal rules specifically, into a wider understanding of practical reasoning. As noted, under Raz's view, all practical reasoning invariably takes the same one form: a self conscious, deliberate process of decision-making which sees the human agent consider and act on the basis of reasons. For him, something like a reason not to reason is required, for action under legal rules appears to be characterised by precisely the lack of just this process of explicit reasoning. Indeed, the human agent in these instances appears passive in a way the account Raz favours simply cannot explain. Something like an exclusionary reason is necessary, then, if Raz is to reconcile this observation with the underlying view taken. Given the specifically legal context in which it is offered, however, Raz's use of exclusionary reasons must match our experience of action under norms more generally. It must explain not only the passive attitude of the human agent, but must capture this passive attitude accurately. And this is where Raz's account comes into difficulty, *for what he envisions is a fully self-*

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[22] Raz, "Practical Reason and Norms", pg. 40.

conscious decision not to reason when what is clearly the case here is not a decision not to reason, but a failure to enter into any such process of explicit reasoning or decision-making at all.

That there is a problem with Raz's explanation is signalled by the examples he offers to make his point. While the point of his argument is to shed light on action taken under or in relation to norms, in fact not one of the three examples Raz provides present us with anything like norm-based activity. In his first example, Raz relates the case of a woman, Ann, who is asked to make an important investment decision but is denied the time she requires to investigate the proposal thoroughly[23]. Feeling that she is unable to make an informed decision, she decides not to decide, passing on the investment opportunity not because it is unsatisfactory in itself, but because she lacks confidence in her own judgment. According to Raz, Ann here makes use of a reason not to reason, an exclusionary reason of the sort he himself has identified. In the second illustration Raz offers, we are presented with the story of Jeremy, a soldier ordered by his commanding officer to appropriate a van belonging to a tradesman[24]. Rather than consider the balance of reasons for and against this action, however, Jeremy chooses simply to follow the orders issued to him. The order here is a reason for doing what he was ordered to do regardless of the balance of reasons. Here, too, then, what is central to the matter is a reason not to reason, a decision to simply opt out of any sort of extended thinking on what is desirable in the circumstances[25].

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[23] ibid., pg. 37.
[24] ibid., pg. 38.
[25] Raz offers a third example on page 39 of his book. The basic structure of the example remains the same, however.

As far as these specific examples are concerned, Raz's explanation may or may not convince. My concern, however, is whether or not these illustrations really are representative of our experience of norms and of legal life specifically. For myself, I am unconvinced. As noted above, there is a critical difference between making an explicit decision not to consider the balance of reasons on the one hand, and failing to even think of decisions and reasons at all on the other. In my view, the failure to reason we see as so characteristic of life under law exhibits the latter rather than the former character. *It has at its heart a complete failure to even recognise that there is an opportunity to consider alternatives and to actively decide on a course of action.* Indeed, it is instructive that Raz himself failed to give an example of use of "exclusionary reasons" drawn from experience of legal life[26]. Raz's notion of "exclusionary reasons" therefore exhibits the same curious character we saw in MacCormick and Weinberger's Institutional Theory of Law. In that case, we saw an absence of attention to rules explained by the introduction of further rules. In this instance, we see the absence of attention to reasons explained by the introduction of a further, special class of reason. Once again, what we have is a failure to see a viable way forward that doesn't revolve around rules and reasons. If we are really to make sense of the failure to reason Raz notes, we will need to find another way of thinking about these matters. We will look again at "exclusionary reasons" in Chapter Four.

A self-conscious theory of interpretation

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[26] I will present just such an example later on in this thesis, in Chapter Four. The example will not be taken from Raz, though, but from Bernard Jackson. See n. 34 in Chapter Four, on pg. 168.

Hopefully my reader will by now have a good sense of what I am driving at. What both of the examples in the previous section demonstrate is that there would appear to be an inability among legal theorists to see beyond the dominant model, an inability that leads talented and perceptive theorists like MacCormick, Weinberger and Raz to return again and again to the same set of concepts – rules and reasons, particularly – even when these concepts are clearly failing them. Having accepted the self-conscious, deliberative model these theorists find that there is no alternative to rules and reasons. Where problems emerge, then, the answer has to be provided along these same lines. All that is open to them is to assemble these same rules and reasons in constructions and configurations that are ever more creative, and with it, ever more unlikely. As noted above, however, what is required is not more rules and reasons, not different rules and reasons, but an entirely different way of thinking about the problem. The problem described above is not confined to advocates of the positivist, rule- and reason-based view of law, though. As noted above, if the self-conscious, deliberative model is indeed the "framework issue" we seek, then we must find it assumed not only in some schools of thought within the field, but even in the work of thinkers otherwise considered to be bitter rivals. For an example of this, we need only look to the work of Ronald Dworkin. Dworkin's interpretive theory of law is of course the main rival to the view of law advocated by Hart, MacCormick and Raz.

Indeed, Dworkin's theory is particularly interesting in the context of the present discussion because in many ways it resembles precisely the sort of reorientation I will myself attempt here. Unlike MacCormick and Raz, Dworkin clearly felt that a radical approach was needed if the anomalies evident in the underlying rule- and reason-based view of law were to be addressed. Rather than simply extend or elaborate the

pre-existing view to address the anomalies noted, then, Dworkin sought instead to overturn this pre-existing view altogether, setting up a radical alternative in its place. Dworkin's approach and the one I will attempt here therefore have a great deal in common. There is, for example, clearly a sense in which Dworkin's aim was to reconstruct the field from new fundamentals. Butterfield's notion of "picking up the other end of the stick", is reflected, particularly, in Dworkin's decision to place "hard cases" at the centre of his account, where previously "easy cases" were given this role.

For all that Dworkin's theory has proved a popular one, however, it is clear that the reorientation he offered has not been entirely successful. The test of this is straightforward enough. Where such a reorientation is offered, success or failure can be measured from the degree to which the new way of looking at the field succeeds in silencing the various alternatives on offer, particularly the previously dominant one. A successful reorientation is one around which the entire field can rally. This consensus on the issue allows those working within the field to regard the fundamental questions involved to be resolved, leaving them to get on with more specialised, and hopefully useful, work. For an example of such a success within legal theory, think of the fate of Austin's command theory after Hart's own rule-based theory came to prominence. As Dworkin's theory was designed specifically to improve upon Hart's efforts, success for his theory would have seen Hart's theory consigned to history in precisely the way that Austin's was. In fact this has not occurred. Instead, Dworkin's theory now sits alongside Hart's, contributing to the profusion of theories characteristic of the field. Rather than bringing clarity to the field, then, the radical reorientation Dworkin attempted has actually added to uncertainty and confusion there. Students now have

one more theory to grapple with, one more theory which, like all the others, appears to capture legal life only partially. Rather than alleviate the sense of crisis, then, Dworkin's efforts have in fact exacerbated it.

Given the failure of Dworkin's theory to settle matters once and for all, can the prospects of my own efforts here really be so good? Will the view of law offered here simply add to the problem in the way that his has? In fact, there is a crucial difference: In my view, the failure of Dworkin's theory arises from the relatively conservative nature of the reorientation he offered. This will strike many readers as strange, I'm sure. Dworkin's theory certainly appears to be anything but conservative in the reassessment of the field it offers. As noted above, where emphasis within the field previously was placed on the mechanical application of rules, Dworkin favoured an interpretive approach. More than this, his emphasis on "hard cases" effectively turned on its head what was previously the dominant understanding within the field. Superficially, then, his theory does indeed resemble a transformation of the field. Yet for all this, it is important to note an aspect of the picture he leaves untouched: the self-conscious, deliberative model. In Dworkin's interpretive theory, the process envisioned is one of conscious interpretation. The overall change, then, is not really so dramatic. Where judges were thought previously to manipulate rules in a deliberate, self-conscious manner, now they are seen to work with principles in much the same way. Legal life remains, then, essentially a matter of self-conscious evaluation and choice. There is an important difference between mechanical application and interpretation, of course, and the reorientation offered does indeed have some dramatic consequences. What matters, however, is whether or not the results are convincing, whether or not the portrait Dworkin presents actually fits the facts. As we

will see, Dworkin's failure to see past the dominant model leaves him unable to grapple with much of what we see in legal life. His interpretive approach may appear quite radical, then, but its underlying conservatism is such as to leave it unable to provide the answers we require of it.

It is worth exploring the shortcomings of Dworkin's solution briefly here, as it sets up the discussion to follow rather well. When we study the view of law he offered in "Taking Rights Seriously" and "Law's Empire", we find two fairly obvious problems with the account offered, one of them fairly subtle and technical, the other anything but. The latter of these is found in the relatively narrow view of law taken. While Dworkin clearly means for his theory to be taken as a theory of the law as a whole, in fact what he offers is really a theory only of legal adjudication. Reading his work, it is obvious that he is trying to answer the most basic of questions: What is the law? What is it for? Where does it come from? Having tailored his solution so closely to fit adjudication, however, the answers he offers are hard to apply to the wider life of the law. How, for instance, are we to apply the interpretive theory he advocates to our day-to-day experience of the law? When we stop at traffic lights or board public buses, is the law in these instances essentially interpretive or argumentative? In such cases, do we seek to interpret the law, to make it the best that it can be, or do we, rather, seek simply to fall in line with it? The answer is clear, I think. One of the virtues of the rule-based account Dworkin opposed was precisely its ability to answer such questions. The rule-based account, whatever its failings, is at least pleasingly comprehensive. According to this account, the legislature enacts rules, the judiciary applies them, and ordinary citizens abide by them. The limited scope of Dworkin's theory is a real problem, then, because it means that his theory is not really a theory of

law at all. At best it is a theory of legal adjudication. Even on these more limited terms, however, the theory is weak, and it is weak precisely because of its neglect of the larger life of the law. As we will see, understanding the way the law works on the ground – why we stop at traffic lights, for instance – is crucial if we are truly to understand what goes on in the courts.

This last point brings us to the more widely recognised problem with Dworkin's account. We might think that by dropping all consideration of the wider life of the law, Dworkin would at least be well placed to offer a convincing account of legal reasoning. As noted above, for Dworkin, interpretation is essentially a self-conscious, deliberate matter. The judge collects together all of the material that is relevant and produces a verdict in a thoughtful, explicit manner. This being the case, his interpretive theory of law should be a natural fit for what we see in courts, for legal adjudication is surely a thoroughly reflective matter. And provided we restrict our concern to "hard cases", the account actually works quite well. Unfortunately it does not fare quite so well when "easy cases" are at issue. As Dworkin himself conceded repeatedly, the judge's reasoning in these cases is characterised by a certain automatic quality, the judge "seeing at once" what is required[27]. Having adopted a fully self-conscious model, however, Dworkin finds that he simply cannot explain this feature. He is forced, then, into the uncomfortable position of acknowledging this automatic character while at the same time explaining it as a species of self-conscious reasoning. Predictably enough, the result is unconvincing. Indeed, to make his account work,

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[27] Law's Empire, pp. 66-67: "Actual interpretation in my imaginary society would be much less deliberate and structured than this analytical structure suggests. People's intuitive judgments would be more a matter of "seeing" at once the dimensions of their practice, a purpose or aim in that practice, and the post-interpretive consequence of that purpose. And this "seeing" would ordinarily be no more insightful than just falling in with an interpretation then popular in some group whose point of view the interpreter takes up more or less automatically."

Dworkin is forced to invoke a judge of superhuman abilities, Hercules. Under this view, the fully self-conscious account he offers is true only of this superhuman judge, who explicitly reasons through all of the cases which come before him, whether easy or hard. Real judges fall short of this, though, and instead must rely on intuition, experience and something like a "common consciousness", a sort of social understanding these judges share with their fellow citizens[28].

In effect, then, Dworkin was forced into much the same corner that MacCormick, Weinberger and Raz were. Once again, we see the same failure of imagination. Unable to see past the dominant model, Dworkin was forced to characterise a lack of explicit reasoning in precisely the opposite terms, describing it simply as a special example of explicit, self-conscious reasoning[29]. This view of the matter is clearly unsatisfactory. If real judges say that they rely on intuition, experience and a common consciousness of some sort[30], then surely the task of legal theory is to work out just what this means. Our task is to confront reports like the following one head on:

> They say that law is instinct rather than explicit in doctrine, that it can be
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> identified only by special techniques best described impressionistically, even
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> mysteriously. They say that judging is an art not a science, that the good judge
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> blends analogy, craft, political wisdom, and a sense of his role into an intuitive

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[28] Law's Empire, pg. 245: "… an actual judge can imitate Hercules in a limited way. He can allow the scope of his interpretation to fan out from the cases immediately in point to cases in the same general area or department of law, and then still farther, so far as this seems promising. In practice even this limited process will be largely unconscious: an experienced judge will have a sufficient sense of the terrain surrounding his immediate problem to know instinctively which interpretation of a small set of cases would survive if the range it must fit were expanded."

[29] ibid., pg. 266: "So easy cases are, for law as integrity, only special cases of hard ones."

[30] See n. 28 above.

decision, that he "sees" law better than he can explain it, so his written

opinion, however carefully reasoned, never captures his full insight.[31]

Indeed, recourse to ideal figures like the superhuman judge Dworkin relies upon to

make his theory work is almost always a sign that the theory in question is profoundly

mistaken in its design. What it suggests is that the theory and the reality it purports to

model or explain simply cannot be reconciled, and consequently, the theorist in

question must invent an alternative reality the theory actually fits. The claim made,

then, is that while the account offered does not really explain the reality we are

interested in, it nevertheless explains an ideal which somehow will illuminate that

reality, though usually how this might be true is not specified[32].

Once again, then, we see something of the contortions that we are forced into

whenever we attempt to apply the self-conscious, deliberative model to our

experience of legal life. Like the other theorists we have looked at in this chapter,

Dworkin found that he could only explain what he found in terms of deliberate, fully

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[31] ibid., pg. 10.

[32] This recourse to ideal figures is not uncommon. In a particularly notorious passage, Noam Chomsky invokes just such an ideal, in this case an "ideal speaker-listener": "Linguistic theory is concerned primarily with an ideal speaker-listener, in a completely homogeneous speech-community, who knows its language perfectly and is unaffected by such grammatically irrelevant conditions as memory limitations, distractions, shifts of attention and interest, and errors (random or characteristic) in applying his knowledge of the language in actual performance..." (Aspects of a Theory of Syntax, pg. 3) The parallels with what Neil MacCormick has to say in the following passage are striking: "... I envisage citizen's legal reasoning not in terms of social reality but as an ideal construct, in terms of how it would be possible that legal conceptualisations function as action-guides for an idealised norm-subject." MacCormick continues: "We note that homo juridicus is no more a real person than homo economicus, but that each can illuminate actual thinking processes if they elucidate the logic of a possible line of practical thought, and if there is reason to envisage the actual reasoning of actual persons as in some way approximating to the ideal type, and hence being illuminated as to its juristic or economic content by that very approximation" (International Journal for the Semiotics of Law, Vol.V, No.13, 1992, pg. 3). Dworkin's superhuman judge Hercules, too, represents just such an ideal: "No actual judge could compose anything approaching a full interpretation of all of his community's law at once. That is why we are imagining a Herculean judge of superhuman talents and endless time" (Law's Empire, pg. 245). This point is noted by Douzinas, Warrington and McVeigh in their book, "Postmodern Jurisprudence", pg. 71: "Hercules can also be seen as the embodiment of another big modernist dream: the perfect machine that always functions accurately, endlessly churning out right answers."

self-conscious behaviour. Unfortunately, our experience of legal life simply cannot be explained solely in these terms. While Dworkin's strategy might appear a promising one – to look only at that aspect of legal life apparently most conducive to analysis in terms of deliberation and self-conscious choice – in fact the automatic, unthinking character so troubling to the model is pervasive, its presence even in the most reflective aspects of its life. What is required, then, is a model which has a place for *both* the deliberate, fully self-conscious mode we are so comfortable with theoretically *and* the more automatic, unthinking mode of action we find so difficult to explain. This model must be subtle enough not only to encompass both of these modes of action and thought, but must actually capture with some precision the relationship that exists between the two, setting out in detail the way in which the human agent moves between the two in the course of his day-to-day, moment-to-moment life. As far as the law is concerned, we must seek a theory of law subtle enough to encompass the experience of both ordinary citizens and judges, tracing out in detail the relationship between the two. As will become clear in later chapters, the two are in fact intimately bound together. In the end, we cannot hope to understand legal reasoning in "easy cases" if we do not have some understanding of the way in which ordinary citizens understand and respond to the law in their day-to-day lives. This actually follows from Dworkin's own insight concerning the "common consciousness" exhibited by judges. As we will see, the effortlessness of the judicial response in "easy cases" has everything to do with a similar effortlessness in the experience of the ordinary citizen on just those points of law. In general, an "easy case" is easy for the judge wherever it is easy for the ordinary citizen. This is not a trivial point, for when we capture this relationship between the judge and the ordinary citizen fully, we will have a much better understanding both of the role of the judge

and of the nature of the competence he employs. I will return to this issue in Chapter Six.

Irrational, intuitive, emotional and automatic

While uncritical acceptance of the self-conscious, deliberative model is everywhere in mainstream legal theory, there are, of course, exceptions. Perhaps the most prominent of these exceptions is to be found in the writing of the Realist legal theorists, both in their Scandinavian and American varieties. While most legal theorists take for granted the fully conscious, deliberate manner of deciding and acting described above, Realist writing is characterised by the challenge it poses to just this assumption. Interestingly, though, the Realists did not champion a specific psychological model[33]. Rather than arguing for one view of these psychological processes over others, they argued that we actually take the psychological reality of the process seriously in the first place. This more modest goal reveals something important. While I have so far described the dominant model as a particular psychological model, in fact it is nothing of the sort. It is, rather, the model adopted wherever the underlying psychological reality involved simply is not addressed. It therefore represents an absence rather than a presence, what we get when we make no attempt to understand the underlying processes involved. It comes as no surprise, then, that we should find it featuring so prominently in the work of legal theorists and economists. In these fields, thinkers clearly do not feel confident addressing questions of psychology. Legal theorists understand

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[33] The Realists were, of course, thoroughly immersed in an intellectual context in which interest in the psychological was acute. My meaning here is simply that they offered no clear, comprehensive model of how the process worked, making do instead with mere observations. These observations were often impressionistic and fragmentary, and as a result, are poorly understood even today.

themselves to possess expertise in legal matters, discussions concerning rules, principles, rights and reasons. Quite reasonably, then, they have preferred to remain on their own ground, pursuing answers to the problems they face in just those terms. Addressing problems in self-conscious, deliberative terms allows them to do just this.

What marks out the Realist accounts, then, is the readiness with which the difficult work of teasing out this psychological reality is undertaken. Indeed, their work stands in marked contrast to the explanations we have already encountered for just this reason. Where MacCormick, Weinberger and Raz chose to explain the factual and largely thoughtless way in which ordinary citizens interact with the law by looking to explicit rules and reasons, the Scandinavian Realists embraced the problem these experiences represent directly. They asked: How are we to explain this thoughtless, habitual form of behaviour? Similarly, where Dworkin chose to dismiss the intuitive, automatic character of judging in "easy cases", reassuring us that it was simply a variation of the fully self-conscious mode of reasoning we see in "hard cases", the American Realists took the problem on directly, looking specifically to explain just this intuitive, automatic character. For all their good intentions, though, it is interesting to note that they were not themselves spared the difficulties involved in pursuing such a course. While they certainly made valiant attempts to provide a coherent account of these processes, it is fair to say that they fell some way short of this goal. As such, the Realist accounts tend to be valuable primarily for the descriptions of legal life they offer. As noted above, our failure to see beyond the deliberative view leads many legal thinkers to distort their representations of legal life. Reading the Realists writers today, what is most striking is the stubborn way they resisted this temptation to distort, insisting always that the reality of legal life be

recognised within legal theory, however mysterious and unpalatable this reality might be.

And mysterious and unpalatable it certainly is. Taken as a whole, the portrait the Realists presented was one in which our relationship with the law is rather more irrational, intuitive, emotional and automatic than we are inclined to imagine. The profoundly counter-intuitive character of the portrait has proven problematic, for it has left those who have followed them with no effective way of building on the insights they offered. To understand why this has been the case, we have to return briefly to Thomas Kuhn. As Kuhn noted, there is no such thing as research in the absence of a paradigm[34]. To reject one paradigm without simultaneously substituting another is, effectively, to reject science itself[35]. The problem with the Realist writing, then, is in its failure to provide a full-blown alternative to the dominant model. Lacking this full-blown alternative, mainstream legal theory has responded, predictably enough, in two ways. The first response has been to dismiss the views of the Realists altogether as nihilistic. This view is supported by some of the more intemperate statements offered by the Realists themselves. The second, more searching response has seen legal theorists accepting the specific observations of the Realists as valuable, but going on then to attempt to absorb these observations within the pre-existing scheme. This response, too, is understandable. As noted above, legal theorists require a framework within which to work, however unsatisfactory. As the Realists stop short of providing a viable alternative, the theorists who have followed

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[34] Kuhn, "The Structure of Scientific Revolutions", pg. 77: "… once it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternate candidate is available to take its place." And a little later: "The decision to reject one paradigm is always simultaneously the decision to accept another…"
[35] See, for example, MacCormick and Weinberger in n. 18 above on pg. 12.

them have had no choice but to attempt to accommodate their observations within the scheme already in place.

In fact, a positive account can be gleaned from the writing of the Realists, though to recognise it we must read the Scandinavian and American accounts together, and pay particular attention to certain crucial features. First of all, let us look at the Scandinavians. For the Scandinavian Realists – Hagerstrom and Olivecrona particularly – legal life was clearly not a deliberate, self-conscious matter. Indeed, while legal life is more frequently explained in terms of rules, reasons, principles or rights, the Realists bypassed the realm of conscious awareness and choice altogether and looked instead to a deeper set of psychological processes. The Realists understood legal action not as *chosen* by the individual, but instead insisted that the law operates *upon* the individual in some way, as if designed to take advantage of a psychological weakness. This is strange for us, for we are inclined today to think of the law almost exclusively in terms of self-governance, as the way we choose to organise life for ourselves. The Scandinavians painted a rather more sinister picture, though. Olivecrona, for instance, saw the use of language in the law as "a mode of expression used in a suggestive way in order to influence the behaviour of people"[36]. The question the Scandinavians asked, then, was this: How does the mere uttering of words produce changes in the behaviour of people? As the law was, for them, essentially a "delusion" or "fantasy"[37], the law-giver "playing on our minds as on a

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[36] It is important to bear in mind that the Scandinavian Realists were arguing against Austin's command theory. Against this background, the view taken by the Realists is not as sinister as it might appear to us now. The Realists were simply arguing that those subject to the law are not ordered or threatened into compliance but are instead manipulated in some gentler manner.
[37] Hagerstrom, "Inquiries into the Nature of Law and Morals", pg. 319, extracted in M.D.A. Freeman's "Lloyd's Introduction to Jurisprudence", pg. 752. See also Bernard Jackson, "Making Sense in Jurisprudence", pg. 136.

musical instrument"[38], the focus of their investigation was in working out how this fantasy or delusion was brought about.

Obviously, this view of the matter gave the Scandinavians' work a unique character within legal theory. For a sense of just how different their view was, we need only look at Olivecrona's treatment of institutional facts. Like MacCormick and Weinberger, Olivecrona sought to explain the "supersensible sphere" of rights, duties and legal qualities. Like MacCormick and Weinberger, Olivecrona, too, saw rules as central to this strange mode of existence. For him, however, the process was much less straightforward. In particular, he felt that belief in these rights, duties and legal qualities arose not from a conscious, rational process, from committing to institutional rules in an explicit, thoughtful manner, but instead came about through the internalisation of these rules, internalisation achieved through a process of conditioning or habituation[39]. This internalisation was such that the appropriate response could be evoked spontaneously, without external pressure or conscious reflection[40]. As noted above, this spontaneous character is central to our experience of institutional facts, and while apparently lost on MacCormick and Weinberger, was grasped with particular clarity by Olivecrona. The point is made particularly well in the following passage, where Olivecrona presents us with a portrait of an ordinary man's life in modern society:

> … our man is firmly convinced that he has a number of 'rights' and 'duties'.
>
> He 'owns' a house where he lives with his family; but he has a 'loan' from the

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[38] Olivecrona, "Law as Fact" (1st ed.), pg. 54. See also Freeman pg. 759 and Jackson pg. 136.
[39] Jackson on "internalisation" in "Making Sense in Jurisprudence", pg. 136: " "Internalisation" means that a feeling of obligation is spontaneously evoked… without external pressure or conscious reflection. "
[40] ibid.

'bank' on which he must pay 'interest'. He is obliged to pay 'taxes', to send his children to 'school', and to do a lot of other things. He has the right to 'vote' at the 'elections', to be 'paid' for his work, to get his old age 'pension', and so on. In case of a dispute with another man about his own right and another man's duty, he can go to a 'court' to have the matter settled by a 'judgment' … Even when he bids good night to his 'wife' a legal notion is involved.[41]

The passage above captures our experience of institutional facts perfectly, I think. More than this though, it actually gives us a glimpse of much that is central to the process of internalisation involved. What the passage makes clear above all else is the degree to which institutional facts, objects and actions all are experienced as embedded seamlessly into the larger environment the individual experiences, the "whole setting" of his life[42]. There is, for instance, the overwhelming familiarity of the institutional facts in question, so familiar that they seem "a part of the order of the universe like the rising and setting of the sun."[43] Notice, too, the largely practical character of the ordinary man's interest in all this. He is busy paying his taxes, taking his children to school, getting paid for his work. What we see is a man "caught up" in his life, attending to more pressing concerns than the institutional basis of the facts themselves. When we put all of these elements together, we see a man who is truly "at home" in his environment[44], someone who doesn't observe this environment from a

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[41] Olivecrona, "Law as Fact" (2nd ed.), pg. 3.

[42] Olivecrona describes the "imperantum" of legislation in the following way: "The imperantum of legislation is the whole setting in which the enactment takes place: the working constitution, the organization functioning according to its rules, the familiar designations of parliamentary bodies and state officials, etc. Once the constitution has been firmly established, the people respond automatically by accepting as binding the texts proclaimed as laws through the act of promulgation." (Law as Fact (2nd ed.), pg. 130).

[43] see n. 38 above, on pg. 29.

[44] Searle, "The Construction of Social Reality", pg. 147.

distance, but who is absorbed in it, his very ability to see and act partially captured by the environment itself.

There is something very interesting in all this, but if we are truly to make sense of the view of law offered by the Scandinavians, we have to place it alongside the account offered by the American Realists. As noted above, the two schools are classed together as "Realist" not only for their opposition to the deliberate, self-conscious view of thought and action that dominates legal theory, but more particularly for the character of the opposition they offered. Most obviously, both insisted on a realistic description of legal life. In line with this concern for realism, both saw law primarily as a psychological phenomenon, and as such, insisted on a psychological explanation. Taken together, then, the schools represented a movement for a realistic, primarily psychological explanation of law. Beyond this general sense of purpose, however, the detail of the accounts presented can be quite hard to reconcile. Indeed, from one point of view, the schools can be said to offer almost contradictory pictures of the individual's relationship with the law. The Scandinavian view can be said to be challenging for mainstream thought in the way that it presents the ordinary citizen not as rational or free, but rather as captured by the law in a particular way, as acting under a delusion or fantasy. The American Realist view is thought to be challenging for precisely the opposite reason, though. What is so unpalatable about their view is the freedom they appear to attribute to judges, the way in which they seem to see these judges as acting always on the basis of their own judgment. According to the American Realists, judges are *not* captured by the letter of the law in the way that we would like them to be, and this is what many find so problematic about their view.

Despite this superficial difference, the two schools of thought are actually much closer than they might initially appear. As noted above, the American Realists are often mischaracterized as offering a nihilistic or purely sceptical view, with judges presented as wholly free to decide as they wish, on the basis of a pragmatic concern for what is fair or desirable in the case before them[45]. This is not representative of the most interesting writing offered by the American Realists, though. In this writing, the judge is presented not as wholly unfettered, free to decide as he wishes, but instead is presented as deciding always on the basis of his experience[46]. Oliver Wendell Holmes's famous insight comes to mind: "The life of law has not been logic, it has been experience"[47]. Karl Llewellyn's notion of a "situation sense" is a further illustration of this point. Like much of Llewellyn's writing, precisely what he means by this is not easy to grasp, and has remained rather mysterious to most readers even all these years later. In fact it is not so strange. According to Llewellyn, the judge's ability to provide a decision in any given case has a great deal to do with an ability the judge has to "see at once" what is appropriate in the circumstances of the case before him, an ability he acquires through years of experience deciding similar cases[48]. This

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[45] This nihilism is found in Hart's characterisation, of instance, that rule-sceptics are disillusioned idealists who expect too much of rules: "The rule sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointed by the denial that there are, or can be, any rules" (Concept of Law, pp. 138-139).

[46] Cotterrell, "The Politics of Jurisprudence", pg. 198: "So Llewellyn's predominant emphasis is not (as was Frank's) on the factors promoting uncertainty and unpredictability in law, but on those producing a remarkable predictability of legal outcomes, despite the 'leeways of precedent', the indeterminacy of doctrine or its inability to remove the human and subjective character of judging."

[47] Holmes, O. W., "The Common Law", pg. 1: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

[48] Llewellyn, "Common Law Tradition", pg. 190, "… the court is not merely reaching for authority or color to justify the decision at hand, but is also seeking and finding comfort in the conviction that the decision and the rule announced fit with the feel of the body of our law – that they go with the grain rather than across or against it".

experience gives the judge a feeling for the situation, a "situation sense", which allows him to "read" the situation effortlessly, to see what it requires immediately.

What is described, then, is not merely rule-scepticism or outright pragmatism. It is, rather, an exploration of a particular characteristic of judicial competence, a characteristic entirely neglected by descriptions given under the self-conscious, deliberative accounts. What we are presented with is a picture of a judge who comes, through practical experience, to feel "at home" in his work in a certain way. The judge arrives at a point where, like the ordinary man depicted by the Scandinavians, he has internalised the law in a certain way. He has come to be absorbed in it, the law capturing his very ability to see and act. In effect, then, the Realists were making much the same case as the Scandinavians. The law here, too, is found to operate *upon* the individual, though in this case we would likely describe it as arising from a psychological strength rather than a weakness, an ability to absorb tasks and contexts the individual encounters repeatedly. When we begin to think of this as a strength, we see that it is evident even in the Scandinavian portrait, for if we look again at Olivecrona's account of the ordinary man, we can see the very same "situation sense" at work. While we are inclined to think of the fantasy or delusion involved in wholly negative terms, there is in fact a positive way in which to view all of this. What we miss only too easily is the way in which the uncritical acceptance of the environment we see in the individual actually contributes to his ability to negotiate his surroundings in an effortless, thoughtless manner. Like the judge, he, too, has a ready-made sense of what is appropriate in the circumstances, a sense he has acquired through repeated experience of just those circumstances. This ready-made sense of what is appropriate eases his way through life considerably, his very ability to see in

any given encounter having already adjusted itself to the level of experience or the mode of interpretation most relevant to his practical concerns. Every time he is handed a banknote, then, he does not need to reason through or even acknowledge the institutional background involved. Instead, he simply sees the banknote as a banknote, and gets on with paying his bill or with doing whatever it is he happens to be doing.

Separately, then, the Realist accounts are easily dismissed as mysterious and somewhat negative. When we put the two together and look at them in the right way, however, an interesting portrait of the human agent emerges, one that has the potential to serve as a real alternative to the self-conscious, deliberative model. In this alternative, we see the human agent not as detached from his surroundings in the manner the dominant model imagines, the manner taken for granted by MacCormick, Weinberger, Raz and Dworkin. Instead, we see the human agent designed, as it were, to inhabit his practical environment much more directly. *Under this view, the process responsible for consciousness within the individual works primarily to create the most comfortable relationship between the individual and the environment he moves through.* What the process seeks above all else is *fluency*, looking always to make the individual's existence within that environment as effortless as possible. An important element in this is the way in which the process accepts the view of the environment that is most conducive to this fluency. The ultimate accuracy of the view of the environment presented – the fact that a banknote is really just a piece of paper with grey and green markings on it – is therefore a secondary matter. What matters much more is the practical value of the object, the place the object has in the day-to-day, moment-to-moment life of the individual. All of this will no doubt strike my reader as rather mysterious, perhaps only a little less mysterious than the writing of the Realists

themselves. Talk of fluency, of a comfortable fit between the individual and his environment, all will hopefully be much clearer by the end of this thesis.

A top-down concept of law

The Realist writing is important, then, as it provides us with our first positive point of contact with mainstream legal theory. Notions like "situation sense" provide us with our first clues as to how to proceed in seeking our alternative. As indicated above, what we will pursue is a psychologically realistic or psychologically informed account of legal experience, one which takes into account the workings of the process responsible for consciousness. On its face, this concern for the psychological underpinnings of our relationship with the law should not be controversial at all. However artificial or "humanly conditioned" the legal environment itself is, our experience of it must be achieved by some regular process, and it is perfectly reasonable for us to imagine that this process has some bearing on the way we actually experience the law. Our concern, then, will be with what happens beneath the threshold of consciousness, rather than what happens above it. We will look not to conscious experience, but to what goes into the making of this conscious experience. As will become clear, this takes us far from the understanding of these matters currently dominant in mainstream legal theory. For a sense of just how far, I will end this brief survey with a look at an altogether more prominent figure in legal theory than the Realists: Herbert Hart.

It is fitting that we should end this chapter by looking at Hart's work, for there is no one writer who has had so great an impact on legal theory as it currently stands. Indeed, we might go so far as to say that Hart is responsible for Anglo-American legal theory as we know it today, his landmark book "The Concept of Law" setting the stage for almost all work in the field over the subsequent fifty years[49]. That Hart's thinking is the source of our problems is borne out by the detail of his view of law. To see that this is the case, we must look not at this or that particular aspect of his theory, but at the overall view he offered, the comprehensive portrait he set out. When we look at the various concepts he introduced, a distinct pattern emerges. *At each level, Hart sought to remove or marginalize any suggestion of an existence for law that was intuitive, automatic, emotional or culturally derived, insisting instead that the law be seen always as a deliberate, fully self-conscious matter.*

Thinking of the law overall, for instance, Hart insisted that our experience of it was characterised by a "critical reflective attitude", going out of his way to distinguish this attitude from "mere habits of behaviour"[50]. A similar preference was shown in the distinction he drew between what he described as the "internal" and "external" aspects of rules[51]. With this distinction, Hart sought to make clear that obedience to the law arises from a self-conscious commitment to the law, which is what the

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[49] Cotterrell, "The Politics of Jurisprudence", pg. 80: "Of Hart's work it has been appropriately said that it 'provides the foundations of contemporary legal philosophy in the English-speaking world and beyond…'." In fact, this point is particularly appropriate in the immediate context. Both MacCormick and Raz were students of Hart, and each in his respective way has sought to complete or extend Hart's theory of law. Dworkin, too, owes a considerable debt to Hart, for his larger view of law evolved, both historically and conceptually, out of his critique of Hart's work.

[50] Hart, "The Concept of Law", pg. 56: "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'. These are the crucial features which distinguish social rules from mere group habits".

[51] ibid., pg. 55: "A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record."

internal aspect amounts to. It describes not only cognisance of the rule in question, but explicit acceptance of it. His preference for a deliberate, self-conscious view of law is reflected, too, in his insistence that law and morality be seen as separate. The point of this separation, once again, is to make clear that legal life is not a matter of intuition or feeling or cultural inheritance. It is, rather, a matter of self-conscious choice. It is a matter of our taking a hand in our own destiny, approaching life in a thoughtful manner and making decisions as to how we will live.

Hart's prejudice in this respect was both perfectly reasonable and admirable when seen in its historical context. In offering his account of law, Hart was much exercised by a need to extricate the law from influences he took to be extra-legal in nature, influences like traditional beliefs, superstitions, and hierarchies based on religious and customary understandings. The concern, then, was to establish a picture of law with what we might describe as self-determination or self-mastery at its heart, with the law itself seen as a wholly invented phenomenon, created at the top by our elected representatives, administered deliberately by officials of various sorts, and observed with equal deliberation and self-consciousness by citizens on the ground. This, then, is why he sought to remove or marginalize any suggestion of an existence for law that was intuitive, automatic, emotional or culturally derived. For him, recognising any such basis was tantamount to conceding a lack of control over our collective destiny. It would leave the law compromised by customs, habits or religious beliefs.

There is a relationship, then, between Hart's positivism, the top-down view of law he espoused, and the fully self-conscious mode of operation he envisioned. *The challenge we will offer, then, is to this whole picture: The positivist separation of law*

from extra-legal social understanding, the top-down view of law, and the self-conscious manner of operation he envisioned. This is what I meant when I wrote above of looking not at this or that particular aspect of Hart's theory, but at the overall view he offered, the comprehensive portrait he set out. My argument in this thesis is that recent legal theory has taken for granted the top-down, language and rule-based, bureaucratic picture of law Hart set out. Anomalies have been approached as local problems requiring local solutions, with the top-down picture itself left untouched. Indeed, Hart's own work is much concerned with these anomalies. His argument concerning the "core of settled meaning"[52], for instance, represents just such a concession to the very automatic, intuitive aspect of legal life he sought to excise. In this thesis I will view the various anomalies all as requiring a more comprehensive solution, however, a need for us to think again not just about this or that aspect of the law, but about the overall view we have taken[53].

This, then, is what I will offer in the coming chapters: I will challenge the top-down, bureaucratic model and offer instead a ground-up, experiential one. With this in mind, I will look at each of the elements of Hart's view of the law over the coming chapters, in each case with a view to turning the view he took on its head. Indeed, it is helpful to think of the view of law offered in these pages as something like a reversal or upending of Hart's view. The rule of thumb is this: When Hart goes one way, I will go the other. Where Hart sought to remove or marginalize any suggestion of an existence for law that was intuitive, automatic, emotional or culturally derived, here we will embrace just these aspects of our experience, fashioning a view of law that is as far from deliberate and fully self-conscious as can be imagined. Where Hart took

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[52] ibid., Chapter Seven.
[53] Hart's local solution concerning the "core of settled meaning" will be contrasted with my own approach in Chapter Six, see n. 48 there, on pg. 257.

the law to have at its heart a critical reflective attitude, for instance, here I will offer a view of law built around mere habits of behaviour. Where Hart took the internal attitude to be characterised by a self-conscious attention to rules, here I will characterise internal and external in exactly the opposite way. I will argue, first of all, that Hart's explicit, rule-based internal attitude is actually an external attitude, and secondly, that the external, rule-based view is found in just those cases where commitment to the law is likely to be at its weakest. And finally, where Hart sought to maintain a clear separation between law and morality, I will argue that the two are in fact inseparable. I will argue that the law must have a basis in morality if it is to be effective[54].

Habits of behaviour will therefore form an important part of the view offered here. Of course, before habits can play this role we will need a much clearer view of what these habits in fact amount to. Hart's own investigation into these habits of behaviour can hardly be described as searching[55]. Indeed, there is a sense, reading Hart, that no careful examination was thought to be required. For Hart, the unthinking, automatic character of such habits surely could not be sufficient to account for the complexity of legal life. While he conceded that a rule requiring us to drive on the left side of the road may well be simple enough to function in a purely habitual way, he felt that such a rule simply could not be representative of the law as a whole. The greater part of the law is characterised by a level of complexity which, surely, necessitates at least some degree of conscious thought.

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[54] This will be dealt with in Chapter Five when I look at the role played by "clear patterns in life".
[55] Hart, "The Concept of Law", pp. 55-58. See Cotterrell, "Politics of Jurisprudence", pp. 90-92, for an example of criticism of Hart's discussion.

There is great appeal in this view of the matter, and it is easy to see why he spent so little time exploring what such habits might amount to. Yet his notion of mere habits of behaviour is intriguing. Hart's one example – the rule requiring us to drive on the left side of the road – brings several others to mind. What about the rule requiring us to stop at red traffic lights? Could our compliance in these instances be a matter of habit? Is what we have here simple enough? Moving towards further complexity, what of our use of public buses?[56] The legal aspects of the act are sufficiently intricate and unnatural to make an explanation along the lines of mere habits unlikely. Yet when we buy a ticket upon entering such a bus, are we fully aware of the legal implications of the act? Do we have the legal implications in mind as we do it? Can this, too, be described in terms of a habit of behaviour? When we proceed in this way, we find Hart's argument losing much of its clarity, for when we actually begin to think about our day-to-day experience, what quickly strikes us is just how much of our behaviour is indeed habitual. Indeed, as Dewey put it, we perform a thousand useful acts everyday without ever thinking of them[57]. Often, the actions in question are indeed complex, both physically and in the legal and social implications they entail.

While Hart was quick to dismiss mere habits of behaviour, then, we will find in them the beginnings of a real alternative to the dominant model. The challenge for us is to make something useful out of this notion of habits of behaviour. I will pursue this in the coming chapters. As noted above, when my account is complete, we will find that Hart not only got his account badly wrong but that he got it almost exactly backwards. We will see that habits of behaviour are indeed central to the operation of the law

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[56] Our use of public buses is an example Neil MacCormick offers in his article, "Law as Institutional Fact" in Law Quarterly Review, No.90, 1974, pp.102-129.
[57] John Dewey, "Human Nature and Conduct", pg. 177.

even in the present day. As the Scandinavian Realists realised, the law operates not in the fully self-conscious, deliberate manner we are inclined to assume, but rather through the embedding of the law in the environment the human agent perceives. Habits, both of perception and behaviour, are central to this. Even more surprisingly, we will see that judges, too, are not really so different from their ordinary counterparts. For them, too, the law is never a *fully* self-conscious deliberate matter[58], but instead has much more to do with habits they have built up over the course of their professional lives.

All of this will take some explaining, of course. My task in the next three chapters will be to set out my alternative to the dominant model, an alternative based around *habits, skills and expertise*. When the model is complete, we will be equipped to answer the specific questions we have encountered over the course of this chapter. We will have a model which allows us to accommodate the real existence of norms, our widespread failure to reason through our decisions, and the conscious and unconscious nature of interpretation, all without difficulty. Setting out my model and answering these specific questions will be the central focus of Chapters Two, Three and Four. In the second part of the thesis – Chapters Five and Six – I will go on to use my model to set out a complete portrait of legal life to rival the Hart's own. I will provide an account of what the law is like for ordinary citizen and the judge alike.

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[58] The emphasis here is on *fully* self-conscious rather than merely self-conscious. It is not my aim in this thesis to replace the dominant wholly self-conscious picture of the human agent with a wholly unreflective, automatic one. I will not offer an absolute argument against self-conscious, deliberative activity, for this mode of activity clearly has its place. Rather, my aim here is to achieve a better understanding of the balance that exists between the unreflective and reflective aspects of our experience. It is this question of *degrees of awareness* that is at the heart of everything that follows. When I turn my attention to the formal life of the law in Chapter Six, for instance, my concern will largely be with self-conscious reflective activity. Yet I will show that even in these instances, pre-reflective understanding plays its part. In the end, I hope to show that the reflective mode cannot really be understood without a good understanding of the unreflective mode. As this latter mode is less well-understood, though, much of my time will be taken up with providing an account of it.

Comment on sources

With this thesis, I have sought to fashion a more realistic psychological model with which to explain the various anomalies we see in legal life. From the start, therefore, I pursued my project in an interdisciplinary spirit, looking to a wide range of source material. Though my survey, I eventually found my way to a disparate group of writers, working in a range of different fields, all of whom seemed to offer precisely what I was looking for. I was drawn, particularly, by the resemblance I found in this work to the work of the Legal Realists, the school of thought within legal theory I feel the greatest affinity for. All wrote from disillusionment with the formal, rule-based, computational explanations that dominated their respective fields. In their own work, all sought to "come to grips with life, experience, process, growth, context, function" (Twining, "Karl Llewellyn and the Realist Movement", pg. 8).

While the point of view this group of thinkers favour is not yet recognised as a distinct school, recognition is surely not far off. For the time being, though, there is no neat label which can be applied. This lack of a label has much to do, I think, with the fragmentary nature of the work, when taken as a whole. No one writer provides a comprehensive model, for instance. Even worse, the various accounts often are offered in quite different terms. This is hardly surprising, though. As each writer builds around the anomalies he or she finds within his or her respective field, this is to be expected. Roy Harris and George Lakoff, for instance, build their accounts around the inadequacies suffered by the linguistic theories of Chomsky and Saussure. Hubert

Dreyfus and Rodney Brooks, on the other hand, concern themselves with the failure of the traditional AI programme, and do so in terms and with priorities appropriate to that field. Yet careful reading reveals striking similarities in spirit and overall orientation, and this is recognised by the writers themselves.

If a label must be had, the labels "anti-cognitivist" or "non-cognitivist" are sometimes used, for so much of the work takes the form of criticism of the formal, computational approach most frequently associated with Chomsky. Note that this criticism of cognitivism extends even to those approaches which seek to replace rules with, say, narratives or static frames. What is rejected are all "part" or "content" oriented theories, those which seek to build experience up from discrete cognitive "building blocks". Instead, the anti-cognitivist writers believe that an accurate account is one in which the whole is greater than the parts. Once again, the concern is with process and growth, the life of the body as a whole as it evolves over the course of its life, as it moves and shifts in answer to stimulation, as it bends and folds back upon itself in reflection.

This brings us to the positive claims made by the various writers, the picture of human functioning they seek to offer in place of the more familiar rule-based one. "Behaviourism" is not appropriate at all, as the writers all place considerable emphasis on introspection and on a careful study of the moment-to-moment unfolding of our mental lives. Indeed, this concern for subjective experience stands at the heart of much of their criticism of the formal or structural approach that so dominates today. Again and again, they criticise their opponents for not taking seriously how we

really see, feel and think as we move through the world, ironically, much in the way the computationalists criticised the behaviourists they sought to displace.

When positive accounts are given, the writers look, more often than not, to pragmatism, phenomenology and the "anti-philosophy philosophers" of the late nineteenth and early twentieth century. Dewey, James, the later Wittgenstein, Heidegger, Wundt, Hebb, the Gestaltists and Merleau-Ponty, all feature heavily, as do concepts like know-how, habits, gestalts and forms of life. The school of thought in question can therefore be said to unite what we might describe as pre- and post-computational thinking, dominated as it is by thinkers who, disillusioned with the computational revolution, proceed by returning to the best work of those working before the computational model took hold.

For good introductions to the school of thought favoured in this thesis, relatively short and readable accounts can be found in the first chapters of Varela's "Ethical Know-How", Jerome Bruner's "Acts of Meaning" and George Lakoff's "Women, Fire and Dangerous Things". Chapter Six of John Searle's "Construction of Social Reality" is recommended, too. In that chapter, Searle attempts to make sense of an unacknowledged background to our experience, a background responsible for the very intelligibility of our experience. What unites the various writers cited above is a concern for just this background, and it is a concern I have taken up myself in this thesis.

A final qualification: As no one writer provided me with the complete model I required, I was forced to synthesise my own, by drawing together their various

insights and supplementing them with a few insights of my own. While some of these writers feature more prominently than others in the main body of the text (Hubert Dreyfus, for instance), the model I have settled upon owes its origin to all of these writers equally.

The thesis takes into account source material published up to June 2004.

Chapter Two

Facts and values, experience and constraint

In this chapter, we will begin fashioning an alternative to the self-conscious, deliberative picture of intentional action that so dominates our thinking within the humanities and social sciences. The substance of this alternative will be offered in Chapters Three and Four. We will begin, however, by laying the foundation for this view. We will do so by looking closely at the dominant model itself, by teasing out its underlying assumptions and subjecting these assumptions to scrutiny. We will look at three sets of assumptions in particular: assumptions concerning our experience of facts and values, assumptions concerning our experience of institutional facts, and finally, what we understand by detachment and immersion. As will become clear, all three are closely bound together, with a position taken on the first leading inevitably to related positions in the second and third. The resulting complex of assumptions underpins much of our thinking concerning legal and moral life, and leads to most of the seemingly intractable problems we face when trying to make sense of this aspect of our lives. To remedy this, we will have to systematically reverse the positions we customarily take on each of these issues. In this way, we will prepare the ground for the alternative model that will be offered in the next two chapters.

Let us begin, then, with what is typically referred to as the *fact-value* or *is-ought* distinction. The distinction is straightforward and intuitive, and simply insists that brute or physical reality – the world of concrete objects and physical laws – be

distinguished from the world of human culture – the world of beliefs, thoughts and speech[1]. In legal and moral discussions, the distinction is often attributed to David Hume, and to one passage of his "Treatise Of Human Nature" in particular:

> In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*.[2]

Though Hume is almost always invoked where the relationship between facts and values is in question, the distinction itself is perfectly intuitive, and would likely be taken up even by those unfamiliar with Hume's argument. Indeed, the distinction is quite correct. There is, however, a complication. The distinction is correct where our concern is with the nature of the "things" under scrutiny themselves. Where facts and values are contrasted, the difference between the two is perfectly obvious. Facts are

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[1] John Searle, "Speech Acts", pg. 175: "One of the oldest of metaphysical distinctions is that between fact and value. Underlying the belief in this distinction is the perception that values somehow derive from persons and cannot lie in the world, at least not in the world of stones, rivers, trees, and brute facts. For if they did, they would cease to be values and would become simply another part of that world."

[2] Hume, "A Treatise of Human Nature", Book 3, Part 2, Section 1. The paragraph in full: "In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it should be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason."

facts and values are values, the two clearly requiring completely different analyses. As we will see, however, this is not the same thing as asking how facts and values *are experienced by human beings in the course of moving, practical life*. It is this second question that is of interest to us here.

The fact-value distinction is so relevant to legal and moral thinking because of the implications it has for our understanding of the constraints we experience in day-to-day life, hence the distinction between "is" and "ought". The physical world is understood to constrain our behaviour in perfectly obvious ways, of course. We cannot walk through walls or on water, after all. In these instances, we accept that it is the nature of water and the walls themselves which determine what we can and cannot do. Where the physical world is concerned, then, there is no need for us to explain the constraints we experience. We fall into patterns of behaviour for the most obvious of reasons. When we turn to those parts of the environment which appear to arise from human thought and speech, however, we find that there are no such natural constraints. Bus stops and post offices are mostly created environments, after all. Why, then, do we queue at bus stops and in post offices? Why do we stop at traffic lights? Why is it that we conform to patterns of behaviour when we are in fact free to act in any number of different ways? As there is nothing physical forcing us to fall in with the desired patterns of behaviour, there must be something else that is responsible. Indeed, there can only be one answer: We *choose* to be so constrained. We choose to queue at bus stops, and at traffic lights, and do so *for reasons*.

Within theories of legal and moral life, this line of reasoning often sets the stage for everything that follows. The fact-value distinction is simply taken for granted, and

serves thereafter to frame all discussion on the issue[3]. As a result, the discussions themselves overwhelmingly revolve around the precise nature of this "choosing to be constrained". The resulting explanations include those which envision a cost-benefit analysis on the part of the human agent, for instance, with the individual in question thought to weigh up the advantages of disobedience against the disadvantages entailed by possible detection and sanction[4]. Alternatively, there is the view which envisions acceptance on the part of the human agent of some sort of contract or convention[5]. Under this view, human agents are thought to recognise the broader advantages of complying with the legal order and it is this recognition of advantage that stands behind their obedience to the law. As should be clear, in both of these attempts at explanation what is sought is something which tips the balance of reasons in the mind of the human agent in favour of conformity. The threat of punishment is an obvious potential answer. Long term interest is another. However the matter is resolved, though, the basic structure of the explanation remains the same. In all cases the human agent is thought to choose to conform, and to do so for reasons.

It is worth asking, though: Are we right to distinguish between facts and values in the way that we do? Certainly, facts and values *themselves* can be distinguished in the manner envisioned. As noted above, our concern here is not with the facts and values themselves, but with *the way in which these facts and values are experienced by the human agent*, which is something else entirely. Is this difference an important one? In

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[3] This assumption is taken by Joseph Raz as the starting point for his own investigations (see, for instance, the introduction to his book "Practical Reasons and Norms"). For another example, see Neil MacCormick's cursory dismissal of Searle's attempt to show the derivability of ought-statements from is-statements: "Searle's thesis and his 'proof' of the derivability of the ought from the is are refutable by giving a sound analysis of the concept of institutional facts and of the way they are constituted by means of rules" (MacCormick and Weinberger, "An Institutional Theory of Law", pp. 21-22).
[4] The most obvious example of this is provided by John Austin's "command theory of law".
[5] This refers to the social contract theory of Hobbes and Locke. More recent articulations include, for instance, David Lewis's book, "Conventions".

fact, there is good reason for us to think carefully about this[6]. When we look at the way we really interact with our environment, for instance, the distinction habitually made between the real world and the world of thought and speech loses much of its clarity. More often than not, the products of thought and speech are experienced as indistinguishable from what we take to be the concrete, real-world background. We do not have to look very far for examples in our own day-to-day lives. Consider receipts and banknotes. If, say, thumbing through a wallet found in the street, I were to find a receipt and a banknote, I would not go on to talk about the two pieces of paper I had found there. I would far more likely say that the wallet contained a banknote and a receipt, distinguishing the two as I would an apple and an orange. Receipts and banknotes are "things" in their own right, and are unselfconsciously seen and spoken of in this way. Similarly, we think of marriages simply as "things", in precisely the same way we think of dogs and trees. We do not say to ourselves, "I will, for my purposes, regard these disparate components – man, woman, shared life, children – as a marriage". Instead, we simply point and say, "That's a marriage. There it is."

Indeed, when we think about it, we see that there is little in our lives now that can truly be thought of in terms of a pure or brute physical existence[7]. Our common environment is effectively a language-world, composed as it is of so much that comes from thought and speech. For this reason, when philosophers describe the world we know, they commonly use designations like "form of life"[8] or "life-world"[9]. In both

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[6] For more on this phenomenological approach to the fact-value distinction, see John Wild, "Plato's Modern Enemies".
[7] A famous discussion can be found in G. E. M. Anscombe's "On Brute Facts", Analysis, Vol.18, No.3, 1958.
[8] From the work of Ludwig Wittgenstein.
[9] From the work of Edmund Husserl.

of these instances, the designations are used to acknowledge the seamless way in which cultural forms are embedded in the landscape we experience[10]. We do, of course, *sometimes* acknowledge the created, composite character of the social objects we interact with. We can and do frequently recognise the composite character of objects noted above, for instance. My point, however, is that *we seem more inclined to not see this composite character*. Indeed, it is as if we are naturally oriented to our environment in such a way as to minimise this type of detail, opting instead for a clean, uncomplicated finish. Where we do recognise receipts and banknotes and marriages as "humanly conditioned objects"[11], this always seems to require special effort on our part[12], or to take place within special circumstances[13]. This being the case, we must qualify the fact-value distinction by recognising that, while true, the distinction is nevertheless much more likely to occur to us when an analytical attitude is taken to the material under scrutiny. In moment-to-moment, moving practical life, however, the distinction is less likely to be clear.

We have good reason, then, to suspect that there is something very wrong with the fact-value distinction. Facts and values may themselves be distinct, but as far as we are concerned, no clear difference is perceived in day-to-day life. Nor is this really so surprising. On the whole, we are much more interested in being able to negotiate our environment successfully than we are in "seeing through" the false or merely cultural elements contained therein. We seek to master our environment, to work out the right

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[10] Others who have pursued this line of thinking include Charles Taylor and Karl Popper.

[11] Ota Weinberger, "An Institutional Theory of Law", pg. 78, where he contrasts "brute facts", "raw facts" and "natural facts", on the one hand, with "humanly-conditioned facts" on the other.

[12] We will pursue this point in Chapter Four, where we will see that reflection is almost always entered into grudgingly, where the individual is forced by his immediate circumstances to reconsider his expectations and assumptions.

[13] Also to be discussed in Chapter Four, where we will see that reflection tends to be pursued in circumstances of breakdown. In addition, there are special contexts which encourage a reflective attitude. Obvious examples include literary and academic practices. These special contexts tend to be ones which enjoy shelter from the pressures of moving, practical life.

way through it. In doing so, we are happy to accept recurring objects like banknotes and marriages as simple, undifferentiated objects if this way of looking at the material in question eases our way forward. The question of real-world constraint, too, is a little more complex than we are inclined to think. As noted above, we assume that the physical world constrains us, well, physically. Yet, even this is a mistake. We do not repeatedly throw ourselves against walls, or fall fully clothed into swimming pools and lakes on a day-to-day basis, after all. Instead, we are guided by *what we know of* water and walls, what is *"in the nature of"* water and walls. Having established the futility of such attempts, we thereafter simply take for granted that these are not viable courses of action. It is our knowledge of water and walls that guides us, then. Once again, what seems to matter to us is establishing a successful way through the environment. In doing so, we build up an understanding of our environment, an interpretation of it, and it is this that guides our action, not the essential nature of the environment itself.

As we proceed, we will see this notion of mastery of the environment playing a central role in the explanation offered of these matters. Indeed, to understand the strategy I will take, it helps to look again at what Hume had to say. Hume famously noted a persistent flaw in our thinking concerning morality and moral systems. He drew attention to the way in which we appear easily to confuse facts and values, conflating them in a single, seamless view of the environment. In drawing this to our attention, Hume appeared to be offering this as a caution to us, as if to encourage us to be more rigorous in our thinking[14]. Yet there is another way for us to take his insight: If we are so inclined to confuse facts and values, could there not be something

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[14] Hume, see n. 2 above, on pg. 47.

significant about human nature in this? Could it not be that we are naturally confused in this respect, that "is" and "ought" are not distinct in our experience, but in fact are indistinguishable? Moreover, if the mistake is so closely associated with "vulgar systems of morality"[15], then perhaps a propensity to confuse fact and value is actually central to the existence of morality itself. This is precisely the view of the matter I will take in this thesis. I will take Hume's comments in the passage above not as they typically are taken, as a report of a common error, but rather as providing insight into the very process itself. This will allow me to offer a completely different explanation for legal and moral life, one which no longer revolves around choice and reasons, but which arises from the way in which we inhabit interpretations of our environment, interpretations which are configured not on the basis of accuracy, but primarily for their practical value, for the way in which they allow us to negotiate these environments successfully.

Weightless and invisible

Our concern in this thesis, then, is with the relationship with have with our surroundings, and in particular, the influence these surroundings have, if any, on our behaviour. As noted above, there is little in our lives now that can be thought of in terms of a brute or pure physical existence. The question of physical compulsion, then, is not really appropriate. If our common environment is effectively a thought, language or idea-world, then do these thoughts, language and ideas have any hold over us? Can we be compelled by mere value? And if so, how is this achieved? To

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[15] ibid.

approach these questions, we must start by thinking about the constitution of the "humanly conditioned" environment itself. We must consider the underlying mechanics of this "human conditioning". This is, on its own, a formidable puzzle. Once again, our concern here is with the direct way in which we appear to experience composite, cultural objects like marriage ("That's a marriage. There it is"). It is the immediacy of the experience that is so puzzling, for surely our primary experience should always be of the brute facts involved, the physical, tangible material standing before us, and not the various ideas we might be inclined to associate with this material. To find ourselves experiencing mere associations in so immediate and compelling a manner is troubling, for it suggests that we habitually see and act while "caught up" in a delusion or fantasy, as if trapped by our own understanding and unable to appreciate what is really around us.

The theorist who is perhaps most closely associated with these questions is John Searle, who famously introduced his notion of "institutional facts" in the hope of providing some answers[16]. In pursuing his analysis, Searle rightly sought his answer in the background understanding we each acquire over the course of our lives, understanding we then deploy to make sense of our surroundings. This seems appropriate. In the various examples we have ourselves considered, the fact or object in question seems always to draw upon our understanding of the larger human landscape in some way. If we are to speak of marriages, for instance, we must first have some understanding of the way in which human societies and families are organised. Searle was much more specific, though, finding his answer not in the human landscape more generally, but in particular human institutions. It is only given

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[16] John Searle, "Speech Acts" and "The Construction of Social Reality".

the specific institution of marriage that certain forms of behaviour constitute the enactment of a marriage, for instance. Similarly, our use of a five dollar bill presupposes the institution of money. As Searle puts it: "Take away the institution and all I have is a piece of paper with various gray and green markings."[17]

This gives us our start, but the question of what we mean when we think and write of institutional backgrounds is itself hardly straightforward. Indeed, we can pursue our analysis in two distinct ways. As in the previous section, we can pursue the structure of the institution itself, thinking and speaking as if we are addressing it directly, a physical structure with struts and beams and a clear logical organisation. Alternatively, we can attempt to think realistically about the human agent himself, placing our emphasis not on the institution conceived in abstract terms, but on the experience and knowledge the human agent in question acquires and deploys as he goes about his daily activities. Searle himself favoured the former, the formal, analytical approach. For Searle, the heart of the matter is found in *rules*. Institutional facts exist only within systems of *constitutive* rules, with these systems of rules creating the very possibility of facts of this type.[18] These rules are of the form "X

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[17] For Searle's introduction to institutional facts, see "Speech Acts", pg. 51: "They are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions. It is only given the institution of marriage that certain forms of behaviour constitute Mr Smith's marrying Miss Jones. Similarly, it is only given the institution of baseball that certain movements by certain men constitute the Dodgers' beating the Giants 3 to 2 in eleven innings. And, at an even simpler level, it is only given the institution of money that I now have a five dollar bill in my hand. Take away the institution and all I have is a piece of paper with various gray and green markings."

[18] Searle, "The Construction of Social Reality", pg. 28. The emphasis is on constitutive rules, rather than the more familiar regulative variety: "…some rules do not merely regulate, they also create the very possibility of certain activities. Thus the rules of chess do not regulate an antecedently existing activity… Rather, the rules of chess create the very possibility of playing chess. The rules are constitutive of chess in the sense that playing chess is constituted in part by acting in accord with the rules. If you don't follow at least a large subset of the rules, you are not playing chess. The rules come in systems, and the rules individually, or sometimes collectively, characteristically have the form "X counts as Y" or "X counts as Y in context C"" (pp. 27-28).

counts as Y in context C"[19], and operate by transforming the "naked" acts and events into institutionally significant ones. This transformation operates in the following way: In institutional context C, whenever naked act or event X is encountered, it is regarded by the human agent as an instance of institutional act or event Y. For example: In a shopping context, whenever a piece of paper with grey and green markings on it is encountered, it is regarded by the human agent as a banknote.

This sort of formal analysis is attractive, of course, and appears to present us with a rigorous examination of the phenomenon we are considering. The problem, however, is that it does not accord at all with our experience of these institutions and facts as we find them in our day-to-day lives. For a sense of this, it helps to look at another prominent analysis of institutional facts, in this case provided by Elizabeth Anscombe[20]. It is worth looking for a moment at Anscombe's approach to the matter, for she seemed to take the question raised above – concerning the degree to which the human agent is actually aware of the formal structure of the institution involved – much more seriously:

> … we must be careful, so to speak, to bracket that analysis correctly. That is, we must say, not: It consists in these-facts-holding-in-the-context-of-our-institutions, but: It consists in these facts – in the context of our institutions, or: In the context of our institutions it consists in these facts. For the statement that I owe the grocer does not contain a description of our institutions, any more than the statement that I gave someone a shilling contains a description of the institution of money and the currency of this country. On the other hand,

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[19] ibid.
[20] Anscombe, n. 7 above, on pg. 50.

it requires these or very similar institutions as background in order so much as to be the kind of statement that it is.[21]

The distinction Anscombe makes here is critical. As she puts it: Do institutional facts consist of "these-facts-holding-in-the-context-of-our-institutions," or do they consist of "these facts – in the context of our institutions"? In the former, what we have clearly takes for granted a particular view of the human agent's experience more generally. Under this view, the human agent is thought to move through the world with everything he sees and thinks of always fully exposed to him in the bright glare of consciousness. In the latter, however, something else is envisioned. In this case, the institutional background is just that – a background. While the human agent's very ability to recognise his surroundings is informed by this background, allowing him to "see at once" banknotes as banknotes, the background itself does not occur to him at all. As Searle puts it, the background here is "invisible and weightless"[22] and does not impinge on consciousness.

While the formal approach may well prove tempting, then, we must ask whether it is really appropriate to place such store on rules when these rules rarely appear to us in the course of our day-to-day activity[23]. When we take this daily activity into account, what we are pursuing here seems less a matter of formal, self-conscious knowledge – self-conscious knowledge of the rules of an institution – and instead appears to take

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[21] ibid.

[22] Searle, "The Construction of Social Reality", pg. 4, see n. 26 on pg. 60 below.

[23] ibid., pg. 127: "Under these conditions, what causal role can such rules possibly play in the actual behaviour of those who are participating in the institutions? If the people who are participating in the institution are not conscious of the rules and do not appear to be trying to follow them, either consciously or unconsciously, and if indeed the very people who created and participated in the evolution of the institution may themselves have been totally ignorant of the system of rules, then what causal role could the rules play?"

the form of a set of capabilities and abilities the human agent possesses. For all his own commitment to rules, this last point was not lost on Searle:

> But it does not follow that a person is able to function in a society only if he has actually learned and memorized the rules and is following them consciously or unconsciously. Nor does it follow that a person is able to function in society only if he has "internalised" the rules *as rules*. The point is that we should not say that the man who is at home in his society, the man who is *chez lui* in the social institutions of the society, is at home because he has mastered the rules of his society, but rather that he has developed a set of capacities and abilities that render him at home in the society; and he has developed those abilities because those are the rules of his society. The man at home in his society is as comfortable as the fish in the sea or the eyeball in its socket, and we do not have to account for the behaviour entirely in terms of rules in any of these three cases.[24]

Though Searle himself seemed not to fully appreciate this, in fact this shift from an understanding of institutional facts based on explicit, formal knowledge ("knowing that") to one based on capabilities and abilities ("knowing how") is dramatic. Indeed, the two are not compatible at all[25], for the move signals a shift from a concern for the conscious life of the human agent to one in which the processes *responsible for* that conscious life take centre stage.

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[24] ibid., pg. 147.
[25] Searle's own understanding appears to have evolved over the years. In "Speech Acts", he appears to offer a straightforward rule-based analysis. In his later "Construction of Social Reality", however, he devotes considerable time to his own conception of the "background" as it operates within the individual, offering this alongside his original analysis of the institutions themselves. He appears to take the two to be compatible. In my own view they are not.

While this may initially appear difficult to accept, it is not really so strange. All that is suggested here is that our experience of a "humanly conditioned" reality has everything to do with the way our long-term experience of the world builds up within us, providing us with resources we then deploy in our sense-making activity. Rather than looking for ways in which this experience can accumulate within the conscious realm, however, providing us with explicit resources in the form of rules and reasons and principles, we must instead think of it *building up beneath the threshold of consciousness*. The point, then, is to see the process responsible for consciousness itself collecting material from day-to-day life, organising it to greatest practical effect, and finally deploying it in such a way as to make that immediate experience of reality appear seamless and unmediated. *With this in mind, our concern must shift from what is in consciousness to how consciousness itself is constituted and maintained.* Rather than pursue our explanation in the form of a conscious mechanism, here we will pursue an unconscious one. Where our explanation previously was impersonal, abstract and ahistorical, now we will think in terms that are much more historical and biographical. Our concern is now with how this or that particular human agent gains knowledge of the world cumulatively, and how this acquired knowledge of the world is then deployed on a moment-to-moment basis. Our analysis ceases to be a formal exploration of disembodied, abstract institutions, then, and comes instead to be concerned with the on-going development of a particular individual's view of the world.

When this reorientation is completed, we quickly see that the immediacy of our experience of institutional facts is really not puzzling at all. This immediacy is simply

the immediacy of perception. The institutional background is "weightless and invisible"[26] because, well, it must be. We do not see our environment decomposed into parts, after all, with all of the relevant elements of background understanding helpfully articulated out and on display. Why should institutional facts be any different? As part of our environment, these facts must, and do, make simple, effortless sense. Our experience of the world would be quite different if this were not the case. Talk of a "delusion" or "fantasy" is therefore really quite appropriate, but with none of the negative connotations we might otherwise expect. In the end, the world we inhabit is a world of our own making, one specially adapted to our size and capabilities and needs, a world which, yes, objectively speaking, is indeed a "delusion" or "fantasy". But think of how alien we would find the "real" world, how sterile and inhospitable. It would be a world, not of "moving cars, dollar bills, and full bathtubs"[27] but of "masses of metal in linear trajectories, cellulose fibers with green and grey stains, or enamel covered iron concavities containing water"[28].

And so, while we are inclined to think of the fantasy or delusion involved in wholly negative terms, to find troubling the immediate, compelling way we experience mere associations, in fact what we are exploring here is something critical not only to our experience of the world, *but to the very constitution of that world.* We are not talking

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[26] Here is Searle's paragraph in full ("Social Construction of Reality", pg. 4): "One reason we can bear the [metaphysical] burden is that the complex structure of social reality is, so to speak, weightless and invisible. The child is brought up in a culture where he or she simply takes social reality for granted. We learn to perceive and use cars, bathtubs, houses, money, restaurants, and schools without reflecting on the special features of their ontology and without being aware that they have a special ontology. They seem as natural to us as stones and water and trees. Indeed, if anything, in most cases it is harder to see objects as just natural phenomena, stripped of their functional roles, than it is to see our surroundings in terms of their socially defined functions. So children learn to see moving cars, dollar bills, and full bathtubs; and it is only by force of abstraction that they can see these as masses of metal in linear trajectories, cellulose fibers with green and grey stains, or enamel-covered iron concavities containing water."
[27] ibid.
[28] ibid.

about a man caught up or trapped in a false reality, but rather one who is effortlessly comfortable in a world specially adapted to his own dimensions and needs, a world he has himself contributed to, though unwittingly. Think again of Olivecrona's ordinary man. The fantasy in question is his whole life; the facts – "wife", "mortgage", "pay", "tax" – capture in simple formulae not only all that he wants from his life, but also how he will go about getting what he wants. To become "caught up" in such a web is therefore not so horrible a fate. It is merely to say that the individual in question is comfortable in his surroundings, that he is well fitted to it. Indeed, he is most likely to escape his delusion only where he finds his surroundings unfamiliar and his needs unsatisfied. As we will see in later chapters, this is desirable in small doses, a spur to reflection and, with it, improvement. But it is positive only when it comes in small doses. On a grand scale it is leads to profound alienation and discomfort, and as such is pursued exceptionally, and even then, sparingly.

These are themes we will return to again and again over the coming chapters. At this point, however, it is worth returning to our discussion of the relationship that exists between the environment as we understand it and our behaviour within this environment. Typically, we think of ourselves as naturally alienated from our surroundings, moving through those surroundings self-consciously, making explicit decisions to do this and that, stepping carefully as we go. Under the view taken here, however, there is no easy separation between world and self. Both arise mutually – are "structurally coupled"[29] as it is sometimes put – with one bringing forth the other. In this more difficult picture there is little place for rules. Institutions are not constituted explicitly through rules, but instead simply evolve through interaction,

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[29] Varela, Rosch and Thompson, "The Embodied Mind", pg. 75: "We speak of structural coupling wherever there is a history of recurrent interactions leading to the structural congruence between two (or more) systems."

through the negotiation of shared environments and the pursuit of common purposes, more often than not in the course of mundane day-to-day activity. This is all equally true of the individual him or herself. In the same way that institutions are not composed of rules, but are instead more problematically bound up in the fabric of communal life itself, the behaviour of the individual, too, exhibits a similar essence and origin. More often than not, these patterns of behaviour arise spontaneously through interaction, and when acquired, come to the individual not in the form of formal, self-conscious instructions, but instead as part of his or her very constitution. All of this will no doubt seem very mysterious. All will be explained over the coming chapters.

Detachment and immersion

Over the course of this chapter so far, I have drawn attention to the culturally informed character of our immediate environments. I have suggested that the key to understanding this state of affairs is to recognise the way in which our past experience informs our immediate experience, the way in which our experience today draws from the experiences we have built up over the course of our lives. Where we might be inclined to think of this use of past experience in conscious terms – the experience collecting in the form of a body of consciously appreciated rules – I have here argued for an unconscious variation, with the experience in question building up beneath the threshold of consciousness rather than above it. In this latter approach, the experience in question contributes to the constitution of experience at any given moment, leaving

conscious experience itself largely undifferentiated. This is all interesting enough in its own right, of course, but as noted at the beginning of this chapter, our concern here is not merely with the nature of our experience, but with our experience of constraint. We are interested in working out not only why we effortlessly recognise bus stops and post offices as "things in themselves" in the way that we do, but why we feel so inclined to conform with the prescribed patterns of behaviour we associate with them.

As it happened, Searle, too, had this issue of constraint in mind, addressing it explicitly as part of his larger institutional theory[30]. Indeed, when Searle proposed his notion of institutional facts, he did so as part of a challenge, not to the "fact-value" distinction itself, but to the "is-ought" distinction which is commonly thought to follow from it. As noted above, belief in an essential difference between the physical world and the world of thought and speech leads many to regard morally-significant acts like promising merely as acts of will or expressions of intentions to act. If we are truly to understand the binding power of promises, for instance, the centre of our account must be found not in the simple act of making a promise, but in something more, in the human agent's will or intention to keep the promise. Against this, Searle sought to show that the simple making of the promise could indeed bind the human agent. Searle's explanation was provided by his theory of institutional facts. For him, the simple ability to make a promise comes from the acceptance of a set of institutional rules. These rules, in turn, logically tie up the making of the promise with a number of further concepts, among which is the obligation to keep the promise. In making the promise, then, the human agent cannot but accept these further concepts. His acceptance of one logically entails his acceptance of the other. By engaging in the

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[30] In his famous article, "How to Derive an Ought from an Is", included in his book, "Speech Acts".

activity of promising, then, the human agent subjects himself in a quite specific way to the corresponding system of institutional rules. It is this "subjecting oneself to institutional rules" which gives rise to the obligation.

While his notion of institutional facts has been taken up enthusiastically, Searle's challenge to the "is-ought" distinction has proven far less successful. A notable challenge is provided by Hare[31]. For Hare, an important distinction must be made between a committed participant and a neutral observer:

> The point about words like "promise" is that they have both an evaluative and a descriptive sense. In the descriptive sense (sense 1) "promise" means simply *uttering certain words*. In the evaluative sense (sense 2) "promise" means *undertaking an obligation*… The difference between sense 2 and sense 1 is the difference between a committed participant and a neutral observer.[32]

Hare's point here is that institutions can be used for their sense-conferring properties, without requiring any real commitment to the institution itself. In the end, the question of ultimate commitment to the institution itself is a matter of will, something that can always be withheld. It is simply not true, then, to suggest that the individual's will can logically be tied up through the mere use of institutional language.

As he himself put it, Hare's point here is that the sense or meaning of the promise-making act actually changes depending on whether or not the individual in question is a committed participant or a neutral observer. One way of thinking about this is to ask

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[31] Hare responded to Searle in his essay "The Promising Game", included in his "Essays in Ethical Theory".
[32] Searle, "Speech Acts", pg. 192.

whether the individual is speaking from within the "promising game" or from without. Is his position an internal one or does he use the term, as it were, from outside of this game? Hare does not stop at making the distinction, though. For him, it is the neutral observer who presents us with the more basic state:

> … it is only the neutral observer who is making genuine factual or descriptive statements. As soon as you interpret the word "promise" from the point of view of the committed participant you have tacitly slipped in an evaluation…[33]

For Hare, a genuine "is-statement" is one in which the form of words is used in its bare form. If the promise-maker actually means to keep his promise, however, then an additional evaluative element must be said to have "slipped in". At this point the exchange takes on a different character. Though an "ought" is now involved, this "ought" is in fact supplied by the promise-maker's intention to keep his promise. It is the promise-maker's commitment to the "promising game" that supplies the "ought" in other words, not the bare form of words he uses.

Hare's decision to see the neutral observer's bare factual or descriptive statement as, in a sense, *prior to* or *more basic than* the committed participant's evaluative one is critical here. It would seem that Hare has in mind a human agent whose essential or basic experience of the world is of bare or naked acts and events and uses of language. The social and institutional significance these acts, events and uses of language may possess is apparently thought to come later, or to appear to the human

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[33] ibid.

agent always as separate, as something he can take or leave. Searle's response to this, indeed, the whole point of his theory of institutional facts, however, is to insist that the very ability to make the promise, to use the language of promising, comes precisely from acceptance of the relevant institutional background:

> The objection above tries to offer a sense of promise in which the statement "He made a promise" would state a brute fact and not an institutional fact, but there is no such sense.[34]

According to Searle, the descriptive and evaluative elements are intimately bound together:

> One does not first decide to make statements and then make a separate evaluative decision that they would be better if they were not self-contradictory.[35]

Once again, the idea here is that promises exist for us, and therefore can be spoken of and thought about, only because of the background institutional structure. When such a statement is made, then, *it is inherent in the act that it is used in a manner consistent with its institutional use.* No separate evaluative decision is required to choose a manner of use that is not inconsistent with this institutional use. On the contrary, the only time such a decision is made is where the aim is to use the concept of promising inconsistently, or where such an inconsistent use is at least contemplated. These instances are peripheral ones, though, not central ones. In the usual run of things, no

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[34] ibid., pg. 193.
[35] ibid., pg. 191.

separate decision is made. The obligation is understood simply to be "in the nature" of promising and therefore is accepted simply as following from the making of the promise.

What Searle is suggesting, therefore, is that while the distinction between the committed participant and the neutral observer is itself a valid one, the order of priority Hare suggests is in fact wrong. Hare appears to suggest that we are neutral observers first and foremost, and committed participants only derivatively. Searle argues for the opposite view, with committed participation coming before neutral observation. Searle makes this point in the following way:

> Standing on the deck of some institutions one can tinker with the constitutive rules and even throw some other institutions overboard. But could one throw all institutions overboard... One could not and still engage in those forms of behavior we consider characteristically human. [36]

In fact, we can go so far as to say that neutral observation arises from and relies upon, committed participation. To illustrate this, we need only think of Hare's own example of a Machiavellian politician who makes promises without ever meaning to keep them[37]. Hare appears to suggest that the more natural experience is of promise-making in its bare state, the use of the form of words without the accompanying obligation. A moment's thought reveals this to be unrealistic. The more basic experience has to be one of promise-making in which the obligation simply follows.

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[36] ibid., pg. 186, n. 1. Searle's point here recalls Olivecrona's point (Chapter One, n. 41 above, on pg. 30) concerning the embeddedness of particular institutions and institutional rules in the larger environment the individual experiences, the "whole setting" of his life.
[37] This is Hare's choice of illustration, see n. 31 above on pg. 64.

This is where promises start, we might say, the original social form that underpins all subsequent thinking and talking about promises. The Machiavellian attitude is derivative of this initial position and can be adopted only as a deliberate departure from the original social form.

While Searle is right to insist on this order of priority, his position is weakened, however, by the way in which he presents his own argument. Indeed, his theory of institutional facts can be said to invite precisely the sort of criticism advanced by the likes of Hare. The problem arises from the emphasis Searle places on constitutive and regulative rules, and particularly, from the self-conscious manner of application the form itself invites. As noted above, if we are to get our understanding of institutional facts right, we must think carefully about whether or not the human agent is *actually aware* of the created, institutional basis of the immediate fact he encounters. Once again, does he say to himself: "As I have committed to the institution in question, and only because I have committed to the institution in question, this will count for me as a fact"? Or: "As I have committed to promising, and only because I have committed to promising, I will now honour my obligation under this promise." When we place so great an emphasis on rules, just this self-consciousness comes to mind. The problem with viewing the matter in this way, however, is that it places the language of the institution, the obligation that follows from it, and the weakness of the bond between the two, all very much in the mind of the human agent. The human agent is now in a position to do precisely what Hare envisioned. He can simply pick and choose from among these elements, accepting the language of the institution without actually accepting the obligation that is meant to follow from it.

Searle's mistake, then, is this: *By placing so much emphasis on self-conscious appreciation of rules, Searle's own account presents us with a neutral or detached observer, not a committed participant.* Searle's is an external point of view, not an internal one, for the internal point of view is characterised precisely by the lack of any recognition of the rules[38]. If we are truly to do justice to Searle's insight, then, we must place the institutional background not within the consciousness of the human agent, but *beneath* it. We must see it as contributing to the human agent's very ability to see and act. The institutional structure does not provide the human agent with various bits and pieces he is able to choose from, therefore. Rather, it is what he chooses *with*. Stanley Fish puts the matter very well when he distinguishes between theory and belief:

> A theory is a special achievement of consciousness; a belief is a prerequisite for being conscious at all. Beliefs are not what you think *about* but what you think *with*, and it is within the space provided by their articulations that mental activity – including the activity of theorizing – goes on. Theories are something you can have… beliefs have *you*, in the sense that there can be no distance between them and the acts they enable.[39]

The institutional structure of promising is not what we think about, then, but *what we think with*. It is how we know, think and speak about promises. The institutional structure limits our imagination, setting out possible future lines of action we can choose between – to promise or not to promise – but closing down possible lines of

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[38] This is, of course, completely at odds with the dominant view within legal thinking, usually attributed to Hart. This reversal of the internal and external view will prove to be a recurring theme in the coming pages.

[39] Fish, "Doing What Comes Naturally", pg. 326.

future action which are not envisioned by that structure – not keeping promises. This internal view – the institutional background operating beneath the threshold of consciousness to shape experience – is precisely the view I have argued for here.

A lack of attention

The discussion above sets the stage for the discussion to follow in the next two chapters. If we are to replace the dominant self-conscious, deliberative view of intentional action, we must first reject the position's underlying assumptions concerning the fact-value distinction, the emphasis placed on rules in our appreciation of institutional facts, and the dominance of detached, analytical thinking over the less critical, unreflective attitude characteristic of immersed participation. All three are central to our thinking concerning legal and moral life. According to the more familiar view, it can be taken for granted that the human agent sees effortlessly a difference between the real world and the cultural world. This being the case, we feel that we can take for granted that the institutional rules in place will "show up" for the human agent helpfully distinct from the real or natural environment he inhabits. In other words, the human agent here is understood to "see at once" the rules as standing apart from the physical background in which they are embedded. This leads to the third part of the position. Having accepted the detached, explicit character of the rules, it follows then that the human agent's negotiation of the institutional arrangements will be achieved through self-conscious attention to, and deliberate manipulation of, just these rules. This, essentially, is the portrait we characteristically accept: The

institutional realm is understood to be experienced by the human agent self-consciously as distinct from the natural world and reducible to rules. Action within this realm is deliberate, and includes always an awareness of the institution itself.

In this chapter I have attempted to demonstrate the fallacy of each of the three aspects of this position, and with it, the failure of the portrait as a whole. First of all, there is the fact-value distinction. It does not take a great deal of thought to see that there is something very wrong with the distinction as it is commonly understood. While there is a valid distinction to be made when thinking of these facts and values themselves, it does not necessarily follow that this distinction is actually part of our day-to-day, moment-to-moment experience of the world around us. Indeed, we need only look up from our books and peer out the window for a moment to see how rarely the difference between facts and values is registered in moving, practical life. Moreover, the simple existence of institutional facts themselves actually makes this clear. When we think about institutional facts in their social contexts, what is striking is just how little we are inclined to distinguish the institutional aspects of our social environments from their natural underpinnings. As I put it above, we do not see banknotes as small rectangles of paper with a peculiar institutional significance. Rather, we see them simply as banknotes. If there is one lesson we can take away from any discussion of institutional facts, then, it is that the distinction itself is naturally problematic for us. We are simply not designed to be good at telling the difference between the two. This is actually implied in Hume's own insight[40]. Hume complains that confusing fact and value is a common error. This is precisely my point. In day-to-day life, we simply do not see the difference without special effort. Institutional facts take advantage of this

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[40] Hume, n. 2 above on pg. 47.

weakness, leaving us experiencing in a direct, seamless way environments that are actually composed of many different elements.

The same is true of the emphasis given to rules. While it is true that rules do indeed have a role to play, the precise nature of this role is much harder to grasp than characteristically is accepted. Certainly, it is clear that our day-to-day and moment-to-moment experience of institutional life does not really require explicit awareness of any of these rules. As we act, we do so, in the main, with little awareness of the institutional rules in place. Instead, these rules seem to be subsumed into a larger understanding of the whole environment, a "total, factual background" we simply accept as applicable at just that time and place. This "total, factual background" equips us with assumptions and expectations which, though barely registered consciously, nevertheless are instrumental in allowing us to function in that environment. The rule-based analysis offered by Searle and taken on by MacCormick and Weinberger is problematic, however, even where our concern is with the formal life of the institution itself. When these institutions are up and running, we do indeed often find rules in place, rules which many, if not all, are cognisant of. What, then, is the true role of these rules? If they are not critical to the day-to-day operation of the institution and they did not feature prominently in the establishment of the institution[41], what, really, are they for?

All of this leads us neatly to the question of detachment and immersion. When we look again at the portrait Searle presented, what is striking is the distance the portrait

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[41] See Searle, n. 23 above, on pg. 57.

imagines exists between the human agent and his surroundings. Indeed, under Searle's view, the human agent is effectively an analytically minded theorist, moving through the world always with what we might describe as a "detached anthropological standpoint"[42]. When we think of rule-based portrait in this light, it actually makes very good sense. As he moves through the world, the human agent is indeed able to register the difference that exists between facts and values. He easily notices the role rules play in institutional life. He thinks through his actions carefully, acting deliberately at each step. As he acts, he likely achieves the end he has in mind through some active manipulation of the information he has available to him, with the rules of the institution in question included as part of this information. Finally, as a detached observer, he is able to recognise just how little hold the institution has over him, that he is in fact free to depart from or ignore the duties and responsibilities the institution places on him. All of this is perfectly accurate. The problem, however, is that we only sometimes relate to our surroundings in this way. The view of the human agent the rule-based account presents therefore captures an aspect of our selves and our behaviour which, though accurate, is nevertheless peripheral. It captures the way we sometimes are, but misses entirely the way we usually are. *Far more often than not we do not relate to our surroundings in this way at all.* We do not see the difference between the facts and values involved, but instead accept the context simply as it is. We do not negotiate institutional life through any active attention to or manipulation of the institutional rules involved. Instead, we simply negotiate these environments in precisely the same way we do all others. Indeed, we rarely recognise institutional environments as separate from the rest of the environments we occupy.

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[42] Searle, "Speech Acts", pg. 198: "… words no longer mean what they mean and the price of a really consistent application of the 'detached anthropological standpoint' would be an end to all validity and entailment."

The dominant position can therefore be rejected in its entirety. As noted at the beginning of this chapter, however, my aim is primarily constructive. The more important point, then, is to recognise what the dominant position obscures. When we pay attention, what we see is not simply a lack of the sort of analytic attention the dominant position assumes, but that *this lack of attention is in fact at the very heart of the way in which we relate to our surroundings.* When we consider scenarios like the one Anscombe presented, for instance, what we find is that the human agent is happy enough to recognise the whole scene or episode he currently occupies and leave the matter there. He is happy enough to recognise that he is buying a sack of potatoes, say, taking for granted that the scene or episode in question always takes a certain form or unfolds in a certain way. Crucially, the detail of this "buying a sack of potatoes" seems to register only minimally. The human agent does not think explicitly about the institutional structure standing behind his use of the banknotes he offers the shopkeeper, for instance, nor about the expectations and assumptions he makes use of in thinking of himself as a purchaser and his opposite, a seller. Indeed, the whole experience has something truncated about it, as if it has been whittled down over time, coalesced or congealed into a well-worn script or plan, a "smoothed road"[43] which now can be travelled with perfect comfort and efficiency, and crucially, with as little explicit thought as possible.

What we find, then, is this: We do not register the difference between facts and values in moving, practical life, nor do we recognise the rules so central to institutional life, because, quite simply, we are really not all that interested in such things. In the end, it

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[43] Dewey, "Human Nature and Conduct", pg. 20: "Civilised activity is too complex to be carried on without smoothed roads. It requires signals and junction points; traffic authorities and means of easy and rapid transportation. It demands a congenial, antecedently prepared environment. Without it, civilisation would relapse into barbarism in spite of the best of subjective intention and internal good disposition."

is enough for us that the scenes and episodes we encounter are familiar to us, that they take recognisable form and can be relied on to unfold in this or that predictable way. Where this requirement is met – where the buying of potatoes conforms happily with our expectations and assumptions in these matters – there appears to be little need for self-conscious, deliberate attention. As we have seen, this point is a particularly important one in the present context, as it has implications for the commitment the human agent shows to particular institutions or practices. What we have found is that the rule-based explanation offered by the likes of Searle, MacCormick and Weinberger actually leads to a poor commitment to the institution on the part of the human agent. As Hume himself put it, awareness of the fact-value distinction, itself a product of self-conscious, analytic attention, is effective in subverting all "vulgar systems of morality"[44]. If we are to understand the operation of social norms, morality and law, then, what is required is a portrait in which the human agent is seen to prefer uncritical immersion *in* familiar contexts to detached, analytical scrutiny *of* those contexts.

Our starting point is clear, then. In setting out an alternative, we must begin to think of the human agent not as a detached, analytically minded theorist, but as a *committed, immersed participant.* This notion of committed, immersed participation helps explain the lack of attention we see as characteristic of our experience in each of the three aspects discussed above. The human agent does not see the difference between facts and values, for instance, because, as a committed, immersed participant, he accepts his surroundings uncritically. This is what immersion amounts to, after all. When the human agent is immersed in a particular setting, his very way of seeing is

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[44] See n. 2 above, on pg. 47.

co-opted by that setting. He comes to see with setting-informed eyes. This leaves him free to ignore much of the detail in the environment and concentrate instead on the goals he pursues within that environment. Indeed, with a little thought we see that this immersion is not just commonplace, but necessary. The human agent simply does not have the capacity to think explicitly about the institutional background on each and every occasion and at the same time think about his more immediate goals. Some mechanism is required, then, to allow us to learn how to move through our surroundings in an initial learning phase, with the competence acquired implemented in some more automatic fashion later on. This automatic mode of execution frees the human agent up in later encounters to concentrate on his goals.

Scene setting and coping strategies

In the next two chapters, we will leave the law to one side and instead look squarely at the process responsible for consciousness itself. As we have seen, mainstream thinkers in legal theory tend to be happy simply to sweep away all concern for this process, assuming a fully self-conscious attitude on the part of the human agent in all of his dealings. Indeed, we might say that mainstream thinking in legal theory is defined by just this attitude[45]. Here, however, we will seek to fashion a more comprehensive portrait, incorporating not only the explicit, fully self-conscious part of the human agent's experience, but also what accompanies these actions beneath the

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[45] This ultimately, is what analytic jurisprudence entails – it is jurisprudence severed from any sort of temporal, material underpinning. When engaged in analytical thinking, theorists abstract certain crucial features away from the landscape in which these features are embedded and produce models and explanations wholly indifferent to that landscape.

threshold of consciousness. What will be presented, then, is what we might describe as a "tip-of-the-iceberg" model, with everything depicted above the threshold of consciousness understood to have a deeper, hidden component. Indeed, this is the crucial point: *We must accept that a high degree of continuity exists between what is found above and below the threshold of consciousness.* While most are happy to accept that our experience of the world is constructed, that it is a product of active processes of data-collection and organisation, what is suggested here is that just this process of construction must be placed at the very centre of our explanations of all human behaviour, even where it is behaviour that appears to us to be thoroughly self-conscious and deliberate.

Obviously, this approach to the matter requires a dramatic reorientation on our part. Typically, while the existence of some such activity beneath the threshold of consciousness is accepted as uncontroversial, the relevance of this process to the immediate concerns of theorists is not. This, in a nutshell, is the problem with the rule-based approach to institutional facts. There, the theorists in question assume that the creation of experience itself has no part to play in our experience of institutional facts. Similarly, in theories of practical reasoning, theorists too often think and speak as if the matter is exhausted by a concern for distinct reasons, imagining that the way in which the human agent comes to experience his immediate surroundings is itself uncontroversial and can simply be left out of the picture. No thought need be given, for instance, to the way in which the human agent arrives at his sense of his own place in the world at that moment, the options he understands to be open to him then and there. In this thesis, however, we will see the more visible activity as inseparable from the deeper activity responsible for the creation of consciousness itself. In the case of

both institutional facts and practical reasoning, then, the explanation offered here will incorporate an account of how the human agent comes to experience his immediate context in this or that particular way. I will insist that this "coming to experience the context in this or that particular way" actually is inseparable from the part of the problem that usually receives all of the attention.

What the reorientation pursued here requires, then, is that we include what we might describe as a "sense-making prelude" to our accounts of particular acts and experiences, an account of how the human agent *arrives at* his conscious experience of just that act or experience, the experience of an institutional fact, for instance, or the experience of the problem or decision the human agent goes on to address with practical reasoning. What is sought is an account of the "scene-setting" that precedes the action upon the stage. While this concern for "scene-setting" takes us far from mainstream thinking in legal theory, in fact it is not so novel a preoccupation. Within legal theory, there are thinkers who have long looked to the creation of consciousness in just this way. Prominent examples include Bernard Jackson and Vittorio Villa, for instance, both of whom are notable for having devoted a considerable amount of time to providing precisely the sort of background I am myself pursuing here. Though the general position is not a unique one, the detail of what I will offer here is, I think, a little different. Some measure of novelty is provided, I think, by the nature of the "scene-setting" activity envisioned. In pursuing this account, special attention will be given to the difficulty involved in the creation of consciousness, the fact that it is really a rather demanding task for the brain. This is critical to the account sought here. We must think, in other words, of the brain working furiously from moment to moment to create the individual's whole experience at this or that moment in time.

This element of pressure, coming both from the time constraints involved, and from the complex, evolving nature of the events to be represented, is critical. Too often, we take rather a leisurely view, as if imagining the brain to have all the time and resources in the world with which to complete its task. This comes from thinking of the work the brain does in a completely abstract and detached way and results in the indifferent information processing system view we fall into so easily.

When we acknowledge the challenging nature of the process, however, a very different view of the process quickly emerges. When we place this activity within the context of moving, practical life, we see that the brain is placed always at a disadvantage, running always to keep up with events. When this view is taken, it quickly becomes natural for us to see the brain making use of whatever it has to hand, cobbling together a viable account as best it can in the time available to it. *The brain must be seen, in other words, as doing its best always merely to cope.* This emphasis on what we might describe as "cognitive coping strategies" is at the very heart of everything offered in this thesis and it is this that distinguishes the approach taken here from other similar ones[46]. The view taken leads us to think of the processes responsible for consciousness as much more pragmatic, and less precise, than we generally imagine. In taking the process as a whole to be our primary actor in this

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[46] In this thesis, space prohibits a detailed examination of the differences that exist between the "coping strategy" approach advocated in this thesis and rival semiotic ones, though such an examination may be pursued in the future. Briefly, though, the main difference is the "whole to parts" approach taken here, with sense-making understood primarily to be a task for the organism as a whole. In the rival approaches, the tendency, quite understandably, is to isolate particular tasks and operations and seek out the task- or operation-specific sense-making procedures involved. A further difference is found in the more dynamic character of the process envisioned here. While semiotic theories traditionally offer a static picture of sense-making, here the process is understood to work continuously to maintain the most useful repertoire of responses. Rather than make sense through the application of discrete sense-making units, then, the process maintains organised sets of responses, constantly updating these in answer to experience. Further detail on both of these points will be offered in Chapters Three and Four. Finally, it is important to note, too, that what is offered here is not a behaviourist account. Indeed, quite the opposite. The point of view taken here has at its heart a desire to do justice to our subjective experience of the activities under examination.

way, we quickly find the sort of questions we are inclined to ask changes dramatically. We begin to ask questions of the following sort: Given the limited time and resources the process has available to it, how would it prioritise its activities? Which activities would it place before all others? Also, where would it cut corners? Which parts of the experience would the process distort or edit out altogether, in the interest of better achieving its ultimate aims? And finally, when considering the resources it has available to it, is there anything the process might use to its advantage? Does the process find anything in the task and setting it faces that actually work in its favour, aspects of those circumstances the process can exploit to better achieve its aims?

What I will pursue in this thesis, then, is an overall approach which has this "coping strategy" design philosophy at its very heart, with the process responsible for consciousness itself understood to be dominated by just this sort of pragmatic and objective-oriented reconstruction. This will entail quite a shift in attitude. Where the information processing model is accepted, it is assumed that the process has all the time in the world to perform its task. This gives the approach its characteristic flavour, with the process thought to constitute our moment-to-moment experience from a collection of individuated parts, organising these parts again and again and again, once for every moment of our lives. Under this view, any given experience can be reduced to a formula, with the apparently endless processing power of the brain thought to make so demanding and resource-intensive a strategy a viable one. In such explanations, emphasis falls on the individual parts the process is thought to combine, a set of inert, well-differentiated meanings or frames or narratives, for instance. This approach is particularly satisfying for theorists, as the detailed models and

hierarchical structures that result speak effortlessly of the sophistication and mastery of discipline that is expected of them. In this thesis, however, we will not rely so heavily upon brute processing power. Nor will we place such store on any such range of imagined parts. On the contrary, our emphasis will instead be on *strategy and capability*, with the process understood from the very start to be concerned with making the most of the limited resources it has available to it, doing so by cultivating specific abilities and capabilities and by employing effective, time-proven strategies. Indeed, rather than seek to reduce the process to its imagined constituent parts, we will here seek to address it always primarily as a whole. While the resulting account will therefore appear less detailed, with no intricate and jargon-laden conceptual scheme to impress, it will nevertheless prove far more true to life. This will be evident both from its descriptive accuracy and its practical value, two tests the apparently more detailed accounts characteristically fail.

At this point we can return to the fact-value distinction. Under the view advocated here, the sense-making process is like a blind man feeling his way with his hands. Working with only limited access to the necessary resources and with only limited time, the process is left to do its best with the fragmentary evidence made available by the senses, organising this evidence speculatively, in the most plausible configuration the process can achieve. What is perceived, in other words, is always merely a guess at what might be out there in the world. This is an important difference, for what we are left with is not an objective view of our environment, but one that is accurate enough, a sort of working sketch we have cobbled together ourselves through our sense-making activity. Indeed, when we begin down this road, we quickly see that the

basic units of experience are not facts at all, brute or otherwise, but *fact-patterns*[47].

While a fact-pattern will indeed reflect some degree of regularity and predictability in the environment, we must keep in mind always that such fact-patterns do not necessarily reflect what is really there.

This, ultimately, is the right way to understand our relationship with the world. We must see ourselves moving through the world tracking patterns and regularities as we go, organising these into the facts we perceive at any given moment. While these facts appear to us as real, in fact each is merely a product of the strategy the sense-making process employs to draw out and grasp what, hopefully, are real facts. While there is an obvious connection – what we are most likely to grasp as facts are, indeed, facts – there is nevertheless a critical difference. The strategy is not infallible, after all. *In the end, the process will be much more concerned with its primary business of tracking patterns and regularities relevant to our activities, in the form most conducive to the successful pursuit of those activities, than it will be in verifying whether or not particular patterns are real or illusory.* As a result, whatever appears to us to have a factual basis will be taken on as such. If banknotes and marriages look and "behave" like real things, they will be taken on as real things and the matter left there. Indeed, to see just how speculative and imprecise the process is, we need only think a little about what must be involved. We might describe the process as one of "rational reconstruction", in which fragmentary material received from the world is provided

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[47] Karl Llewellyn, "The Common Law Tradition", pg.122: "Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is in-dwelling in the very circumstances of life."

with some form of useful organisation, a "structured representation in a thematic order":

> For here we see no mere collocation of material, but a structured representation of it in a thematic order. This can be seen to have required some kind of initial analysis (breaking down) in at least a tentatively thematic way, then a grouping of the material so analysed from all sources, then a pulling-together of them according to the thematic rationale, and finally adjustment of the whole for maximum clarity of presentation.[48]

What begins, then, as "arbitrarily given raw material", is actively fashioned into a coherent account possessing a "systematic and thematic shape", one built around organising concepts like persons, things and actions. *Critically, it is this orderliness and thematic clarity that is the priority, not the nature or order of the original sources.* As Neil MacCormick puts it, "one takes the raw material apart, then puts it back together according to the rationale of the scheme, not according to the order of its original sources"[49].

With this process of rational reconstruction interposed between the real world and the world we experience, we can see just how wrongheaded the fact-value distinction really is. We do not experience facts and values as belonging to distinct "streams" in experience because what we experience is a mediated view of reality, one chosen for its thematic coherence, its clarity of presentation. This, ultimately, is the primary goal

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[48] MacCormick, "International Journal for the Semiotics of Law," Vol.V, No.13, 1992 at pg. 3. This is a surprising source. What MacCormick has in mind here is a purely self-conscious experience. My claim, however, is that this is how consciousness itself is constituted. The point made will be clearer by the end of Chapter Four.
[49] ibid.

of the process. Whether the facts and values evident in a particular scene will be accurately differentiated in experience is therefore a more open question than advocates of the fact-value distinction imagine. Whether or not such a distinction is made in experience will be determined much more by the "rationale of the scheme". It will only be indirectly influenced by the "order of the original sources". This explains the uniformity we see across our experience. We do not find the various objects we encounter already separated out into their respective categories, after all – discrete physical object, object with institutional interpretation, wholly ideal object. Instead, all such objects are regarded equally as "things" in unreflective experience. We should not be surprised, then, to find that institutional facts and objects are experienced directly, as straightforward things in the world. They are as much patterns or regularities in experience as anything else, and as such enjoy the same status.

The treatment of facts and values above provides in a neat sketch the sort of difference the reorientation pursued here can offer. Typically, we begin our efforts at explanation by identifying what we take to be "the law" itself, going on then to fashion elaborate models built around the rules, rights or principles involved. When this approach is taken, the human agent himself is included only as an afterthought, with his life under law understood to be dominated by a deliberate, self-conscious relationship with these legal objects. In what follows, I will attempt to take the opposite path, building my account almost entirely around the processes responsible for consciousness within the human agent. It is important to note, however, that what is offered here is an account of a particular processing *style*. While other similarly psychologically-inclined theories take for granted the information-processing model,

at the centre of what is offered here is a different understanding of the way in which the brain goes about its work. In moving away from the information-processing approach, then, my account will be less concerned with the parts involved – meanings, rules and narratives, for instance – and much more interested in the strategies employed by the whole. With this in mind, we will look first at the habits the process cultivates to ensure the most comfortable relationship with the environment is achieved, before going on to look at the reflective activity the process employs to tend to these habits.

Chapter Three

Theory and practice, skills and fluency

As noted in Chapter One, what is sought in this thesis is an alternative to the dominant

model, the view of human intention and action which sees the process always and

inevitably as fully self-conscious and deliberate. Particularly, what is sought is an

alternative to the rule-based view of human activity. As we have found, such an

alternative is necessary if we are to do justice to the habitual, largely unthinking

character we see in so much of our day-to-day activity. Arriving at this alternative is

no small undertaking, of course, particularly as we seem unable to imagine any other

way of explaining organised behaviour. This is what I meant by a failure of

imagination. As we saw in Chapter One, the rule-based explanations we see in legal

theory often are offered quite in the face of the available evidence, yet the theorists in

question simply cannot imagine another way forward, and so are forced to proceed by

explaining what they see in this same one way. Indeed, when we investigate the social

sciences as a whole, we find this same tendency everywhere, with theorists forced

always to offer rule-based explanations for processes and activities which, on their

face, appear to have nothing at all to do with rules[1]. The emphasis given to rules

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[1] This criticism is a well-established one: that the rules of behaviour offered by analysts as responsible
for that behaviour in fact have more to do with the act of analysis itself. Rules don't cause behaviour, in
other words, but merely describe it. Bourdieu and Norton, cited in this chapter, provide examples of
this criticism. Another is Rodney Brooks. Here is his proposal for what he describes as a "new
robotics": "Just as there is no central representation there is no central system. Each activity layer
connects perception to action directly. It is only the observer of the creature who imputes a central
representation or central control. The creature itself has none: it is a collection of competing behaviors.
Out of the chaos of their interaction there emerges, in the eye of the observer, a coherent pattern of

within legal theory is at least understandable given that rules do indeed play some part in legal life. More implausible, however, are those instances where anthropologists attribute rules to "primitive" societies, for example, even where it is patently clear that no such rules are involved[2]. Rule-based explanations of language use provide another example of this tendency. While this point is obscured by the grammatical rules of sentence construction sometimes taught to students, in fact explicit attention to rules does not really feature prominently in actual language acquisition and use, which is itself an altogether more spontaneous phenomenon[3].

If we are to make any progress at all, then, we will need to find another way of thinking about the way in which human behaviour comes to be organised, the way in which regularity in this behaviour is achieved. In fact, a promising avenue of investigation is suggested by the diagnosis of the problem I offered in the previous chapter. As we saw there, the most obvious problem with the rule-based explanation

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behaviour." (Rodney Brooks, "Achieving Artificial Intelligence", pg. 11, quoted in Varela, "Ethical Know-How", pg. 60).

[2] In his book, "An Institutional Theory of Law", Peter Morton identifies Hart as making just this mistake: "There is a widespread assumption that, even in the earliest forms of human association, rules constituted a basic and essential category of social life; legalistic accounts of communities are common" (pg.14). See also Pierre Bourdieu, Chapter Five, n. 5 on pg. 194 below.

[3] As in n. 1 above, this, too, is a well-established line of criticism, particularly within linguistics. For examples, see the work of George Lakoff ("Women, Fire and Dangerous Things"), Roy Harris ("The Language Myth") and Michael Toolan ("Total Speech"). The point is fairly straightforward, though. We learn and use language spontaneously, after all, without at any point having recourse to rules. Are rule-based theories really appropriate, then? Surely this contradicts our own experience? John Searle articulates this point very well in the following passage from his book, "The Construction of Social Reality" (pg. 128): "A standard answer to this question is given in the literature of cognitive science and linguistics... The answer is: Of course we are following these rules, but we do so *unconsciously*. Indeed, in many cases the rules are not even the sort of rules that we *could* be conscious of. For example, Chomsky, in his account of Universal Grammar, says that the child is able to learn the grammar of a particular natural language only because he or she already is innately in possession of the rules of a Universal Grammar, and these rules are so deeply unconscious that there is no way that a child could become conscious of their operation. This move is very common in cognitive science... I am deeply dissatisfied with these accounts. Since Freud we have found it useful and convenient to speak glibly about the unconscious mind without paying the price of explaining exactly what we mean. Our picture of unconscious mental states is that they are just like conscious states only minus the consciousness. But what exactly is that supposed to mean?" As demonstrated in this passage from Searle, Chomsky is frequently singled out for criticism on this point, for his tendency to gloss over what is clear from our experience in the pursuit of a straightforward and apparently scientific theory. Much more can be said about the detail of Chomsky's theory of grammar, of course, but to do so would take us too far from the central concern of this thesis.

is its complete lack of fit with our experience in practical life. Indeed, in all such explanations, what we have are effectively seminar room models which bear almost no relation to reality on the ground. As Michael Toolan put it when discussing rule-based explanations in linguistics, the explanations regard the material under investigation as elements of theory first and foremost, and as lived human practices only secondarily, if at all:

> The crucial mistake of established linguistics, a linguistics that champions the decontextualizedness or autonomy of the linguistic structure, is that it effectively regards a language as a theory before it is a practice.[4]

This criticism is a fairly common one within linguistics, evident in Bakhtin's rejection of Saussure's *langue* (which he described as a "scientific fiction"[5]), and, more recently, in criticism of Chomsky's work[6]. A particularly memorable remark was made by Alan Gardiner:

> It is as though the critics were everlastingly discussing dramatic art without ever going to the theatre. One is tempted to conclude that philological science abhors the concrete no less than nature abhors a vacuum.[7]

The point made here, then, is that legal theory suffers this same defect, this same abhorrence of the concrete. Legal theorists, too, appear everlastingly to discuss legal life without ever actually going out and taking in what really happens in the world. As

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[4] Michael Toolan, "Total Speech", pg. 13.
[5] Mikhail Bakhtin, "Speech Genres", pg. 68.
[6] Particularly notable in this respect is the work of Roy Harris.
[7] Alan Gardiner, "The Theory of Speech and Language", pp. 106-107.

Neil MacCormick concedes[8], almost all of Anglo-American legal theory today is analytically inclined, with only the Realist writing standing as an exception. Analytically inclined theories of law or language are, almost by definition, concerned with clarity and comprehensiveness of theory over and above all else. The reality of the activities in question comes a distant second, if at all[9].

With this in mind, an obvious way forward comes to mind. If we are to produce the alternative we seek, we must start with practical experience, with practical functioning, and work our way back towards the theoretical underpinning we seek. We must start, in other words, by looking directly at the problem we are addressing. This might seem obvious, but the analytical approach in fact proceeds in the opposite direction, with efforts building, in the first instance, around theoretical building blocks like rules or reasons. In proceeding in this way, the theorists in question assume, or hope, that everything will work out in the end, with the analytic accounts produced happily matching up with our experience. When they do not, and they invariably do not, then recourse must be made to ideal hearer-listeners[10], ideal norm-subjects[11] and superhuman judges. If we do not want to repeat this mistake, then, we must begin

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[8] Neil MacCormick in "Institutional Theory of Law", pg. 17: "With the possible exception of some varieties of realism, every contemporary approach to legal theory includes a substantial analytical element. This involves taking seriously the job of describing the kind of thought-object or conceptual construct a legal system is, of elucidating the logical relationships among its parts, and of showing how legal relations, indeed the totality of legal phenomena, can be mapped on to conceptual relations, operations and systems."

[9] This point is an instructive one, I think. What does the fact that we have a "realist" school of thought in legal theory say about the discipline as a whole? Could we imagine a similar realist school in physics?

[10] Chomsky, "Aspects of a Theory of Syntax", pg. 3: " Linguistic theory is concerned primarily with an ideal speaker-hearer, in a completely homogenous speech community, who knows its language perfectly and is unaffected by such grammatically irrelevant conditions as memory limitations, distractions, shifts of attention and interest, errors (random or characteristic) in applying his knowledge of the language in actual performance." Chomsky continues on pg. 65: "… the "ideal speaker-hearer" has at best an indirect relation to actual speakers and hearers and is rather an abstract construct necessary for an orderly study of linguistic competence as a cognitive faculty (regardless of how, in actual linguistic performance, scrutiny of that competence may be obscured by individuals' errors, social "noise", and so on.)." See n. 44 on pg. 111 below for a response.

[11] MacCormick, International Journal for the Semiotics of Law, Vol.V, No.13, 1992, pg. 3.

with the very thing we are hoping to explain, which is this: What we seek is an explanation for immersion in rule-structured contexts, the way we appear to fall only too readily into "deep engagement"[12] with these rule-structured contexts and activities, engagement characterised by directed action which, counter-intuitively, appears to be attended by a certain lack of awareness on our part. Our concern is with the way we appear to be able to move and act successfully in contexts apparently structured by rules, without actually appearing to attend to those same rules. Indeed, this is what Searle and Anscombe both appear to have been grasping towards, Searle in his talk of a man "at home" in the institutions and practices of his community[13], Anscombe in her notion of rules absorbed into a "total, factual background"[14].

If we are to provide an adequate account of legal life, then, we must somehow explain the effortless, thoughtless way we seem to be able to negotiate our surroundings. When we begin to take the problem on directly in this way, a direction of investigation immediately presents itself to us: *practical skill* or *"know how"*[15]. Webster's 1913 Dictionary defines "skill" in the following way:

> The familiar knowledge of any art or science, united with readiness and dexterity in execution or performance, or in the application of the art or science to practical purposes; power to discern and execute; ability to perceive and perform; expertness; aptitude; as, the skill of a mathematician, physician, surgeon, mechanic, etc.[16]

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[12] This is part of the definition of the word "immersed" offered by Webster's 1913 Dictionary. The definition also includes "overwhelmed or deeply absorbed".
[13] Searle, "The Construction of Social Reality", pg. 147.
[14] Anscombe, "On Brute Facts", Analysis, Vol.18, No.3, 1958.
[15] The phrase is often attributed to John Dewey, see "Human Nature and Conduct".
[16] Webster's 1913 Dictionary.

The dictionary goes on to tease out the relations that exist between skill, dexterity and adroitness:

> A man is skilful in any employment when he understands both its theory and its practice. He is dexterous when he manoeuvres with great lightness. He is adroit in the use of quick, sudden, and well-directed movements of the body or the mind, so as to effect the object he has in view.[17]

If our concern is in fact with the way in which human agents *really* understand and operate within their day-to-day environments, then this family of concepts – skill, dexterity and adroitness – is precisely what we require. When we think of our discussion so far in this thesis, many of the words and phrases in the passage quoted from above[18] have considerable resonance: "readiness of performance", "habitual ease of execution", "a general facility of movement". All have obvious relevance to institutional facts, of course, but think more broadly of the discussion of the Realists offered in Chapter One. Think, too, of Hart's "mere habits of behaviour". There is clearly something of great value here.

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[17] ibid.

[18] ibid.: "Skill is more intelligent, denoting familiar knowledge united to readiness of performance. Dexterity, when applied to the body, is more mechanical, and refers to habitual ease of execution. Adroitness involves the same image with dexterity, and differs from it as implying a general facility of movement (especially in avoidance of danger or in escaping from a difficulty). The same distinctions apply to the figurative sense of the words. A man is skilful in any employment when he understands both its theory and its practice. He is dexterous when he manoeuvres with great lightness. He is adroit in the use of quick, sudden, and well-directed movements of the body or the mind, so as to effect the object he has in view. " Compare this with Mortimer Adler's description of a "habit of operation": "There is no other way of forming a habit of operation than by operating. This is what it means to say one learns to do by doing. The difference between your activity before and after you have formed a habit is a difference in facility and readiness. You can do the same thing much better than when you started. This is what it means to say practice makes perfect. What you do very imperfectly at first you gradually come to do with the kind of almost automatic perfection that an instinctive performance has. You do something as if you were to the manner born, as if the activity were as natural to you as walking or eating. That is what it means to say that habit is second nature" ("How to Read a Book", pg. 76).

Invoking skills in this way will no doubt inspire surprise and confusion in many of my readers. When we think and speak of skills, we almost always mean *bodily* skills. The notion of an intellectual or cognitive skill is a much less familiar proposition, particularly in the philosophical and academic literature. Indeed, we tend to regard the two – the mind and the body – as belonging to quite distinct worlds. On the one hand, we have higher, intellectual activities like language use, rule-following, decision-making, and anything else that is symbolic, conceptual or linguistic in nature. On the other, there are physical activities like driving a car or riding a bicycle. As noted, we tend to see the two as entirely unrelated, as matters for quite separate discussions, with different concepts involved and a different set of underlying mechanisms. Indeed, when we think of the intellectual and bodily activities we engage in, we tend to feel that there is no need for us even to attempt to reconcile their existence within the same one organism. The fact that we learn and implement both sets of skills side by side in the course of our day-to-day lives is not thought interesting or relevant at all. As the two are so different in appearance, it simply does not occur to us to ask whether there is any resemblance or relation at all.

In fact, the customary separation of bodily and intellectual abilities has a great deal to do with the apparent isolable character of the "objects" of those intellectual activities. Intellectually oriented activities tend to have at their heart material which is easily seen, in analysis, to exist in discrete object form. Language offers the best example of this isolable character. As words and meanings look so much to us like discrete things, we fall easily into thinking of linguistic ability as essentially a matter of our possessing sets of these things. These are complimented by sets of rules which dictate

how the word- or meaning-objects are to be manipulated. For advocates of this view, then, to become competent is to have taken in a sufficient quantity of these "things" and rules[19]. The more competent the individual is in the field in question, the more "things" and rules he or she is thought to have taken in. Against this, a very different portrait is presented of our physical abilities. On those rare occasions when we actually think about these matters, about the way we go about walking, or driving a car, or riding a bicycle, we certainly do not think of these activities as achieved through any such combination of "things" and rules. Indeed, how would we do so? What sort of "things" could be involved? A description along these lines – exclusively in terms of "things" and rules – appears wholly alien to the activities themselves. It is not at all natural for us to reduce, say, striking a ball with a tennis racquet, or kicking a football, to any such talk of "things" and rules. It is not even a question of the difficulty we face in producing such a description. In this case, we find that we cannot even imagine making a start. Rather than "knowing that", here we must be content with mere "knowing how".

In fact, for all that this separation of bodily and intellectual abilities is intuitive, the matter is not really as clear cut as we are inclined to imagine. Think, for instance, of the day-to-day activities of doctors and nurses. When we break their activity down into the specific tasks involved, often the "things and rules" explanation does indeed appear appropriate. When we think of the material nurses have to internalise, for instance, how and when specific drugs are to be administered, say, we tend to focus on the facts and rules themselves. We fall easily into thinking of the acquired competence exclusively in terms of these facts and rules, imagining that the same one

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[19] A good illustration is provided by Steven Pinker, who titled one of his books on language, "Words and Rules".

set of facts and rules stands behind each and every instance of execution. Under this view, the nurse on every occasion holds the relevant facts and rules in mind in some way, executing the programme for action they represent in a self-conscious, deliberate manner. As this task is repeated again and again, day after day, we imagine that there is always this same one way of going about it, always with the same careful attention to the relevant facts or rules.

When we step back, however, and survey more broadly the way in which this or that particular doctor or nurse goes about his or her duties, the fact-and-rule view begins to lose its hold on us. When we think about the work nurses get through in the course of an average day, for instance, or the work they get through in the course of an average week or month or year, we are struck by a certain interconnectedness. We do not see our nurse performing one task, then another, then another, with each task completely independent of all the others, each one a fresh adventure. Instead, we recognise the closed, repetitive character of the work, the way the various tasks sit together in a sort of web. We begin to see these tasks all as belonging to the same one set, a set the nurse encounters again and again, day after day after day. When we recognise this interconnected character, our attention shifts from the individual tasks to the set as a whole, the "world of the skill", as it is sometimes put[20]. At this point, the mediating facts and rules we initially placed such store upon now begin to feel a little like an impediment, for it is much more natural for us to see the individual relating to the world of the skill as a whole, doing so in a much more direct manner than is envisioned under the fact-and-rule explanation. This, I think, is a much more natural way to think of the day-to-day life of work of doctors and nurses. Each of these

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[20] Dreyfus and Dreyfus, "Mind over Machine", pg. 29.

professionals is seen as more or less comfortable, more or less *fluent*, in the "world" of their chosen profession. This fluency, an ability to move easily through the world of the skill, comes from the individual having grown into its dimensions, from having taken on its shape and character.

Rather than seeing the human agent always as detached from his surroundings, then, as negotiating those surroundings with self-conscious, deliberate attention, doing so by manipulating sets of decomposed facts and rules, what we see here is the individual becoming ever more "fluent" in his or her ability to interact with the environment. This growing fluency comes from repetitive experience, arising where the human agent encounters the environment and acts within it in the same way again and again over a period of time. The parallel with bodily skills should be obvious, I think. In the same way that we "grow into" our ability to play musical instruments or to drive cars, what is envisioned here is a similar process of "growing into" ways of seeing and responding within particular contexts and in relation to particular tasks. Under this view, then, what matters even in intellectual and practical action and decision-making is not the deliberate manipulation of facts and rules, but, rather, *an in-built propensity to adapt to our surroundings, achieving this adaptation through the absorption and automation of activity, of whatever sort, we enter into repeatedly.* Indeed, we will see that facts and rules have a specific, much more limited place in cognitive life. To get a clear view of both of these positions, however – both the absorption and automation of repetitive behaviour and the diminished role envisioned here for deliberate manipulation of facts and rules – we will have to look more closely at what is involved in the acquisition of practical skills. It is to this that we will now turn.

Five steps from novice to expert

The notion advanced here of an individual growing progressively into the "shape" required by his or her profession is perfectly in keeping with our day-to-day habits of thought and speech. For all this, the process remains rather a mysterious one. Though we are familiar enough with the phenomenon itself, we feel that the process is closed to us, leaving us with little to say beyond vague, impressionistic talk of habits or reflexes[21]. He or she simply becomes a better doctor or nurse or teacher. We say that he or she is "experienced", that he or she is "skilled". We take all of this for granted, yet there is surely something very interesting here, something with profound implications for our understanding of what it is for a human being to move through the world making the decisions that he or she makes. In their excellent book, "Mind over Machine", Hubert and Stuart Dreyfus present a model of just this process, the progressive way in which our habits of perception and response apparently are reshaped to fit the demands of particular skill-environments, the way doctors become good doctors, and nurses become good nurses. In setting out their model, they identify five steps or stages. We will address these stages shortly. As interesting, however, is the role they see played by facts and rules. While we tend to think the possession of facts and rules is a form of competence in its own right, we will shortly see that it is in fact merely a stage in the larger process of skill acquisition, and a relatively early one

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[21] This inability to provide an explanation in more obviously scientific terms is one reason why bodily skills are sharply distinguished from intellectual abilities and rarely investigated. Chomsky articulates the underlying prejudice perfectly in "Aspects", pg. 4: "Observed use of language or hypothesized dispositions to respond, habits, and so on, may provide evidence as to the nature of this mental reality, but surely cannot constitute the actual subject matter of linguistics, if this is to be a serious discipline."

at that. What we will find is this: *Facts and rules are not the way we deal with higher cognitive or intellectual skills; they are, rather, an important part of the way we go about learning all of our skills, which is something else entirely. More specifically, they are how we initially go about coping with novelty, with unfamiliar tasks and surroundings.* Where we are able to gain extended knowledge of the task and the surroundings, however, this reliance on decomposed facts and rules gives way to a much more powerful mechanism. Facts and rules are less than half the story, then. In essence, this is the picture Dreyfus and Dreyfus present. Let us turn to their model now.

In the first stage or step of the skill acquisition model they propose – the Novice stage[22] – the human agent is entirely unfamiliar with both the skill he seeks to acquire, and with the sets of circumstances in which the skill is to be exercised. His first task, then, is to make some basic inroads into both the task and the context. At this stage the novice is equipped to take on very little, and confronted with so much strangeness, will be fully occupied identifying only a handful of the most prominent elements. What he must do, then, is reduce the complex picture he faces into smaller manageable "bites", into facts and rules, usually[23]. At this point, some basic grasp of the most salient features and a few rules or instructions making clear the appropriate responses to these features will be about as much as he can manage. These will be introduced gradually, in order of prominence, with more subtle details left for later[24].

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[22] Dreyfus and Dreyfus, "Mind over Machine", pg. 21.

[23] ibid., pg. 21: "During the first stage of the acquisition of a new skill through instruction, the novice learns to recognize various objective facts through instruction, the novice learns to recognize various objective facts and features relevant to the skill and acquires rules for determining actions based upon those facts and features. Elements of the situation to be treated as relevant are so clearly and objectively defined for the novice that they can be recognized without reference to the overall situation in which they occur."

[24] This is in keeping with the resource-bounded view taken here of the creation and maintenance of consciousness. Where analytical approaches are happy to take the finished competence and imagine it

At this early stage, what matters most is that the individual be able to cope with the task he has been given or has set himself. He is content merely to keep his head above water, as we might put it. To do so, he will follow the instruction he is given to the letter. Indeed, as he lacks a good sense of the overall task he is undertaking, he will judge his performance exclusively by how well he has implemented the instructions he has been given, regardless of the overall efficacy of his action[25]. This complete reliance on decomposed facts and rules often leads the novice to go about his task in the stilted, disjointed way we all recognise as characteristic of novice-level ability.

The second stage Dreyfus and Dreyfus identify is that of the Advanced Beginner[26]. Even at this relatively early stage, we can see the emphasis on context-free features and rules beginning to be overtaken by the practical experience the individual acquires in concrete situations. Already, we see concrete, repetitive experience becoming immeasurably more important than any form of verbal description the student might be given. Indeed, increasingly we find that the subtleties of the skill simply cannot be reduced to any such verbal description[27]. There is nothing else for it, then. The student must learn by doing. What we find is this: *While the coping strategy*

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fully-formed within the human agent, under the view taken here the acquisition of skills or knowledge is always achieved in stages. Another example of this principle is provided by Roger Brown's notion of a basic level of categorisation ("Social Psychology"). Thomas Kuhn's whole theory of paradigm shift, too, has this same principle at its core. In all of these cases, what we have are examples of "boot-strapping", where progress is made by building on the earlier products of the very same process. In this way, later categories build on earlier ones, and older paradigms facilitate later ones.

[25] Dreyfus and Dreyfus, "Mind over Machine", pg. 27: "The beginning student wants to do a good job, but lacking any coherent sense of the overall task he judges his performance mainly by how well he follows learned rules. " We will see an example of this in Chapter Six when we turn to look at judges. When judges emphasise the literal guidance a particular legal measure provides, it usually signals a lack of relevant experience on the part of the judge. As the instance is unfamiliar, the judge will not "see at once" an obvious interpretation. In these cases, the judge will pay careful attention to the actual form of language used.

[26] ibid., pg. 22.

[27] ibid., pg. 22: "Through practical experience in concrete situations with meaningful elements, which neither an instructor or the learner can define in objectively recognizable context-free features, the advanced beginner starts to recognize those elements when they are present. How? Thanks to a perceived similarity with prior examples."

implemented early on works well enough as an initial "way into" the world of the skill, the task and contexts involved are themselves too complex and subtle to make this strategy workable in the long-term. If the individual is to do more than merely cope, he will have to go about his task in another way entirely, one that can be acquired only from actual experience. The initial reliance on decomposed facts and rules is therefore not an end in itself, but is instead aimed solely at facilitating acquisition, which is achieved through actual experience of the skill or task. This is the real role of decomposed facts and rules: *They are there to allow the human agent to build up direct experience, to give him an opportunity to become immersed in the world of the skill.* As it happens, this is perfectly clear from our own experience. Think about what happens when we learn to drive or play the piano. In both of these examples, the teacher or instructor begins by pointing our very specifically what is involved in the various operations. He or she says: "First do this, then do this. Place your hands here. Sit this way." This initial stage is short, though. Very quickly, the teacher or instructor becomes quiet, allowing the student simply to get on with it, to "grow into" the skill. The teacher or instructor may well make occasional interventions, but these, too, are simply corrections aimed at helping the student "grow" into the skill in the right way.

The third stage is Competence[28]. This is the most familiar of the five stages, the stage which features most prominently in the relevant literature. This prominence comes from the role played within the stage by self-conscious, reflective thought[29]. Having absorbed the basic physical operations in the previous stages, we now see the human agent feeling much more settled in the world of the skill. He can comfortably perform

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[28] ibid., pg. 23.
[29] ibid., pg. 23: "… to perform at the competent level requires choosing an organising plan."

the various operations, and now finds himself in a position to raise his gaze to higher things. It is at this point that we begin to see goal-oriented problem-solving behaviour. *The key to this stage is the coalescing of the various operations the human agent initially struggled with into a single smooth performance.* What initially was disjointed and clumsy now is fluid and effortless. This being the case, conscious attention now can be directed elsewhere. More often than not, it will be directed at higher level goals and problems. Mortimer Adler puts this emerging concern for higher level goals in the following way:

> The multiplicity of the rules indicates the complexity of the one habit to be formed, not the plurality of distinct habits. The part acts coalesce and telescope as each reaches the stage of automatic execution. When all the subordinate acts can be done more or less automatically, you have formed the habit of the whole performance. Then you can think about beating your opponent in tennis, or driving your car to the country. This is an important point. At the beginning the learner pays attention to himself and his skill in separate acts. When the acts have lost their separateness in the skill of the whole performance, the learner can at last pay attention to the goal which the technique he has acquired enables him to reach.[30]

There are several distinct parts to this stage, then. First of all, the "part-acts" coalesce into a single habit, a habit characterised both by its continuity and the thoughtless, effortless manner of its execution. Adler calls this "the habit of the whole

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[30] Mortimer Adler, "How to Read a Book", pg. 88. Note that Adler is here writing about reading, which is particularly interesting given the nature of the argument offered in this chapter.

performance"[31]. The thoughtless, effortless character of the performance cannot be overemphasised, the way in which the part-acts now take care of themselves. At this point, the human agent is in the happy position of being able to put his newly acquired habit to use. He can begin to "pay attention to the goal which the technique he has acquired enables him to reach"[32]. It is this "paying attention to goals" that is thought so notable. The picture presented is of a human agent very much in conscious control, one who chooses to this or that always in a thoughtful, calculating way. Every decision is taken in a thoughtful way, and comes from a deliberate weighing up of the various alternatives, an explicit "decision procedure". Dreyfus and Dreyfus refer to this as the "Hamlet model", a "detached, deliberate and sometimes agonising selection among alternatives."[33]

While most writers and thinkers are happy to stop at mere Competence, Dreyfus and Dreyfus identify a further two stages: Proficiency and Expertise. In an important sense, though, this latter half of the model simply repeats the first, the "Competence, Proficiency, Expertise" sequence simply reiterating the earlier "Novice, Advanced Beginner, Competence" one. Typically, the state of being the human agent arrives at in the Competence stage is thought of as our default mode, with the human agent thought to move through the world always in the fully self-conscious, deliberate state of mind we see there, always evaluating his options and making explicit decisions to pursue this or that course of action as he goes. Where this view is taken, the skill acquisition process understandably is thought to end at Competence. At this point the human agent is thought to have mastered the skill, and now can put it to use in the

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[31] ibid.
[32] ibid.
[33] Dreyfus and Dreyfus, "Mind over Machine", pg. 28. We will return to the "Hamlet model" in the next chapter, when we turn to look at practical reasoning.

pursuit of his goals, going about this pursuit of his goals in the fully self-conscious, deliberate manner described above. *In the model provided by Dreyfus and Dreyfus, however, these higher level goals themselves come to be automated in precisely the same way as the more basic ones.* Where this view is taken, the Competence stage is therefore, in one sense, a return to the Novice stage, though in this case the skill to be acquired is an extension or a refinement of the more basic one. Indeed, we might put it this way: Where in the first three stages, part-acts coalesce and telescope into a single, seamless habit, in this second cycle further, higher-level part-acts are absorbed, causing the "habit of the whole performance" acquired to become even more complex and specific, with, for instance, the habit of being able to drive in an effortless and thoughtless manner being extended and refined into the habit of being able to "drive *to work*" or "drive *to the supermarket*". In this way, general habits come to be elaborated into much more specific ones[34].

Competence can be seen, then, as a second Novice stage. As the higher level goals the human agent now pursues are completely novel, he finds that he must once again proceed in a fully self-conscious manner, reducing his task to manageable elements and attending to each of these elements deliberately. Great importance is placed again, too, on whatever instruction he might receive. For this stage, think of a driver making his way to work for the first time, perhaps on the basis of directions he has received from his employer. As was the case when he was learning to drive, at this point almost all of his attention will be taken up with the various manoeuvres and decisions

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[34] The point has special relevance in AI research, in the pursuit of what are known as "microworlds" (ibid., pg. 76): "Subworlds, like the world of physics, the business world, and the theatre world, make sense only against a background of common human concerns. They are local elaborations of the one commonsense world we all share. That is, subworlds are not related like isolable physical systems to larger systems they *compose*, but are rather, local elaborations of a whole, which they *presuppose*." The point made here is that our ability to function in any one particular context is never an isolable matter, something we might reduce to a stand-alone formula or algorithm. In each case, the process proceeds by building on its earlier successes, producing a local elaboration of a global resource.

involved, though in this case the manoeuvres and decisions would be of the "Left at the patrol station" variety. Next is Proficiency[35]. Like the Advanced Beginner stage, the Proficiency stage is an intermediate one. As in that stage, activity here is underpinned by the conscious attention to decomposed facts and rules characteristic of the preceding Competent stage, but is itself characterised by an ever greater immersion in the world of the skill, by the acquisition of the practical, concrete experience facilitated by those very facts and rules. Theoretically speaking, the Advanced Beginner and Proficiency stages are both awkward, because the transformation each stage describes is subtle. On the one hand, the human agent here appears to continue to operate for the most part in a self-conscious, deliberate manner. As he does so, however, he is all the time gaining concrete, practical experience of the task. While the benefit of this concrete experience is difficult to point out in any simple, explicit manner, it is felt by the human agent in terms of an increasing sense of confidence and facility, the task itself coming to seem less and less demanding as he repeats it over and over again. Imperceptibly, the weight of the task is lifting. There is a sense in which the explicit, self-conscious experience of executing the task so prominent in the previous stage here is, as it were, beginning to be absorbed into the human agent himself, into the very way in which he sees and thinks and responds[36].

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[35] ibid., pg. 27.

[36] ibid., pg. 27: "Usually the proficient performer will be deeply involved in his task and will be experiencing it from some specific perspective because of recent events. Because of the performer's perspective, certain features of the situation will stand out as salient and others will recede into the background and be ignored. As events modify the salient features, plans, expectations and even the relative salience of features will gradually change. No detached choice or deliberation occurs. It just happens, apparently because the proficient performer has experienced similar situations in the past and memories of them trigger plans similar to those that worked in the past and anticipations of events similar to those that occurred."

Finally, there is the Expertise[37] stage, the true end of the process. The Expertise stage mirrors the Competence stage as it appears in the first cycle. Just as the Competence stage is made possible by the integration and automation of the decomposed facts and rules so central to the Novice stage, *Expertise sees the explicit, self-conscious attention to goals characteristic of Competence integrated more and more into a fluid, unthinking performance.* In other words, in the same way that the Competence stage sees the once separate and consciously-attended physical "part-acts" successfully integrated into a single unthinking habit, *the Expertise stage sees the human agent's higher-level goals and organising plans integrated into this same single habit.* To return to my driving illustration, the driver, having driven repeatedly to the country, or to work, or to the local supermarket, after a time will find the higher-level planning required to get him to the country, or to work, or to the supermarket, requires less and less of his conscious attention. Just as he needs to think less and less about the "part-acts" involved in the act of driving, *repetitive implementation of higher-level plans will see these, too, coming to be implemented in an equally unthinking manner.* More and more, then, the driver will find his conscious attention freed to pursue other tasks. When he enters his car and turns the ignition in the morning, it will no longer occur to him to even consider the route he is taking to work. And while he is actually driving, he will find this task so undemanding that he will have difficulty keeping his mind from drifting to other things.

Here, then, is the whole cycle: First the nuts-and-bolts mechanics of driving is absorbed, leaving us free to plan our route and attend to the detail of the journey. After this or that particular journey has been repeated a sufficient number of times,

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[37] ibid., pg. 30.

however, the journey itself is absorbed in precisely the same way. Soon we find that we can drive to the country, or to our place of work, or to the local supermarket, and all without remembering a single detail of the journey, as if we have been operating on "auto-pilot". Recognising the second half of the cycle is crucial because it allows us to see that the acquisition of particular bodily skills is not an isolated achievement. Indeed, where we previously placed our emphasis on the individual skills themselves, now we find ourselves looking much more at the nature of the underlying process of acquisition. We begin to see that discrete skills are not simply "bolted on" to an essentially stable default state of being. Instead, we see that the default state is itself dynamic, that it exists from moment to moment looking always to absorb regularity in its life and surroundings, whatever form these regularities might take. When we follow the human agent as he works his way through the five stages, then, what we see is a certain lack of tolerance for repetition, the process bent always on absorbing and automating impressions and responses that can be relied upon to reoccur again and again in more or less the same form. This is the recurring pattern: Novelty leads to familiarity, which is absorbed, allowing conscious attention to seek out further novelty. As this novelty becomes familiar, it, too, is absorbed, opening the way in turn for conscious attention to pursue further novelty. As the process proceeds in this fashion, we find that our tasks require less and less from us, our lives becoming more and more an unthinking acting out of habits. Indeed, this last point is the critical one: *The process appears to work always towards unconscious mastery, towards an unthinking, habitual mode of action.* It is as if there is a force within us that works always to drive the objects of our attention downwards, lodging them beneath the threshold of consciousness wherever it is able to do so, leaving our conscious,

reflective attention free always to attend to novelty, to sudden change and unexpected impediment. As will become clear shortly, this will prove an important insight.

The real role of rules

We will return to unconscious mastery shortly. For now, though, let us return to facts and rules, and to self-conscious, deliberate application. When we work our way through the five stages set out above, what we find is a clear picture of the human agent coming to terms with the "world of the skill" progressively, in a step-by-step fashion. Dreyfus and Dreyfus describe this progress in the following way:

> What should stand out is the progression from the analytic behaviour of a detached subject, consciously decomposing his environment into recognizable elements, and following abstract rules, to involved skilled behaviour based on an accumulation of concrete experiences and the unconscious recognition of new situations as similar to whole remembered ones.[38]

When we take this larger picture into account, we see that the facts and rules we place such store upon in fact have a limited role. In the early stages, the "world of the skill" is inscrutable, the human agent experiencing it as a problem he must overcome. The human agent is acutely aware of his own estrangement from this world, and at this early stage, works to make the environment and its workings a little more familiar to him. What he seeks, at this point, is a "way into" this world. With this in mind, the

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[38] ibid., pg. 35.

human agent begins by identifying the most prominent features and by seeking out explicit rules which relate the various features together. By decomposing the environment into manageable elements in this way, and relating these elements by way of rules, he finds that he can begin to cope with his problem. This mere coping is precisely what facts and rules are for, in other words. They are the human agent's "way into" a strange, inscrutable environment, the first steps he must take if he is to gain entry.

Now, while this explicit self-conscious attention to facts and rules is an effective initial coping strategy, seen more broadly, it is an extremely inefficient way to go about the skill, leaving the human agent capable only of a relatively poor performance. We are all familiar with the stilted, self-conscious, disjointed way in which we go about changing gear when learning to drive, for instance, or the trouble we have contorting our fingers into the right chord-shapes when learning to play the guitar or the piano. Clearly, this is not the right way to go about the skill, not the optimal way, at any rate. It is a short-term coping strategy, merely a "way into" the world of the skill. At the same time, we are familiar, too, with the fluid, effortless character of our performance when we have finally internalised those same operations through practice. What begins as "clumsy, disconnected, tedious, and painful"[39] becomes "graceful and smooth, facile and pleasant"[40]. By this stage, mastery of the skill has been achieved, the human agent truly having entered the "world of the skill". *The clearest sign of this mastery, then, of our having entered into this world fully, is a lack of awareness of precisely those facts and rules we initially placed such store upon.* Facts and rules do indeed have a special place in the way we go about doing the

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[39] Adler, "How To Read a Book", pg. 87.
[40] ibid.

things that we do, therefore, it is simply that this place is rather more limited than we customarily take it to be. On the one hand, these facts and rules are indispensable if the human agent is to achieve his entry into the "world of the skill". At the same time, true mastery comes only when these same facts and rules are left behind, when the human agent no longer has use for them.

In the context of bodily skills, none of this is controversial, of course. There is nothing shocking in insisting on such a peripheral, instrumental role for decomposed facts and rules when discussing driving, say, or learning to play tennis or snooker. It is only too clear to us that something else is responsible for our ability to perform these skills. The extended, cumulative character of the learning process, the person-centredness of it, all of this is perfectly obvious. We see very clearly that what we have here is intimately bound up in the development of this or that particular person, a process that unfolds over a period of time, through a series of concrete experiences. The acquisition of a skill must be seen to represent progress for this or that particular person, progress achieved over the course of his or her unique, unfolding life[41]. When we turn our attention to our higher, intellectual abilities, however, we find a jarring change in our attitude. Indeed, we find our understanding of these higher skills is rather impoverished in comparison. The bodily skills model has a richness and subtlety, a connection with concrete experience and lived, practical life that is entirely absent from the higher, intellectual model. In this instance, there are *only* decomposed facts and rules. There is no question here of beginning incompetently, of

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[41] This is another aspect of the embodied approach taken, again in marked contrast to the analytic approach. When this view is taken, we see the skill or capacity in question as something a particular individual acquires over the course of his or her life. Any such skill or capacity is the product of a meeting between the underlying potential of the organism and the stimulation it receives over course of its particular life. See, for example, pg. 96 of "The Embodied Mind" by Varela, Rosch and Thompson.

implementing coping strategies, and moving progressively, through practice and repetition, towards a more advanced, integrated way of going about the relevant task.

Indeed, astonishingly, intellectual progress under the traditional model tends to be thought of *entirely in quantitative rather than qualitative terms*, a matter simply of our acquiring more and more decomposed facts and rules. The popular metaphor for intelligence is that of the encyclopaedia or database, the especially intelligent person thought to possess, at his fingertips, as it were, a vast store of inert, already defined facts. The exercise of intelligence often is thought of in this way, as little more than a talent for holding vast quantities of inert facts. Crucially, no provision is made for the surely more interesting but problematic question of judgment or insight. Under the facts and rules model, there is no scope for us to make sense of our ability to arrive at understanding that is truly novel[42]. This is particularly damning as insight and good judgment are everything in intellectual life. Advances in communal and personal understanding come not from the mechanical application of already defined facts, but from the creation of new perspectives, from the creation of new ways of seeing. Indeed, I would go so far as to suggest that a model of our higher, intellectual abilities that is incapable of explaining insight and good judgment is not worth very much at all. Nor, under the facts and rules model, is there any scope for explaining progress that is not straightforward and pleasingly linear. Under the facts and rules model, the human agent becomes more competent fact by fact, rule by rule. When faced with

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[42] Indeed, Chomsky himself trumpeted the mathematical or combinatorial view as a real advance, yet the impoverishment of its view of creativity should be clear. See Chomsky, "Aspects of a Theory of Syntax", pg. 8: "Although it is well understood that linguistic processes are in some way "creative," the technical devices for expressing a system of recursive processes were simply not available until much more recently. In fact, a real understanding of how a language can (in Humboldt's words) "make infinite use of finite means" has developed only within the last thirty years, in the course of studies in the foundations of mathematics. Now that these insights are readily available it is possible to return to the problems that were raised but not solved, in traditional linguistic theory, and to attempt an explicit formulation of the "creative" processes of language."

sudden, dramatic leaps in performance in, say, language acquisition, there is no way, really, to reconcile this with the structure of the model. Theorists are left invoking, rather spuriously, innate, fully realised abilities that are installed by God or by natural selection and are activated all at once at a specific point in the human agent's life[43].

While we tend to think of the two models above – self-conscious manipulation of decomposed facts and rules on the one hand, unthinking skilled behaviour on the other – as two distinct ways of going about our tasks, two distinct ways of being skilled, in fact both are found in a single structure. The approaches are characteristically thought of as equal but different, one suitable for one range of activities, the other suitable for another range entirely. Here, however, we must see one as a prelude to the other, much in the way that training wheels precede and facilitate the competent riding of bicycles. The point, then, is this: *Decomposition into facts and rules is merely a preparatory phase which, if followed, leads to deeper, more intuitive understanding, one based on familiarity derived from concrete experience.* Crucially, this is true even of higher intellectual skills. It is the way we learn to drive, to ride bicycles, to play the piano, certainly, but it is also behind our "coming into" language, behind our "coming into" our various intellectual fields. This picture of coming into understanding progressively, of "steadily getting better at…" through repetitive practice, is perhaps most apparent in our long-term experiences of education and career development. Indeed, it is something of a truism that doctors and lawyers and engineers are "made" in just this way. It is well established in practical, common sense understanding that we learn primarily by doing. The "book-learning" provided by the university years of fledgling professionals is acknowledged as a mere

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[43] The most obvious example of this is provided by language acquisition, when children appear to acquire syntax at about 3 years old.

prelude to the real education provided by residence and practice. It is through working

from day to day in the real contexts of their chosen fields that these students truly

learn their art. It is through meeting the problems they will face directly, and working

out actual, practical solutions to them again and again that they truly come to have the

knowledge and understanding their chosen professions require.

While this marginalisation of decomposed facts and rules is perfectly in keeping with

practical experience, there are dramatic, rather less happy implications for much of

the theoretical work that exists in relation to each of these fields. As noted above,

theorists have tended to build their accounts exclusively around the facts and rules

themselves, producing elaborate, often obscure constructions quite in the face of the

accounts given of these matters by those with real-life experience. Examples of this

can be found everywhere in the relevant literature. We can see, for instance, how

poorly the theoretical accounts offered by most linguists compare with our everyday

experience of language use[44]. Theoretical work in legal reasoning provides another

example. In recent decades we have seen the rise of increasingly obscure and

inscrutable logic-inspired models of these processes. When we look to accounts

provided by the judges themselves, however, we find that emphasis is placed not on

self-conscious deduction, a linear working from premise to conclusion, but much

more on intuition and "hunching"[45], on an ability to "see at once" what is required in

the circumstances. Judges place greatest store not on the decomposed facts and rules

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[44] This is the principal argument of advocates of what is known as Integrational Linguistics. Roy Harris and Michael Toolan point particularly to Chomsky's confident dismissal of just about every feature of our real experience of language use: "Thirty years after Chomsky's famous postulation, one is struck by the confidence of the dismissal of crucial considerations concerning the psychological and interpersonal or sociological pressures on the nature and design of language. But so compelling is the Saussurean paradigm of autonomous language study that many linguists have been willing to regard memory and shifts of attention and interest as peripheral to language, as simply parts of an enabling (or disabling) background" ("Total Speech", pp. 141-142, referring to Chomsky's "ideal hearer-listener").
[45] This is, of course, from the American Realist writing, but is also acknowledged by Dworkin and even Hart, as we shall see in Chapter Six.

the theorists favour, but on a rather more mysterious "feeling for" the material they work with on a day-to-day basis. Their ability to offer solutions, they feel, comes from expertise in their field, expertise derived from concrete experience of that field, from "doing law"[46]. They characterise their own abilities in terms of "knowing how" rather than "knowing that".

In fact, the logical account of judging is but one example of a wider trend, a failure of theory to meet practical experience that is evident across the humanities and social sciences generally. Again and again, we see theory pursued for its own sake, theories favoured for possessing the right appearance[47], while little or no attention is given to what is perfectly clear in day-to-day experience. The reason for this disparity should be clear by now: *our emphasis on rules has meant that we have unwittingly been providing accounts suited to novices and detached observers, for it is only novices and detached observers who make use of rules in the way that the dominant theories imagine.* At the same time, no provision has been made for those who have mastered the tasks in question, who are found "inside" the practices. When we do pay attention to experts and insiders, however, what is most noticeable is the way in which "doing" and "being" come to be intertwined. What marks out experts and insiders is the way in which all of their capacities, their reflexes of perception and action, all are perfectly calibrated to those very environments, the "worlds of the skills" they inhabit and operate within. Through repetition, the skill becomes a feature of the individual, part of his "own structural determination"[48]. It is this process of becoming perfectly

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[46] Oliver Wendell Holmes's famous line comes to mind, that the life of law is experience not logic.
[47] John McDowell distinguishes work with true scientific value from work which exhibits mere "scientism", for instance. This criticism is often levelled at Chomsky.
[48] Maturana and Varela, "The Tree of Knowledge", pg. 196.

calibrated to our environments that belongs at the centre of our account, and not the decomposed facts and rules that are given so much emphasis in the literature.

There *is* a place for rules, of course. Rules are indeed central to many of our practices. The key, however, is to find the right place for these rules in our accounts. Identifying the use of rules with novices and outsiders allows us to do this. Think of our experience when playing games, for instance. The rule-based account actually describes quite well the experience of those relatively new to the game in question. With each move, we can imagine the novice player saying to himself, "How am I to move now? What do the rules say about this move? Is it allowed?" and so on. In these instances the novice's lack of experience of the game means that he is much more likely to think of the rules of the game in this explicit manner. An experienced player would not think of the rules in this way, though. For him, the rules would likely not occur to him at all, but would instead structure the very way in which he experienced the game. Indeed, this is what would allow him to perform at the standard that he does. His transcendence of the rules translates into a much higher level of performance simply because he is able to concentrate on his goals within the game. We see all of this, too, when we think of judges. The logical, deductive approach may well be true of a judge with absolutely no experience relevant to the case before him. In such an instance, we may well see him attending very closely to the meanings of the words used and to the logical structure of the argument. An experienced judge, however, will be able to move much more quickly. His prior experience of the matters directly under consideration will allow him to "see at once" what is required in the circumstances. There will be no need to analyse the words or the structure of the argument because he will already know what the words mean and where the argument

is going[49]. We will return to this discussion in Chapter Six when we look at experts and novices in judging.

Everyday expertise

Careful study of skill acquisition has provided us with the beginnings of an alternative to the disembodied rule-based accounts we are usually so taken with. If we are to make the most of the insights offered in this chapter, though, we must take one more step. Talk above of becoming "fluent" in particular domains, of becoming shaped progressively to best fit that domain, must not be thought of as relevant only to experts and novices performing distinct skills. Indeed, to truly grasp what is envisioned here, we must move away from thinking about the distinct activities we have been discussing – learning to drive to work, say, or to perform this or that professional task – and think instead about where and why such skills are exercised. Activities like driving always have a context, of course, the skill exercised always in the pursuit of this or that particular goal. Rather than see the absorption and automation of repetitive activity as the way in which this or that distinct ability is acquired, then, it is better, for my purposes, to think of the process instead as *the organism's standard response to the demands made of it by all contexts and tasks.* Indeed, advanced skills in driving or professional life are, under this view, merely specific, rather prominent instances of something essential to our basic "way of

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[49] As the decision-making process is itself so mysterious, a distinction is often made between actual decision-making – or discovery, as it is sometimes put – and justification after the fact. This allows the theorist to sweep decision-making aside and offer an exclusively justificatory account. As we will see in Chapter Six, however, this is not really a viable strategy. Discovery cannot be side-stepped so easily.

being", giving us a rare glimpse into what is in fact prevalent, so prevalent as to go unnoticed in all but these few, exceptional cases.

While I began this chapter by looking at the acquisition of distinct skills, then, the more important point to grasp here is the way in which the automation of repetitive experience *stands behind everything we do*. As noted above, what marks out experts and insiders is the way in which all of their capacities, their reflexes of perception and action, all are perfectly calibrated to the environments they inhabit and operate within. Through repetition, the form of action taken within that environment becomes a feature of the individual, part of his structural determination. The view taken here, then, is that *this tendency to become perfectly calibrated to particular contexts and tasks is in fact basic to our ability to function at all*. Just as we become advanced drivers or athletes or musicians, we all become similarly advanced at whatever we do over and over again in the course of our day-to-day lives. We become experts at getting out of bed and brushing our teeth, at having breakfast and getting ready for work. We become experts at getting to work, at using buses and trains, at stopping at traffic lights and intersections. We become experts not only at the work we do while at our places of employment, but at our social interactions there, too, becoming experts at having lunch with our colleagues, or at having a chat at the vending machines. In each of these examples, what we see is precisely the intolerance for repetition described above, with the sense-making process driving activation of the repeated response beneath the threshold of consciousness, absorbing it into the repertoire of the more basic processes responsible for apprehending the context and task in the first place.

The picture of skill acquisition provided by Dreyfus and Dreyfus therefore has wide application. It applies not only to highly specific skills, but even to the most mundane of our daily activities. We have seen one example of this in our discussion of driving. At this point, I will add two further examples: stopping at traffic lights and boarding public buses. The experience begins with a first encounter with the task and the context. We must place this first encounter at the beginning of the second half of the five step sequence, at the Competence stage. It is not a truly Novice experience because the human agent in these instances will have already mastered the most basic aspects of the operation. Riding a bus, even if a new experience, will never be completely novel. The specific operation involved will be novel, though, and it is this aspect of the experience that will dominate his thoughts in that first encounter. As he repeats the task, though, he will find it becoming less and less demanding. When riding the bus, for instance, the human agent will find that he no longer needs to think quite so explicitly about how he will pay, where he will pick up his ticket, where he will leave his bag, how he will get off, and so on. Finally, when the human agent reaches the expert stage, he will find that he barely has to think about any of this at all. It is this everyday expertise that is responsible for the disconcerting experiences we sometimes have, when we lock the door or switch off the cooker but later find that we cannot remember having done it, or when we arrive at the end of a journey and find that we cannot remember much of it.

Hart was mistaken, then, to be so dismissive of habits of behaviour. As noted in Chapter One, my principal aim in this thesis is to arrive at an alternative to the dominant self-conscious model, an alternative more conducive to the unthinking, habitual character we see in so much of our day-to-day activity. What is sought is a

way of making talk of habits meaningful when considering the complex forms of behaviour we undertake in modern life. The skill-based model advocated here achieves this, I think, for it is quite natural for us to speak of habits where the single most powerful resource the sense-making process has at its disposal is its ability, quite simply, to learn from experience. This is what absorbing and automating repetitive experience amounts to, after all: conditioning over time. This conditioning over time comes from the way in which the process responsible for consciousness seeks always to grasp and retain recurring contexts and activities as wholes, readying them for redeployment later as part of the scene-setting function it performs[50]. We find, then, that we can quite legitimately speak of "habits of behaviour" when describing social and legal life. As our very ability to function in the world comes, in large part, from the entrenching of a set of responses distilled from repetitive experience, it is perfectly meaningful to suggest that regular social and legal behaviour, too, relies upon this mechanism. That what we have here are habits was recognised by John Dewey:

> We may… be said to know how by means of our habits … We walk and read aloud, we get off and on street cars, we dress and undress, and do a thousand useful acts without thinking of them. We know something, namely, how to do them…[51]

This is exactly my point: We do a thousand useful acts everyday without once thinking of them. We get out of bed, brush our teeth, make our breakfast, commute to work, and so on, without really thinking very deeply about what we are doing or how

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[50] We might put it this way: the process's enthusiasm for its more basic task of ensuring that we find the world familiar and comprehensible has the unintended effect of suppressing conscious experience of the most regular and predictable aspects of our surroundings.

[51] John Dewey, "Human Nature and Conduct", pg. 177, cited at Dreyfus, "Being-In-The-World", pg. 67.

we are going about the acts themselves. When I get out of bed in the morning, for example, I do not take a moment to decide which side of the bed I will use. Instead, I simply "get out of bed". When I brush my teeth, I do not engage in a process of conscious reasoning to decide which toothbrush I will use. Instead, I enter the bathroom, "see at once" the right toothbrush as my own, and get on with "brushing my teeth". And when leaving for work, I do not take a moment every day to consciously formulate or recall a particular plan for getting to work. I just "leave for work". I am conscious in all of this, of course, and no doubt I am thinking of something or other at each stage. The point, however, is that *I am not necessarily thinking about the acts themselves as I perform them*. Rather, the acts have become automated in some way, leaving me free to think of those other things.

All of this sets the stage for a much more satisfying solution to the problem of institutional facts. As noted above, our problem here is in trying to account for the apparently real existence of norms, the way in which notional objects like banknotes and marriages seem to appear to us directly in day-to-day life, as if they are somehow there before us in the physical world. In these instances, we appear to apply an institutional interpretation to the underlying objects and actions involved, without actually acknowledging that we are doing so. We appear to see the interpretation we apply not as an interpretation, but as the way things really are. We can now go some way towards explaining this aspect of our experience. The key to all this is to recognise the *cumulative* nature of experience, the way in which our very ability to experience the world builds up and changes over the course of our lives. This has been one of the central themes of this chapter. As we saw a little earlier, we typically assume a sharp distinction between our state of mind on the one hand, and the various

skills we acquire and employ on the other. The human agent is thought to move through the world with his state of mind largely insulated from the events unfolding around him, as if enjoying a certain detachment. It is as if we imagine the human agent viewing events always from afar, even when he is at the very centre of these events.

When we place the automation of repetitive experience at the centre of our account, however, the human agent can no longer be understood always to stand above or apart from the tasks and activities he is participating in. Under the tip-of the-iceberg view advocated here, the process is dominated by the submerged, unconscious part of the structure. This part of the structure works silently to absorb repetitive experience and build up resources for sense-making, using these resources then to provide a "frame"[52] for the individual's conscious experience at any given moment. It is this on-going accumulation of resources for sense-making that gives the process its cumulative character. This is because the more experience the individual has of the particular activity or context involved, the more resources the unconscious part of the process comes to have at is disposal. This means that as time goes on, the process will get better and better at "framing" particular repetitive experiences. As the human agent encounters the activity or context again and again in the course of his life, the unconscious part of the process will map out the experience more and more comprehensively. By the time expertise in the given activity or context is achieved, the process will have absorbed so much of the experience as to leave very little room

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[52] "Frames" and related concepts are well-developed within cognitive science and artificial intelligence. See, for instance, Minsky on frames: "A Framework for Representing Knowledge." in P. H. Winston (ed.) "The Psychology of Computer Vision", 1975; Schank and Abelson on scripts: "Scripts, plans, goals, and understanding: An inquiry into human knowledge structures", 1977; Rumelhart and Ortony on schemata: "The representation of knowledge in memory" in R.C. Anderson, R.J. Spiro and W.E. Montague (eds.), "Schooling and the Acquisition of Knowledge", 1977.

for conscious awareness. Almost the whole experience now will be carried within the frame, as it were.

To understand institutional facts, then, we must see the acquisition of an automatic response to a particular set of circumstances *as incorporating an enrichment of the basic view taken of those circumstances.* Becoming skilled is therefore not limited to a growing dexterity in the fingers, say. There is also what we might call a growing dexterity in perception, in imagination, even in emotional response. Indeed, what we see here is not the exercise of a thousand distinct abilities, each one executed alongside innumerable others in any particular act. What we have, instead, is a complex, richly structured ability to respond to all of life, an ability the human agent develops context by context and task by task. To illustrate this, think of the way in which we "see at once" train stations as organised along specific lines. We do not really see environments like these purely in objective terms. Instead, the sense-making process grasps environments always by organising them into practical spaces, spaces populated or occupied by objects whose relevance is determined by our interaction with them. The thoughtless way we function within contexts such as these comes, then, not from merely adding a plan of action to an objective view of the environment. Rather, the view of the environment, too, is automated. What we see is a *mutual shaping of perception and response.* The human agent comes, then, to "see at once" the institutional significance of particular patterns and regularities as embedded in the landscape itself, as inseparable from it.

With this view of the sense-making process in place, we can finally do justice to Searle's own insight, the picture he painted of a man "at home" in the institutions of

his community. Searle's mistake was in placing rules at the centre of this being "at home". In fact, rules play only a small part in the process. Rules are creatures of conscious life, and while they may have a role in the establishment of an institutional practice, or where that institutional practice is ambiguous or has come into question in some way, in the ordinary run of things life for the human agent is only minimally reflective. More often than not, then, rules barely come into it. When we say a particular fact is "a fact, in the context of our institutions"[53], what we mean is that the fact in question *shows up as a fact for us because we have internalised a way of experiencing our total environment that incorporates just those institutions.* The role of institutional rules is revealed to us in analysis of course, when we step back from moving, practical life and reflect on the matter. Our more common experience is not reflective at all, though. Consequently, perception in these cases sees the part-acts coalesced into a seamless habit. I "see at once" a banknote as a banknote not because I am aware of institutional rules which make this so, but because I am simply used to seeing banknotes in this way. I have formed a habit of perception.

On following a rule

By looking to perception in this way, we find a satisfying solution to the problem of institutional facts. It is important, however, to see that the problem of institutional facts does not represent an isolated puzzle, but in fact is closely connected to a range of other phenomena, both in legal life and in our lives more generally. This is one more problem we face when we opt for the rule-based explanation. Obviously, if our

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[53] Anscombe, "On Brute Facts", Analysis, Vol.18, No.3, 1958.

experience of institutional facts is so dependent on rules, then it can only apply where there actually are rules operating within the experience or practice involved. Much is made of games within Searle's account, for instance, for the perfectly obvious reason that rules are indeed central to our experience in this area of life. Similarly, MacCormick and Weinberger see Searle's theory as a natural fit for the law, for the law, too, is easily seen as a practice structured by rules. While we remain with such rule-structured activities and practices, the rule-based solution remains at least plausible, if not perfect, but what happens when we need to explain similar experiences in other areas of our lives? Does the rule-based explanation of institutional facts have anything more to offer us?

In fact, when we look carefully, we see that the underlying problem we are addressing here in fact is quite widespread, occurring in slightly different forms everywhere we choose to look. Two examples come to mind particularly: *spontaneous order* and *customs*. In both of these examples, we see the very same organised, regulated form of behaviour we see in games and institutional life, but here with no explicit rules in evidence. How, then, would we explain these aspects of our lives? Indeed, while spontaneous order and customs are the most obvious examples, the examples most clearly relevant to legal life, in fact the very same pattern can be seen even in areas of life too personal and ephemeral for any sort of institutional, never mind rule-based explanation to even begin to be plausible. Even in the briefest of conversations, for instance, we often see objects and actions acquiring special conversation-specific "identities", with Searle's formulation of "X counts as Y in context C" applied and observed by the parties involved in an ad hoc way, and without an institution or a rule

in sight[54]. Indeed, in each of the conversations we enter into daily, we are actually

constituting and inhabiting small organised spaces all the time, building up the "rules"

of these special mini-contexts and mini-practices as we go. For any particular pair or

group of speakers, then, any word or phrase can come to carry any and every meaning

imaginable. "Slab!" can come to mean "Bring me a slab", "Rain!" can come to mean

"It is raining, close the window", and so on. Provided that the parties have shared a

common experience and have "negotiated" the relevant meaning, the word will bring

to mind the meaning. Without rules or self-conscious negotiation, X will count as Y.

Indeed, when we take in the social landscape as a whole, we find this sort of

spontaneous organisation of our practical spaces far outstrips those which appear to be

structured by rules. With this in mind, we must ask whether the emphasis on rules is

appropriate even in those few rule-structured activities and practices that feature so

prominently in the literature. This is because even those instances where we do find

rules – games and legal life – are themselves so thoroughly embedded and enmeshed

in organisation of this more spontaneous kind as to make us question whether the

rule-based aspect is really separated out and given a separate treatment. Think again

of our experience of moving through train stations and of using trains. Consider the

continuity that exists between legal patterns in life at one extreme, through merely

social regularities a little further on, through to purely personal regularities in

behaviour at the other extreme. Getting to work by train, for instance, would see me

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[54] If this conversation-specific identity remains relevant over time for the individuals in question, it will even persist beyond the immediate conversation itself, becoming for them part of a mutual shorthand. Indeed, this is the way in which language itself evolves. A good, quite prominent example of this is the way in which compounds become primitives. The phrase "the later Wittgenstein" provides an illustration. The phrase originally was used as a compound but has come, through use, to stand as a single meaningful unit in its own right. This has not come about through institutional rules which dictate how the phrase is to be taken, but through the unfolding of the life of the community in question. For writers and readers familiar with the phrase, they have simply come to see the phrase as shorthand for a complex idea. The basic mechanism involved, then, is not a rule but precisely the "shaping to surroundings" described in this chapter.

acting out a particular procedure only part of which has a legal character. It would also include regularities that are social in nature (how to board the train, when to give up my seat, how to stand and act when in close proximity to others in a particularly busy train) and further regularities that are purely personal and idiosyncratic (the particular position on the platform I habitually choose when waiting for the train to arrive, how I habitually pass the time when on such journeys). To place our emphasis on rules where there are rules is to suggest that the aspect of experience in question is separated out and processed in a different way, but is this realistic? Are we suggesting that we have a special sensitivity for formal rules which leads us to uncover these even when they are hidden?

Clearly, this is unsatisfactory, while the more obvious answer stares us square in the face. Whatever the nature of the context itself, our ability to function in the world comes overwhelmingly from the way in which we absorb and internalise regularities in our environment. Having taken this view, we can drop rules from the picture entirely, for we now can see the individual coming to feel "at home" or "dwelling" [55] in his environment without a need for any such rules. *Indeed, we can see the individual feeling "at home" or "dwelling" in his environment, even where formal rules are in force.* In all these instances, the process responsible for consciousness operates in the same way. As it works from moment to moment to provide the individual with a coherent, meaningful view of his surroundings, the process works always to model and internalise the whole environment the individual moves through.

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[55] Hubert Dreyfus, "Being-In-The-World", pg. 45: "What Heidegger is getting at is a mode of being-in we might call "inhabiting." When we inhabit something, it is no longer an object for us but becomes part of us and pervades our relations to other objects in the world. Both Heidegger and Michael Polanyi call this way of being-in "dwelling." Polanyi points out that we dwell in our language; we feel at home in it and relate to objects and other people through it. Heidegger says the same for the world. Dwelling is [our] way of being-in-the-world. The relation between me and what I inhabit cannot be understood on the model of the relation between subject and object." See also Michael Polanyi, "Personal Knowledge".

There is no difference, then, between games, language use and customary practices. In all of these cases the very same process is at work: the individual in question finds himself within a structured space and goes on then to internalise that structure[56]. Indeed, given their abstract character, the rules themselves simply cannot form part of the environment that is modelled. The environmental regularities that come about through the observance and enforcement of these rules can, however, and it is through this indirect route that rules have their effect.

This more direct relationship with the environment was what Wittgenstein had in mind, I think, when he famously wrote about rule-following[57]. Wittgenstein's aim, I think, was to help his reader see that we don't actually follow rules at all when we act in practical life. Indeed, when the rules themselves "show up" for us we are actually engaged in a different sort of activity altogether. We are no longer doing what we characteristically think of when we think of "following a rule" or "obeying a rule".

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[56] Thomas Kuhn provides another example of this lack of a need for rules, "The Structure of Scientific Revolutions", pg. 44: "[Scientists can] agree in their identification of a paradigm without agreeing on, or even attempting to produce, a full interpretation or rationalization of it. Lack of a standard interpretation or of an agreed reduction to rules will not prevent a paradigm from guiding research. Normal science can be determined in part by the direct inspection of paradigms, a process that is often aided by but does not depend upon the formulation of rules and assumptions. Indeed, the existence of a paradigm need not even imply that any full set of rules exists." Kuhn continues: "The process of learning by finger exercise or by doing continues throughout the process of professional initiation. As the student proceeds from his freshman course to and through his doctoral dissertation, the problems assigned to him become more complex and less completely precedented. But they continue to be closely modelled on previous achievements, as are the problems that normally occupy him during his subsequent independent scientific career. One is at liberty to suppose that somewhere along the way the scientist has intuitively abstracted rules of the game for himself, but there is little reason to believe it. Though many scientists talk easily and well about the particular individual hypotheses that underlie a concrete piece of current research, they are little better than laymen at characterizing the established bases of their field, its legitimate problems and methods. If they have learned such abstractions at all, they show it mainly through their ability to do successful research. That ability can, however, be understood without recourse to hypothetical rules of the game." This last point will prove particularly relevant to our understanding of the abilities judges acquire over the course of their careers. It is particularly relevant to Dworkin's theory of legal reasoning, the fact that judges, too, are "little better than laymen at characterizing the established bases of their field". We will return to this in Chapter Six.
[57] Concentrated in the Philosophical Investigations §§185-242 and in Part VI of the Remarks on the Foundations of Mathematics.

Instead, we are engaged in interpretation[58]. In his book, "Nothing is Hidden", Norman Malcolm uses the same contrast between both novices and experts and insiders and outsiders I have myself used to draw out what he takes to be Wittgenstein's meaning:

> A motorist driving through a large city that is unfamiliar to him, does look to the road-signs for guidance. If he comes to an intersection where there are no signs, he is bewildered: he doesn't know which way to turn. At last he does see a sign which tells him which way to go: he is relieved. In contrast, a motorist who is familiar with the city pays no attention to the signs: he knows his way: he doesn't need to be guided.[59]

Malcolm uses this example of the motorists to help illuminate Wittgenstein's famous example of "adding 4":

> When an adult person adds a column of figures in doing his accounts, which motorist does he most resemble? Surely the second one. When he adds 4 to 1016 he puts down 1020 without any hesitation. He doesn't feel any need for guidance; nor does he think he is guided. He just writes or says '1020', and goes on to the next sum. A child who was learning to add, might hesitate and feel uncertain. He might look to his teacher for guidance. But the adult doesn't look anywhere for guidance – not even to the 'mathematical rule of addition',

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[58] Wittgenstein, "Philosophical Investigations", §201: "What this shows is that there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying a rule" and "going against it" in actual cases."

[59] Norman Malcolm, "Wittgenstein: Nothing is Hidden", pg. 160.

whatever that is supposed to be. Nor does he dwell on the meaning of 'add 4'.
He just adds 4.[60]

The point, then, is this: no "mathematical rule of addition" characteristically appears
when we "add 4", and no such rule is needed, provided we are sufficiently familiar
with the procedure. Signs, and rules, are there to guide us when we have lost our way,
but we have little use for them when we know where we are and are caught up in the
things we do again and again, day after day after day. *Paradoxically, then, the very
existence of rules signals a shift from successful, natural "rule-following" activity to
a detached, reflective mode of being which sees the "rule" itself lose its guiding
power.* The very presence of the rule signals a different sort of act, with the material
under consideration ceasing to fulfil its role in practical life and instead offering the
human agent fodder for contemplation and negotiation. Indeed, the appearance of the
rule usually signals a breakdown in natural "rule-following" activity. As Dewey put
it: "It is a commonplace that the more suavely efficient a habit the more
unconsciously it operates. Only a hitch in its workings occasions emotion and
provokes thought."[61] Malcolm addresses this when he moves on to Kripke's famous
discussion of Wittgenstein:

> We can see now that there is an ambiguity in Kripke's remark. *Who* is the
> 'we', of whom he says: 'Normally, when we consider a mathematical rule
> such as addition, we think of ourselves as *guided* in our application of it to
> each new instance'? This is certainly not true of us when we add numbers in
> connection with some practical concern of daily life. A person who is worried

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[60] ibid.
[61] Dewey, "Human Nature and Conduct", pg. 178.

about his bank balance does not ponder the meaning of mathematical rules; nor does he think of himself as being *guided* as he adds the figures. On the other hand, there is a great deal of truth in Kripke's remark if his 'we' applies only to people *when* they are engaged in *philosophical reflection* about rules.[62]

Malcolm captures so much of my own argument in these short paragraphs. There is the difference between experts and novices, and the concern for practical life, reminiscent of Olivecrona's picture of the ordinary man in Chapter One. There is, too, the relationships he identifies as existing between reflection and both breakdown in practical life and philosophical inquiry. We will see more of this in the next chapter, and later on, in Chapters Five and Six, where we look at the implications these insights have for our understanding of the role rules play in the life of the law.

Habits for the individual, customs for the group

The failure of the rule-based explanation of institutional facts is all the more glaring when we recognise how badly we need an explanation for both spontaneous order and customs if we are truly to understand legal life. Indeed, next to these problems, the real existence of norms addressed by MacCormick and Weinberger is rather a trivial matter. If we are to understand where the law comes from and how it operates on the individual in day-to-day life, a good understanding of both customs and spontaneous order is critical. As they are so difficult to explain, however, both are largely ignored within mainstream legal theory. The problem, once again, is the lack of explicit rules.

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[62] Malcolm, "Nothing is Hidden", pg. 160.

Having accepted the self-conscious, deliberative view of action and decision-making, legal theorists find that they have no coherent way to explain what they see in either situation. This leaves them with two alternatives. Like Hart, they can simply insist that there are rules involved[63]. The other option is to ignore the our experience altogether, to imagine that the law as we know it today emerged all at once, fully grown, as it were. In this spirit of denial, we can imagine, too, that the law as it is experienced today is always experienced in a fully self-conscious manner, always with some awareness of rules. I will return to both of these issues in Chapters Five and Six. In Chapter Five we will see that the law as it is experienced on the ground cannot be understood without some understanding of spontaneous order. In Chapter Six we will see that the formal life of the law, too, cannot be understood without a good understanding of pre-legal social organisation.

In fact, spontaneous order and customs are not so difficult to explain, provided we have the right psychological model. There are two factors here that are particularly relevant. First of all, there is our tendency, upon encountering a novel task or environment, to automate the first, effective way we find through the task or environment in question. In other words, as soon as we find a way of coping that works, we tend to accept that way through the task or environment as the "right way" to go about it. As Karl Llewellyn put it, "if anything is done about it, the doing will become 'the' procedure"[64]. The background to this is provided above. The point here is that the process responsible for consciousness has little tolerance for conscious deliberation and looks always to move the human agent forward if this is at all

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[63] See n. 2 on pg. 87 above.
[64] Llewellyn, "The Normative, The Legal, and the Law-Jobs", Yale Law Journal 1940 1355 at 1361.

possible[65]. If a particular problem has been solved, then, the unconscious part of the process absorbs the solution and prepares a standard response for future encounters[66]. Whenever the same task or environment is encountered, then, the unconscious part of the process will intervene and supply this ready-made solution before the need for any such solution even enters the human agent's awareness. Think, for example, about a path taken across a field. Initially, the individual will have to choose a way across deliberately. Having done so a number of times, however, the particular path chosen will become, for him, simply the usual way in which to cross the field. By this stage, "crossing the field" will have become an automated response for him. When he arrives at the field, then, "crossing the field" will not even present itself as a problem to him. Instead, his intention to cross the field will itself initiate an established plan for accomplishing the task. As far as the human agent is concerned, the field will now appear to him already structured in such a way as to provide him with a path running through it.

As noted, though, this gives us only half of what we need to make sense of spontaneous order and customs. The other half of the story is provided by the human agent's sensitivity to patterns and regularities in his surroundings, particularly those which are prominent or which intersect with his or her immediate goals. In considering his initial way through the task or environment in question, then, the human agent will be highly suggestible. His initial way of coping with the task or environment will come in large part from guidance he receives from the surroundings he finds himself in. We can see this if we look again at the "crossing the field" example. When the human agent encounters the field for the first time, he will have to

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[65] This point will be covered in greater detail in the next chapter.
[66] Llewellyn, "Law Jobs" at pg. 1359: "To see a pattern is to make a pattern, and to make it a "right" pattern is to project it into the on-coming future."

decide for himself how he will make the crossing. If a sufficient number of people have already encountered this problem, however, and their chosen solution is visible to him in some way, then his own efforts will likely be cut short. This visibility can come about in any number of different ways. The grass may be visibly trodden down, for instance, or a certain amount of traffic may be apparent at most times of the day. Whatever form this visibility takes, what matters is that the way across will now be physically instantiated in some way. Once this physical instantiation is achieved, newcomers will find that they do not really have to think very hard to find their own initial way across. For them, the "right way" to cross the field will already be clear, a pattern in life of precisely the sort the sense-making process seeks to absorb and implement beneath the threshold of consciousness.

All of this gives us the background we need to understand spontaneous order and customs. The key is to think about what happens when habit-inclined human beings of the sort described here live and work together in close proximity. When a completely new problem emerges, the individuals in question will be left simply to work out an effective way of coping. At this point their behaviour will conform to the traditional analysis. The individuals perhaps even will go so far as to arrive at their solution through a process of explicit reasoning. Crucially, though, the solution arrived at will be understood to be of local application only. It will take the form of an immediate solution to an immediate problem. Having found a way forward that works, though, the individuals will stick to it, repeating the procedure whenever the same problem or set of circumstances is encountered. This repetition of the procedure is where the activity begins to take the form of a custom, because over time, with this repetitive activity, the solution will cease to appear to the individuals in question as a chosen

solution, and instead will appear to them, collectively, simply as "the way" in which the activity is carried out. This embedding of the solution into the activity or context itself is further crystallised when newcomers enter the picture, for at this point all sense of an origin in decision-making or choice will truly be lost[67]. The newcomer will have no experience of the activity or context without the solution built into it.

What we see, then, are individual habits of behaviour translating easily into customs for the group, customs which emerge spontaneously, without foresight or intention[68]. In his book "Folkways", William Graham Sumner described this process – the laying down of folkways – very well:

> It is of the first importance to notice that, from the first acts by which men try to satisfy needs, each act stands by itself, and looks no further than the immediate satisfaction. From recurrent needs arise habits for the individual and customs for the group, but these results are consequences which were never conscious, and never foreseen or intended. They are not noticed until they have long existed, and it is still longer before they are appreciated.[69]

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[67] Jack Goody, "The Domestication of the Savage Mind", pg. 27: "One of the features of oral communication in pre-literate societies lies in its capacity to swallow up the individual achievement and to incorporate it in a body of transmitted custom… In oral societies a man's achievement, be it ballad or shrine, tends to get incorporated (or rejected) in an anonymous fashion. It is not that the creative element is absent, though its character is different. And it is not that a mysterious collective authorship, closely in touch with the collective consciousness, does what individuals do in literate cultures. It is rather that the individual signature is always getting rubbed out in the process of generative transmission. And this process affects, though in a different degree, not merely what in its written form we would call 'literature', but more generally the categories of the understanding and systems of classifications themselves…"

[68] Note that there is no need for any *direct* expression or communication of approval of the particular form of behaviour for it to become internalised. Internalisation occurs wherever a form of behaviour *works*. If the form of behaviour is such as to facilitate the human agent's movement through the environment and his pursuit of his goals, and it is adopted repeatedly, then the form of behaviour will be internalised.

[69] Sumner, "Folkways", pg. 3.

Indeed, customs can be thought of as habits for the group. If talking of habits for a whole community is strange, the crucial point to keep in mind is the way in which activity and the view taken of the environment in which this activity is encountered become blurred, described above in the "crossing the field" example. The mechanism behind this blurring is the same one that is responsible for institutional facts. It is the holistic nature of the process responsible for consciousness, the way in which perception and understanding and physical and emotional response all are shaped simultaneously by repetitive experience, the way in which the process seeks always to acquire a habitual response to the whole situation[70]. This being the case, interlocking behaviour very easily comes to be patterned in fact, as Llewellyn put it[71], with forms of behaviour – a way of crossing a field – coming to be seen as a feature of the environment itself. Habits for the group, then, are found in the shared way in which the environment itself is understood, the way in which the various parties collectively decompose their shared environment into places, things and activities, into paths and hammers and husbands and wives. In describing his notion of "habitus", Pierre Bourdieu writes of "a system of durable, transposable dispositions"[72] with just this in mind, I think. Bartlett puts it this way:

> Every social group is organized and held together by some specific psychological tendency or group of tendencies, which give the group a bias in its dealings with external circumstances. The bias constructs the special

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[70] Wolfgang Kohler, "Gestalt Psychology", pp. 80-81. I will return to this point in the next chapter.

[71] Llewellyn, "Law Jobs" at 1360.

[72] Pierre Bourdeu, Outline of a Theory of Practice", pg. 72: "The structures constitutive of a particular type of environment… produces habitus, a system of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles of the generation and structuring of practices and representations which can be objectively "regulated" and "regular" without in any way being the product of obedience to rules, objectively adapted to their goals without presupposing a conscious aiming at ends or an express mastery of the operations necessary to attain them and, being all this, collectively orchestrated without being the product of the orchestrating action of a conductor."

persistent features of group culture… [and this] immediately settle[s] what the individual will observe in his environment and what he will connect from his past life with this direct response.[73]

If we are to gain a clear view of the operation of rules in legal life we must first of all gain a clear view of the role rules play in life generally. This is not easy, as we are inclined to look to rules wherever human behaviour appears regular and organised. Our first task, then, is to overcome a deep-seated prejudice. Stanley Cavell and John McDowell, discussing Wittgenstein's writing on rule-following, put the matter very well. Cavell first:

> We learn and teach words in certain contexts, and then we are expected, and expect others, to be able to project them into further contexts. Nothing insures that this projection will take place… just as nothing insures that we will make, and understand, the same projections. That on the whole we do is a matter of our sharing routes of interest and feeling, modes of response, senses of humor and of significance and fulfilment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation – all the whirl of organism Wittgenstein calls "forms of life". Human speech and activity, sanity and community, rest upon nothing more, but nothing less, than this. It is a vision as simple as it is difficult, and as difficult as it is (and because it is) terrifying.[74]

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[73] Bartlett "Remembering", pg. 255; See also Bruner, "Acts of Meaning", pg. 57.
[74] Stanley Cavell, "Must We Mean What We Say", pg. 52. See also McDowell, "Mind, Value and Reality", pg. 61.

John McDowell continues:

> The terror of which Cavell speaks at the end of this marvellous passage is a sort of vertigo, induced by the thought that there is nothing but shared forms of life to keep us, as it were, on the rails... We recoil from this vertigo into the idea that we are kept on the rails by our grasp of rules. This idea has a pair of twin components: first, the idea... that grasp of rules is a psychological mechanism that... guarantees that we stay in the straight and narrow; and second, the idea that the rails – what we engage our mental wheels with when we come to grasp the rules – are objectively there, in a way that transcends the "mere" sharing of forms of life... This composite idea is not the perception of the truth, but a consoling myth, elicited from us by our inability to endure the vertigo.[75]

Cavell and McDowell capture perfectly my aim in this chapter. I have sought both to make clear the relatively marginal role rules play in human life and to give my reader a glimpse of a viable alternative, to put some flesh on the bones of much-used phrases like "forms of life", "language games" and "meaning as use". As we proceed, however, we will have to gain a clearer view of the role rules play perform in human life, however diminished. For rules are indeed central to legal life, it is simply that they are not causative in the manner characteristically imagined. We will begin this work in the next chapter.

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[75] John McDowell, "Mind, Value and Reality", pg. 61.

Chapter Four

Background and foreground

While the previous chapter was devoted to the background to our conscious experience, in this third, final chapter on my basic model, I will turn to look directly at the brightly lit foreground, taking the self-conscious, deliberative view of action and decision-making head on. The question we will ask in this chapter is this: How thoughtful are we, really? Do we really think carefully about everything we do? Is our every move really preceded by a conscious decision, a weighing up of reasons, of costs and benefits? Reading much of the existing literature on the matter, this is certainly the impression we are given. In his introduction to "Practical Reasoning", for instance, Joseph Raz is quite unequivocal:

> Reasons are the cornerstone of all explanation of human actions, indeed, of the very notion of human action itself. Apart from several categories of involuntary, semi-voluntary, and semi-automatic action (such as breathing, hiccupping, automatic doodling, etc.), which are on the borderline between what we do and what happens to us, all action which is not itself intentional (for example, acts done by mistake, inadvertently, negligently, or recklessly) is done through doing or attempting an intentional act. Intentional action itself is action performed by an agent who knows what he is doing and does it for a reason. Thus all non-intentional action is explained by reference to intentional

acts performed or attempted and these presuppose the notion of a reason for action.[1]

According to Raz, at least, we do indeed think carefully about everything we do. Indeed, for Raz, the process displays such a high degree of uniformity that he is happy to dismiss all of the particularities that might be involved in such an episode. No concern need be shown, then, for the fact that it is this rather than that particular human agent we have in mind, in this rather than that set of circumstances, in relation to this rather than that particular decision. As none of these factors are thought to contribute to the process of decision-making itself, we can happily speak directly about the reasons involved[2]. The process of decision-making is in this way thought wholly separate from anything that might require a more careful study of the particular decision-maker or the particular time and place involved.

To understand this position, we have to think a little about the way in which theorists like Raz understand the mental life of the human agent more generally. For theorists like Raz, conscious experience enjoys a certain sort of autonomy, standing quite apart from the underlying processes responsible for that experience of consciousness. This view of the matter is quite intuitive, of course, but it leads to a very particular view of the human agent's relationship with events unfolding around him. Because the underlying processes responsible for consciousness itself are thought an entirely separate matter, a distinction is drawn within the experience of the human agent

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[1] Joseph Raz, from the introduction to his book "Practical Reasoning", pg. 2.
[2] This dissolving of the human agent himself is reflected in the logical view of legal reasoning, advocated most famously by Neil MacCormick in his book "Legal Reasoning and Legal Theory". See, for instance, Jerome Frank, "Law and the Modern Mind", pg. 120: "The acts of human beings are not identical mathematical entities; the individual cannot be eliminated as, in algebraic equations, equal quantities on two sides can be cancelled".

between what we might think of as a static background and a fluid foreground. For a sense of what I mean, think of this as a distinction between the painted stage backdrop that stands behind the actors and the action unfolding upon the stage, the speech and gestures of those actors. The distinction is an important one, because having made it, the theorists then go on to assume that everything the least bit "moveable" in the scene or episode in question appears within the fluid foreground. This in turn leads them to assume that these developments are always *addressed consciously rather than unconsciously*. In fact, this is inescapable. As no attempt is made to address the underlying processes responsible for consciousness, there is nothing else for theorists like Raz to do. A "pure" account of decision-making must follow. The end-point is the one Raz sets out with such confidence: intentional action is always action performed by an agent who knows what he is doing and does it for a reason.

In this chapter, I will offer a very different view of this business of intending an act. In doing so, I will draw heavily on the picture I presented in the previous chapter. There, I insisted that the following is true: *Our conscious experience is not a stable, autonomous realm, one easily separated from the other processes at work at just that moment, but rather is intimately bound up in them.* As set out in the last chapter, the key to all this is to recognise the *cumulative* nature of our experience, the way in which our very ability to experience the world builds up and changes over the course of our lives. Under this tip-of the-iceberg view, the process is dominated by the submerged, unconscious part of the structure, which works silently to absorb repetitive experience and build up resources for sense-making, using these resources then to provide a "frame" for whatever the individual experiences consciously at any given moment. As time goes on, then, the process will get better and better at

"framing" particular repetitive experiences. When a good deal of experience in the given activity or context is acquired, the process by this time will have absorbed so much of the experience as to be able to serve up a fairly comprehensive frame. If the more fluid part of the picture is sufficiently regular, then, it will not be received as part of the foreground at all. Instead, it will be absorbed into the background, the work involved in recognising and responding to it carried out by the unconscious part of the process.

The problem with the Raz's view, then, is in the way in which it assumes that *all* of the moveable or fluid aspects of the immediate scene are apparent to the human agent *all* the time. In reality, the affected human agent's circle of explicit, conscious awareness will be expanding and contracting from moment to moment, leaving him or her always *more or less* conscious of the surroundings, always *more or less* aware of the options available. This expansion and contraction will be determined by the degree to which he or she is familiar with those surroundings, the degree of expertise acquired. Also, it will be determined by the role the particular element plays in the immediate goals of the individual as he or she moves through that scene. According to this more dynamic view, then, there will be times when we are indeed aware of a great deal of our surroundings and circumstances, just as the standard view imagines. More often than not, however, we move through the world conscious of very little of these surroundings and circumstances, taking for granted not only a particular view of these surroundings, but also much of the narrative we are participating in. We take for granted that we are "on our way to work", or are "doing the weekly shopping" and leave the matter there.

There is a crucial difference, then, between what we – as theorists and observers – perceive *from the outside*, and what the human agent him or herself perceives *from the inside* at just that moment in time[3]. With this difference in mind, there is always the possibility that some of the options we perceive from the outside will be found, within the affected human agent, already subsumed into the "total, factual background" he or she operates with but does not actually contemplate. Given that this is the case, we must always place a question mark over our experience of what we take to be our factual surroundings[4]. We must always ask: What did the human agent accept as the "total, factual background" at just that moment? For our purposes here, however, the most important question is this: Was this or that particular component embedded into the "total, factual background" seamlessly, or did it stand apart for him, an element he actually recognised as separate and contemplated deliberately?[5] This last question provides a central pillar of the view of practical reasoning offered in this chapter. My argument is that if we are truly to understand intentional action, we must first recognise the way in which *elements found within particular scenes sometimes appear to us embedded into the environment seamlessly, while at other times stand apart from those scenes, and thereby are subject to self-conscious attention.*

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[3] This difference between internal and external is one of the central themes of this thesis, of course. We will return to it in the next chapter when we look at the issue as it appears in Hart's writing.

[4] This should be seen as the obvious lesson of institutional facts. What it should make clear to us is that the very notion of factual experience is a problematic one. The rule-based solution obscures this and deprives us of an opportunity to arrive at an important insight.

[5] As will become clear, whether or not something is found to be seamlessly embedded in this way is determined by the degree to which the aspect of the environment in question is familiar, the degree to which it has occurred to the human agent in that same form, in the course of that same activity. The more familiar it is, the greater the likelihood that it will be absorbed into the background. As I will argue in Chapter Six, "easy cases" derive their "easiness" from this familiarity, from the fact that the same problem has emerged in the same form, in the same context.

If the point made here is difficult to grasp, think back to our discussion of institutional facts. Think of the way we experience banknotes. The question above – is the object embedded seamlessly or does it stand apart – can be put in the following way: When I open my wallet, do I see a rectangle of paper with institutional significance, or do I simply see a banknote, a relatively straightforward "thing in the world". Do I "see at once" this banknote as a banknote, or do I recognise all of the various relationships and arrangements which enable the rectangle of paper to perform the function we require of it? Of course, the answer to this question is that we regularly take *both* of these views when thinking of banknotes. In our experience, banknotes are, as it were, both transparent and opaque. On some occasions, banknotes are simply part of the "total, factual background" we experience. When shopping, we draw them from our wallets, count them, and offer them as payment, without once contemplating the institutional background involved. On these occasions we are likely thinking about other more pressing issues: "Do I have enough cash to last the month?", "This supermarket is much more expensive than that one", and so on. On other occasions, however – in the course of a discussion like this one, for instance – this institutional background is very much in our minds.

To understand this rather curious state of affairs, we have to think about the operation of consciousness itself in a somewhat different way than we are used to. Rather than thinking of it as operating in static, mechanical terms, we must instead think of consciousness as the product of a dynamic process, one which moves from moment to moment, adapting in answer to the demands made of it. When we take this dynamic view, we can begin to explain the back-and-forth movement described above. The explanation is this: While the human agent's experience at any given moment will

indeed include something like the demarcation central to Raz's view – the real world distinguished from the world of language and culture – *these demarcations will always be much more provisional, instituted and maintained by the sense-making process itself as it goes along.* In other words, while the intuitive separation into foreground and background is accurate to a certain extent, *the two are more properly seen as belonging to a single continuous structure, with the process "deciding" at each point where it will draw the line separating the two.* This is why it is so important to think carefully about the way in which our conscious experience arises out of activity carried out beneath the threshold of consciousness: From moment to moment, the circle of explicit, self-conscious awareness will be drawn at a different point, the circle effectively expanding or contracting as circumstances dictate. When we think of the decision-making process, then, we must ask where the line separating background and foreground is drawn for just that individual, at just that time. At one point, the process may well choose to present banknotes as mere "things in the world", part of the total factual background the individual takes for granted. At this moment, the line is drawn in such a way as to leave the institutional framework responsible for banknotes outside the circle of explicit, reflective attention. Moments later, however, this line can be repositioned in such a way as to draw much of this framework into the circle, exposing it to the individual himself.

All of this is interesting enough in its own right, of course, particularly where we seek an understanding of institutional facts. *In the immediate context, however, the variable character of what we "see at once" is significant because it actually constrains our ability to actively make decisions for ourselves.* This means that what we are in a position to freely choose for ourselves always depends on where the line

between background and foreground is drawn. As the circle of explicit awareness expands and contracts, the scope for reflective, deliberate decision-making on our part expands and contracts with it. This is not so difficult to grasp, I think. The self-conscious, reflective awareness we are so familiar with is always supported by an unquestioned view of our surroundings and circumstances as they stand at just that moment. When I choose which tie to wear, for instance, I take for granted at that moment that ties go around the neck, and not around the forehead. I take for granted that ties are worn with suits, not with shorts and t-shirts. That I take all of this for granted is important because it means that I do not really *choose* not to wear my tie around my forehead. I do not weigh up the advantages and disadvantages involved, nor do I contemplate the possible sanctions that may be applied by my employer. Rather, it simply *does not occur to me* to take any of these other possible courses. In a sense, then, the decision is taken out of my hands by the sense-making process itself. In deciding how I perceive my circumstances, the process closes down possibilities for action that would otherwise be open to me. As we will see, this particular explanation for our failure to reason through our decisions will stand in marked contrast to the one Raz himself offers.

An easy loss of perspective

If the above discussion of background and foreground strikes my reader as overly abstract, it helps to think of these issues in terms of *immersion*. Think about what we mean when we speak of "falling under the spell of the moment" or of becoming

"caught up in the stream of life". The point made in the above section is that immersion is not only sometimes an issue, but that it is prevalent, *central to any worthwhile understanding of intentional action and decision-making.* As it happens, this neglect of immersion is a widespread problem within the study of practical reasoning. Because of the analytical approach taken, the resulting models tend to be unrepresentative in that the human agent is thought of always as detached from his surroundings. What we end up with is the self-conscious model, with the human agent thought always to make his way through the world with a clear view of all the options available to him, going on then to make a thoughtful, reasoned decision on the basis of these options. Against this background, when we do think of immersion, we often think of it as a peripheral or exceptional state[6]. In using both of the phrases above – "falling under the spell of the moment", "caught up in the stream of life" – what we often have in mind is a momentary loss of perspective, the human agent accepting without question a view of his surroundings and circumstances, and acting under the influence of this view. The presumed momentary character of this loss of perspective is reflected in the way in which the phrases are usually offered to describe a situation where there is unquestioned belief in a fast-moving series of events or an unfolding narrative. Static sets of circumstances, on the other hand, are not thought to bring any such loss of perspective about. The loss of perspective is not natural or commonplace, then, but comes from a certain speed of movement, from the difficulty involved in following a rapidly unfolding narrative.

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[6] This is a deep problem in studies of practical reasoning. The self-conscious, deliberative choice model is so dominant that more realistic assessments of practical reasoning, those which focus on heuristics or rules of thumb, for instance, tend to be pursued as exceptions. Raz's theory of "exclusionary rules" is an example. In fact, all practical reasoning is resource-bounded. As far as the brain is concerned, decisions are always made against a background in which time is short and resources are limited. This is one of the central arguments of this thesis. See Chapter Two.

Perhaps the most familiar example of the loss of perspective that comes with "falling under the spell of the moment" is found in the way we experience games like football or tennis. We often lose ourselves in games, of course, both as spectators and players. We forget the real world, and become immersed in the game-world. We watch with "game-informed" eyes, seeing not only the players and the equipment involved with their game-significance already imbued, but also the actual unfolding of the game. A run at an open goal in the eighty-ninth minute is perceived directly as an opportunity to equalise and stave off a humiliating defeat, for example. We do not need to think about the various factors involved, summing them to gauge their larger significance. Instead, we see the run at the goal in just this way. The effortless, direct character of this experience – "seeing at once" a particular set of circumstances in this or that way – is quite clear in this context, I think. *What is so notable about human beings, however, is the ease and frequency with which this loss of perspective occurs.* In fact, we are natural players of games, and invest readily, often very emotionally, in the outcomes of trivial events, sometimes to tragic effect. It is this that makes the phrase "falling under the spell of the moment" particularly appropriate. My argument is that we *always* see with "practice-informed" or "narrative-informed" or "experience-informed" eyes, even when in the midst of mundane, day-to-day life[7]. In precisely the same way that we "forget" that events in a game are just events in a game, we "forget", too, that the contexts we inhabit can be viewed and navigated in ways other than the ones we are used to. We "forget" that ties can be tied around the forehead, that ties can be worn with t-shirts and shorts.

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[7] Note that the expressions "practice-informed", "narrative-informed" and "experience-informed" are synonymous in this context.

This more general loss of perspective comes from the way in which consciousness itself is achieved. As argued above, the sense-making process in fact decides on a moment-to-moment basis where it will draw the line between foreground and background. *In doing so, however, the process in fact tends always towards minimising the material admitted into the foreground. In other words, if a particular element can be included within the "total, factual background", it will be.* This follows the argument offered in Chapter Three. My aim there was to draw out the most important aspect of the process responsible for conscious experience, namely, the way in which the process looks always to absorb and automate repetitive experience. Where the same patterns are encountered repeatedly, these patterns are absorbed into the "total, factual background" the human agent operates under, allowing him, in time, to "see at once" the scene in question with these patterns already embedded. *If this is the case, however, then the process must at the same time be seen always to seek to minimise the conscious part of the experience.* This is unavoidable, as one follows inevitably from the other. If the process is always looking for repetitive material it can remove from conscious experience and automate, then the process must be seen always to be actively looking for material it can exclude, material the process does not need to recognise explicitly.

The loss of perspective we see in players of games is therefore more representative than we might like to think. Ultimately, this propensity to lose perspective is an important part of our design. At any given moment, we take for granted whatever we can so take for granted and think deliberately and reflectively only where we absolutely must. *When thinking of the circle of explicit, self-conscious awareness expanding and contracting, then, we must recognise that, far more often than not, this*

circle remains fairly narrow, taken up always with a relatively limited clutch of
immediate plans and goals, while familiar environmental features will be recognised
and responded to unthinkingly. What we have here, then, is something like a "set
point", a point of equilibrium the process tends towards and seeks to maintain
throughout its moment-to-moment operation. The circle widens out periodically,
usually in answer to novelty or where the way forward is obstructed somehow, where
the habits the process has built up fail to enable the individual to negotiate his
environment. This remains a relatively rare occurrence, though, and even then is
pursued only so far as is necessary, the process seeking always to return to its "fixed
point" of unqualified immersion as quickly as possible.

However thoughtful and reflective we might like to think ourselves, then, in fact we
are not really very thoughtful or reflective at all. In the end, the demands of daily life
inevitably press us into "inhabiting" our surroundings more directly. Just as we lose
ourselves in games, we lose ourselves in similar manner in the myriad familiar
narratives we recognise ourselves as participating in as we go through our average
day. We lose ourselves in "going to work", "having dinner with the family", and
"doing the weekly shopping". Ultimately, few of us possess the temperament and
mental discipline to maintain the widest possible perspective all day, every day. In a
well-known passage, for instance, Hume described the difficulties his philosophical
thinking caused even him:

> I am confounded with all these questions, and begin to fancy myself in the
> most deplorable condition imaginable, environed with the deepest darkness,
> and utterly depraved of the use of every member and faculty. Most fortunately

it happens, that since reason is incapable of dispelling these clouds, nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all such chimeras. I dine, I play a game of backgammon, I converse, and am merry with my friends; and when after three or four hour's amusement, I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find in my heart to enter into them any farther.[8]

What Hume is describing here is the difficulty we experience whenever we try to dwell for an extended period of time in the bright glare of consciousness, the state of mind analytically minded theorists place such store upon. In the end, we are simply not designed to maintain a detached, reflective attitude for any great stretch of time. Like Hume, we retreat quickly to "everydayness", to living, talking and acting more automatically in the "common affairs of life". The difficulty involved in maintaining a detached reflective attitude is particularly clear to practitioners of Buddhism. In their daily practice of "mindfulness", Buddhists work to maintain just this detached reflective attitude. As anyone who has attempted this practice will attest, though, maintaining this attitude is achieved only with great difficulty, becoming natural and effortless only after years of sustained and painful effort.

That we find the thoughtful or reflective attitude taken for granted by the dominant model so uncomfortable is reflected in the way we move through the world in day-to-day life. Indeed, a moment's thought to our own frustration at the obstacles we

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[8] Hume, "Treatise of Human Nature", Book 1, Section 7, pg. 316.

sometimes encounter, and the often violent way we are inclined to resist such obstacles, suggests that a thoughtful attitude to our daily business, when it arrives, is both unexpected and unwelcome. This is because unexpected obstacles of this sort require reflection on our part. If intentional action were to conform to the analysis suggested by the traditional model, then, we would not find these obstacles so frustrating. We would simply reason through the situation and find a way around. When we look at what actually happens, however, what we see is quite different. Indeed, we appear to take for granted movement through the world that is effortless, movement which requires very little from us in the way of deliberate decision-making. We appear to expect to be able to simply glide through the familiar tasks and contexts we face, the "going to work", "having dinner with the family", and "doing the weekly shopping" scenarios noted above. More than this, when we take a broader view of the way we go about our lives, we see that we actually make a point always of doing pursuing our goals in precisely the same way, looking always for a "path of least resistance" way of achieving whatever we might want to achieve.

Nor is this resistance to reflection confined to our mundane day-to-day activities. When we turn to look at professional thinkers like scientists and judges, for instance, we see precisely the same tendency to seek to avoid entering into any sort of extended reflection. Here, too, we see "path of least resistance" solutions wherever possible. This very insight stands at the centre of Thomas Kuhn's understanding of "paradigm shift", for instance:

> [the] invention of alternatives is just what scientists seldom undertake except during the pre-paradigm stage of their science's development and at special

occasions during its subsequent evolution. So long as the tools a paradigm supplies continue to prove capable of solving the problems it defines, science moves fastest and penetrates most deeply through confident employment of these tools. The reason is clear. As in manufacture so in science – retooling is an extravagance to be reserved for the occasion that demands it.[9]

This point is in fact a deep one, and should be taken as central to everything under consideration here: *Retooling is an extravagance to be reserved for the occasion that demands it.* The argument made here is that producing consciousness is a demanding activity for the brain. With only limited resources, the brain understandably operates always with a view to making the most of these resources. This is what comes from taking a realistic view of the process. Against this background, reflection must be seen as a particularly costly activity, one pursued only where it is absolutely necessary. Short of this, the brain employs a more efficient means with which to allow the organism to exist comfortably in the world. As we saw in the last chapter, and will see again in the next section, this more efficient means is found in the acquisition of habitual responses drawn from the very contexts in which those habits operate.

With all of this in mind, we can see that it is in fact detached, reflective thinking that must be thought of as exceptional, as arising only occasionally, and always only in short bursts. Hubert Dreyfus describes it, after Heidegger, as a "privative modification"[10], for it is derivative of, and parasitic upon, our more familiar experience of unqualified immersion. This is the right way in which to think of

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[9] Thomas Kuhn, "The Structure of Scientific Revolutions", pg. 76.
[10] Hubert Dreyfus, "Being-In-The-World", pg. 47: "It looks like Heidegger thus inverts the tradition and sees detached contemplation as a privative modification of everyday involvement. He seems to be saying that the detached, meaning-giving, knowing subject that is at the center of Husserlian phenomenology must be replaced by an embodied, meaning-giving, doing subject."

detached, reflective thinking – as a temporary widening of the circle of deliberate, reflective thinking, which, when left to own natural tendency, remains fairly narrow. The centre of our account, then, the real story, as it were, is found in our propensity to remain in a state of uncritical immersion. As I will argue in the next chapter, it is this easy loss of perspective, this tendency to fall in with the "shape" of our surroundings or take our place in a familiar narrative, that is responsible for much of what we see in legal life. It is not conscious, deliberate observance of rules, then, but this tendency to fall into line with a settled view we have of the "way things are" that matters. Where the law is concerned, rules are involved, of course. The regularities we see in life around us now often have their origins in enacted rules. Yet, just as we "forget" that the rules in games can be broken, the day-to-day operation of these regularities too come from a similar lapse of memory. Where the rules are successfully integrated into the view we have of our surroundings, they no longer operate as rules[11]. We become so used to stopping at traffic lights and queuing up at bus stops that we "forget" that we are always free to take another course entirely.

Shifts in readiness

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[11] It is important to see rule-breaking against this background of "forgetting". It is simply not the case that, every time the referee's back is turned, the whole team runs around breaking all the rules. If this were true, the game would simply break down. For the game to proceed, a majority of players must play according to the rules. Rule-breaking is the exception, and tends to be found at recognisable weak-points in the game-environment which invite such attempts. Attempts at rule-breaking do not therefore appear at any point in the game, but will characteristically occur at points where it is natural for such rule-breaking activity to be attempted. Note that this is also true of the law. On the whole, most people observe the law most of the time, without anyone needing to watch over them or threaten them. There will be weak-points, however, where many people are tempted to get round the rules – speeding on motorway, tax evasion, etc. This can be due to a number of factors: that the laws themselves are poorly designed, that they are not adequately supported by the design of the social environment, or that the rules clash with the socially accepted/encouraged goal-orientation of the player/citizen.

That we should prove so resistant to reflection has profound implications for our view of ourselves and for our view of practical reasoning. It asks us to think of ourselves as moving through the world more often than not in rather an automatic manner, as acting not always and invariably for reasons, but instead often with very little thought given to the matter one way or the other. Indeed, we often appear simply to move from episode to episode as if on rails or along grooves cut into the landscape. In these instances, our actions appear as if already prescribed by the nature of the episodes themselves. It is as if we are "captured" by the design inherent in these episodes. In fact, this is precisely what happens. Indeed, Raz's talk of actions falling on the borderline between what we do and what happens to us seems particularly appropriate[12]. There is a sense in which these actions do "happen to us". This is because the decision to act comes, for the most part, from sense-making activity that occurs beneath the threshold of consciousness, sense-making activity that is not really within our control. To see how far we are from Raz's account, we need only think of the examples he offered when writing of involuntary, semi-voluntary and semi-automatic action – breathing, hiccupping, automatic doodling[13]. My argument here is that the *greater part of our everyday activity* is in fact involuntary, semi-voluntary and semi-automatic. As Dewey put it, we do a thousand useful things everyday in just this involuntary, semi-voluntary or semi-automatic mode[14].

Obviously, this larger view requires us to rethink our understanding of practical reasoning quite dramatically. Where theorists like Raz imagine that our activity always revolves around reasons of various sorts, here we will look to another sort of resource entirely. Once again, my argument in this thesis is that our ability to move

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[12] see n. 1 on pg. 137 above.
[13] ibid.
[14] Dewey, see Chapter Three, n. 51 on pg. 117 above.

through the world comes, overwhelmingly, from the way in which the unconscious part of the process works always to absorb repetitive patterns in perception and action and implement these patterns in practical life. If we are to understand practical reasoning, then, we must look not to reasons the human agent wields and employs in a self-conscious manner, but to just this process of absorbing and implementing patterns in life. This leads us to a particular view of practical reasoning. Where the reason-based view imagines each decision as inherently isolable, a moment in time that can be analysed out of context, here we must see the immediate decision as having a great deal to do with the relationship the individual has built up with the particular scene, episode or activity in question over the course of his or her life. As the process works continuously to absorb repetitive experience, translating this experience into a habitual response which better equips the individual in future encounters, practical reasoning in any given episode must be seen always to implicate, to greater or lesser degree, just this habitual response. We can see, then, why our actions appear already prescribed by the nature of the episodes themselves. This is because the process works, primarily, by learning to cope with whole, recurring environments.

While this may seem a difficult point to grasp at first, in fact it is not really so challenging. Indeed, to see how natural the view of day-to-day life and activity offered here is, we need only accept a particular design principle for the creation and on-going maintenance of consciousness. While we are inclined to see the products of consciousness always as produced from scratch, as if from a standing start at each and every moment of experience, here we need only think of the process as a rolling one, an ongoing, continuing response to the whole environment. The Gestaltist Wolfgang Kohler argued for just this view, describing the organism as reacting always to "an

actual constellation of stimuli by a total process which, as a functional whole, is its response to the whole situation"[15]. Under this rolling view, the sense-making process works by maintaining a state of readiness, an on-going response to the whole situation. The system as a whole can therefore be said to have a set point, a point of equilibrium it seeks to maintain at all times. When stimuli are received from the environment, then, this does not lead to a completely isolated act of sense-making but instead spurs the process to assimilate just this point of stimulation into its standing interpretation. It will do so in one of two ways. Its first response will be to look for another habitual response it has already acquired which better suits the immediate environment. As Michael Toolan puts it, "we are constantly making provisional assessments of the current gestalt" [16]. If such a response is available, the process will simply shift its readiness in the direction of this response, moving from one established frame or schema or plan to another. Where the circumstances are wholly novel, however, the process will have to acquire a new response or adapt an old one. This is a particularly demanding course of action, though, and is entered into always as a last resort. We will return to this point shortly.

When we take this view of the overall life of the organism, then, we come to see it acquiring and employing its resources in a completely different way. Under the standard view, the process is relatively passive. Information from the world is acquired and stored in part-form. The meanings of words are not stored with any particular organisation, for instance. Application, too, is thought a relatively passive

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[15] Kohler, "Gestalt Psychology", pp. 80-81.

[16] "Total Speech", pg. 31-32: "As we proceed through the interactions that punctuate our lives (and even the business of identifying some point as the close of one and some other point as the commencement of another interaction is provisional), we are constantly making provisional assessments of the current gestalt – of where we are at now and of what will likely be understood (what probable sense will be made or taken)... ". This role for the "current gestalt" explains Wittgenstein's "Slab!", for instance, and similar observations made by Gardiner ("Rain!" in "The Theory of Speech and Language", pp. 114-116) and Voloshinov ("Well!" in "Bakhtin School Papers").

business. When required, the relevant parts are retrieved from memory and the required construction produced. Under the state of readiness or equilibrium view, however, these resources are acquired and employed always with a view to their use. This means, first of all, that they are acquired already formed into practically-oriented configurations, acquired as wholes rather than parts. Secondly, when acquired, these resources are not kept in deep storage, as it were – a storehouse, as Saussure had it – but instead are absorbed into a larger readiness to respond to demands from the environment, a readiness maintained much closer to the surface[17]. Indeed, the whole process must be understood in terms of a readiness for action. It is oriented in its entirety towards the immediate environment, looking always to learn from this environment and prepare responses in advance. In the short-term, then, the moment-to-moment activity of the process is dominated not by a detailed, deep process of combination or construction, but rather by minute adjustments to the standing interpretation, the process shifting its response to the whole situation in whatever way is necessary to accommodate the immediate point of stimulation. The life of the process is dominated by these shifts in readiness, with frame replacing frame in a fluid succession, punctuated by occasional "shocks" where the process finds it lacks an established response. In the long term, however, the process will be occupied acquiring and improving upon its repertoire of responses. It will seek to acquire the comprehensive series of templates or "guiding paradigmatic instances" required to maintain an effortless relationship with its surroundings. This, ultimately, is the

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[17] This is one of the central pillars of Integrational Linguistics. Roy Harris in "The Language Myth", pg. 19: "Human experience is constantly structured and restructured by the need to make sense of present events in the light of past events and vice versa. Language is both a product and a mechanism of this process, by which the ceaseless flow of sensations, perceptions, feelings and judgements which contribute to the mental life of the individual are integrated into a continuum, and a stable framework of beliefs and expectations about the world is constructed and maintained."

overall goal of the organism: to live as happily and as effortlessly with its environment.

This, ultimately, is what differentiates the sense-making view taken here from the more intuitive mechanical one. Where narratives are under consideration, for instance, what is envisioned here is not sense-making conceived as a mechanical process whereby sense is constructed from a finite stock of narratives, but rather is understood as a dynamic, on-going process of narrative-*making*, with the process seen as organising the material before it always in narrative form, acquiring habits in narrative-making – a tendency to *make* this or that recurring narrative – as it goes. In the view advocated here, creativity is central, providing an answer to the well-established criticism of the mechanical view: "… the notion of narrative typifications is a descendent of a tradition of mechanical structuralism, in which choices must be made between already-defined structures of knowledge, without the opportunity to create new structures of understanding."[18] If we are to capture this creativity, we need a more active, attentive view of the process. Jerome Bruner makes this point in his book, "Acts of Meaning":

Is it unreasonable to suppose that there is some human "readiness" for narrative … whether even as a psychological capacity like, say, our readiness to convert the world of visual input into figure and ground? By this I do not intend that we "store" specific archetypal stories or myths… Rather, I mean a

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[18] See Douzinas, Warrington and McVeigh, "Postmodern Jurisprudence", pp. 93-97. For a reply to this characterisation of "narrative typifications", see Jackson, Legal Studies 12/1 (1992), 102-117.

readiness or predisposition to organize experience into narrative form, into plot structures and the rest.[19]

For a sense of the difference envisioned, compare a theory of gestalt-*using* with one of gestalt-*making*. This difference between making and using is central to the view of language proposed by advocates of what is known as Integrational Linguistics:

> Language use is a practice that does not require a (single, community-wide) model, although it is not a practice without modellings. Each speaker of the language has his or her own remembered and revisable modelling of how to use language, how to do what things with what words in what circumstances. This modeling (which really comprises innumerable submodelings for the innumerable language games that speakers play) is provisional and open-ended since, besides being a guide to doing known things with known words in known circumstances, it must have room for, and not render impossible, new experiences in which unforeseen things are done with new words in novel circumstances.[20]

If the discussion above is difficult to grasp, the notion of "shifts in readiness" particularly, it helps to think a little more concretely about just what is involved in meeting and moving through a familiar scene. The key to all of this is to recognise the seamless way in which our moment-to-moment experience unfolds. As I step off a bus, cross the street, dodge a pamphleteer, and step into the post office, for instance, my point of attention remains stable throughout. I remain fixed on my immediate goal

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[19] Jerome Bruner, "Acts of Meaning", pg. 45.
[20] Michael Toolan, "Total Speech", pg. 142.

or goals, and do not experience a shock as I stumble from one episode or scene to another. Yet at each point, my brain is working furiously to supply whatever is required to enable me to receive what I see or hear in just the right way. Clearly, then, there must be some mechanism which sifts through this vast store of knowledge and serves up what is required on a moment-to-moment basis, doing so not within the bright glare of consciousness, but as part of its very constitution. Indeed, while we are inclined to think of the background contexts we experience as relatively stable, with activity in the foreground regarded as much more fluid and changeable, in fact the reverse is true. Our experience is "pinned" at the point of our attention. It is this that remains stable from moment-to-moment. This stability comes from the way the brain works continuously to create the right orientation, an orientation appropriate to just that time and place. When the process is working optimally, then, the individual will be perfectly situated throughout, "seeing at once" the meaning or significance of whatever comes his way. Speech, gesture and activity in the world all will arrive already interpreted, effortlessly comprehensible, all appearing exactly as anticipated, with no uncomfortable jolts of incomprehension.

This concrete, and surely recognisable, scenario should help make the more abstract discussion above a little more accessible. Something of the maintenance of a stable point of equilibrium can clearly be seen, as can the "shifts in readiness" noted above. We can see, too, the "on rails" aspect of apparently intentional action described at the beginning of this section. In the scenario, my movement through the world, through what are in fact quite complex sets of circumstances, is accomplished almost entirely without conscious thought on my part. At the same time, however, we can see that a great deal must be going on beneath the threshold of consciousness. Here, the process

responsible for consciousness must move from moment to moment tracking unfolding developments and reorienting itself repeatedly in answer to the slightest change or disturbance. In achieving this reorientation, however, it is clearly not producing entirely new responses from scratch – this is clear from habitual nature of the response; we do not act thoughtlessly in entirely novel ways[21] – but instead draws heavily upon past experience[22]. The effect, then, is about as far from the picture Raz would have us accept. The human agent must be seen to roll through his life, building up momentum as he goes. As we move forward in this way, we are always in a situation that is recognisable to the underlying process, and we are constantly moving into a new one with our past experience going before us organising what will next show up as relevant[23]. Where the process is working optimally, this moving from recognisable situation to recognisable situation is all there is, leaving very little for self-conscious experience to be concerned with in any extended, explicit way[24].

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[21] This is a particularly important point when we consider Dworkin's theory of legal reasoning. Dworkin suggests that the interpretive work the judge carries out – the production of a novel theory of the law as a whole – can be carried out intuitively. This is simply wrongheaded. Truly novel work is not carried out intuitively. Intuition comes, rather, from the internalisation of that which is familiar. Dreyfus and Dreyfus, Mind over Machine", pg. 29: "… intuition is the product of deep situational involvement and recognition of similarity."

[22] It is important to qualify this by making clear that each response is wholly original. It is simply that this new response is made by revisiting old ones, as a sort of retread. This is a crucial point within both Integrational Linguistics and the criticism of Artificial Intelligence offered by Hubert Dreyfus. See Toolan, pp. 238-239: "Integrational linguistics is not sceptical of repetition; it is, however, concerned to characterize it in theoretically coherent ways… [Harris] argues that contextualization by succession in time means that every linguistic act is experienced, by the individual, as new and unique."

[23] Dreyfus, "Being-In-The-World", pg. 119: "What shows up as relevant in my current situation is determined by what I was just doing and what I am about to do. I move from being in one situation to being in the next by shifts in my readiness, which is itself shaped by years of experience of how situations typically evolve. [The process] is always already in a situation and is constantly moving into a new one with its past experience going before it organizing what will next show up as relevant."

[24] Dreyfus and Dreyfus, "Mind over Machine", pg. 89: "When we are in a situation, certain aspects stand out as salient, and many others go unnoticed. When salient aspects change their character… the current situation may not be as similar to the current guiding paradigmatic situation as to some other paradigmatic situation, which has roughly the same salient aspects but matches better. That new situation then becomes guiding… certain aspects of the new paradigmatic situation that now guides behaviour will have more or less salience than the old one, and other aspects that were of no significance in the old guiding paradigm may now acquire some importance. Thus the relevance of aspects gradually evolves. No detached choice or deliberation is involved in the evolutionary process."

This rather surprising point is what follows from the state of equilibrium view of these matters. It is not just that "knowing how" is more common, then, but that it is, in a sense, self-sufficient. As Hubert Dreyfus puts it, "knowing that" need not arise at all:

Subjects with inner experience standing over against outer objects do not necessarily arise in [our] way of being. [We] could simply be absorbed in the world. A simplified culture in an earthly paradise is conceivable in which the members' skills mesh with the world so well that one need never do anything deliberately or entertain explicit plans and goals.[25]

Dreyfus continues, this time referring explicitly to Dewey:

Dewey makes a similar point and notes that it is lucky for us that our world is not perfectly attuned to our habits. We could think of consciousness, Dewey notes, "as a kind of disease, since we have no consciousness of bodily or mental organs as long as they work at ease in perfect health. " He adds, "… The truth is that in every waking moment, the complete balance of the organism and its environment is constantly interfered with and is constantly restored".[26]

This view of the matter is echoed, too, by Nietzche in "The Gay Science":

We could think, feel, will, and remember, and we could also "act" in every sense of that word, and yet none of this would have to "enter our

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[25] ibid., pg. 85.
[26] ibid., pg. 347; Dewey, "Human Nature and Conduct", pp. 178-179.

consciousness" (as one says metaphorically). The whole of life would be possible, without, as it were, seeing itself in a mirror. Even now, for that matter, by far the greatest portion of our life actually takes place without this mirror effect; and this is true even of our thinking, feeling and willing.[27]

There are two separate points made here, both pointing in the same direction. First of all, what all of these writers are suggesting is that reflective, deliberative thinking *need not arise at all*. As Nietzche put it, the whole of life is possible without the "mirror effect". The second point is a qualification made to the first: Reflective, deliberative thinking can be avoided altogether, but *only where our skills mesh sufficiently well with the world*. For this to occur, then, the organism and its environment must be in perfect balance. As Dewey put it, self-consciousness is a kind of disease, arising always as a result of failure to achieve this balance.

What all of these writers are suggesting, then, is that the moment-to-moment shifting from guiding paradigmatic situation to guiding paradigmatic situation is what accounts for the greater part of our experience. This is what Dreyfus and Dreyfus, Dewey and Nietszche have in mind when they refer to skills meshing with the environment, the complete balance of the organism and its environment being constantly interfered with and constantly restored. For them, the most important part of the sense-making process is found in this creation of a state of readiness appropriate to the immediate circumstances. Under this view, the process works continuously, throwing everything it has into its task of producing the best, most comfortable interpretation of the material it is presented with. Against this

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[27] Nietzche, "The Gay Science" # 354, in Dreyfus, pg. 57.

background, reflective, deliberative thought arises only where this balance between organism and environment cannot be achieved by the more basic sense-making process, and more muscular efforts must be made. Detached choice or deliberation comes only where this more basic process fails, where there is no guiding paradigmatic situation to play the required role of making the immediate scene or episode familiar and furnishing the human agent with a "way of coping". This is an important point not only because it means that explicit reasoning is far less prevalent than we might imagine, but also because it actually gives this process of reasoning a different structure. It means that reasoning is backward-looking in a certain way, with reflection applied always in the first instance as a repair strategy to restore the smooth progression from guiding paradigmatic situation to guiding paradigmatic situation. If this can be achieved easily, then the reflection entered into will be modest and relatively superficial. Where the problem is more demanding, however, where there is no guiding paradigmatic situation for the process to draw upon, then the reflection entered into will be more profound.

Breakdown and traffic lights

We can now return to look specifically at self-conscious reflection, contrasting it with the view of practical reasoning that is typically taken, exemplified by the view advocated by Joseph Raz. As I argued above, the problem with the standard view is in the way it assumes that all of the options available to the human agent are apparent to him or her all the time. This view of the matter comes from the way in which we are

inclined to think of our experience solely as reflective, as if all of our experience of the world comes to us in the bright glare of consciousness. In this chapter, I have argued that self-conscious, reflective awareness accounts for only part of our experience at any given moment. Indeed, I have argued that it actually accounts for only a small part of this experience. We are wrong, then, to attempt to account for all of our decisions in terms of self-conscious reasons for action. More often than not, we move through the world and act within it with very little conscious awareness of what is around us and of what we are ourselves doing. On these occasions, we move through the world carried along by the stream of life, as if on rails or along grooves cut into the landscape. We act in a habitual, automatic manner, falling in with our surroundings as we move from episode to episode, bound by the understanding we have of just those episodes. Under this view, the role played by self-conscious, reflective reasoning is much reduced, for the greater part of the work involved in negotiating the environment will be accomplished before this self-conscious, reflective reasoning even arises. The sense-making process must first set the scene, after all, and it is this scene-setting activity that dominates.

When we take this into account, the overall portrait we arrive at is far removed from the one Raz proposes. We see that self-conscious, reflective awareness is in fact far less central to our day-to-day, moment-to-moment activity. In the ordinary run of things, reflective awareness is almost always limited to a relatively small circle, concerned for the most part only with short- to medium-range planning. The real work is carried out beneath the threshold of consciousness, where the sense-making process works constantly to maintain the right surrounding "frame", shifting and adjusting its view of the environment in response to unfolding events. Where an adequate "fit"

with the surroundings is achieved, reflective awareness of these surroundings will be minimal, taken up only with those aspects of the scene which appear to the human agent as particularly salient given his or her short- to medium-range planning. It is only when this "fit" with the surroundings is impeded in some way, where the process breaks down, that the process really comes into its own, and takes on the prominence Raz attributes to it. In these instances, reflective awareness is applied to remove the obstacle. The process here seeks to make familiar what is unfamiliar, and it is only at this point that the human agent explicitly notices and reasons through the situation. According to this view, then, explicit reasoning must be seen essentially as a repair strategy. It arises fully-formed only occasionally, and, even then, only to the extent necessary to resolve the difficulty faced.

This notion of reflection as applied always as a "repair strategy" is an important one, because it helps us see that reasoning, where it appears, begins modestly, and proceeds, according to need, to become more and more extensive and thoroughgoing. Heidegger describes this movement towards an ever more reflective attitude by identifying three kinds of disturbance: *Malfunction, Temporary Breakdown* and *Total Breakdown*[28]. The first of these, Malfunction, is the most common. These are those brief setbacks which arise often in the course of every activity we might enter into, on any given day:

> … for most normal forms of malfunction we have ready ways of coping, so that after a moment of being startled, and seeing a meaningless object, we shift to a new way of coping and move on.[29]

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[28] Hubert Dreyfus, "Being-In-The-World", pp. 70-83.
[29] ibid., pg. 71.

It is the availability of an alternative "way of coping" that makes the malfunction such a modest disturbance. In these instances, things do not proceed exactly as we expect. This is sufficient to startle us out of our unthinking mode of action, but as we can immediately see another way forward, we quickly shift to this new perspective, our alternative way of coping, and proceed as before. If we look back to the scenario presented above, we can imagine any number of malfunctions. As I attempt to dodge the pamphleteer, for instance, he may reach out and grab me by the shoulder. I would likely be startled by this, but only momentarily. I would not have to think deeply about a way around the problem, but would simply shrug him off and keep going. In this case interference by the pamphleteer is not expected, but it is not unexpected either. In responding, then, I have simply to switch from one plan to another.

Obviously, the simple switching of plans described in the Malfunction phase can hardly be described as reflection. The next stage, Temporary Breakdown, is a little closer to what we expect by the term:

> Temporary breakdown, where something blocks ongoing activity, necessitates a shift into a mode in which what was previously transparent becomes explicitly manifest. Deprived of access to what we normally count on, we act *deliberately*, paying attention to what we are doing.[30]

In such an instance, there is no ready alternative way of coping for the human agent to switch to that will allow him to proceed in an unthinking way. The problem here is

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[30] ibid., pg. 72.

not so great, however, as to require him to arrive at a completely new solution. This means that he must proceed in a deliberate way, paying careful attention to what he is doing. If we return to the pamphleteer, imagine that the pamphleteer resists my efforts to shrug him off, perhaps by stepping in front of me. In this instance I would have to attend to the shrugging off self-consciously. In doing so, however, I would not necessarily be arriving at an entirely new plan. What we see here, then, is self-consciousness, rather than reflection in the strongest sense. It is simply a question of having to think about what I am doing as I am doing it.

So far, then, we have yet to see true reflection. As we have seen, the human agent's default position is to proceed without much thought at all. Where the way forward is obstructed in some way, we see him looking, first of all, simply to shift to another habitual response, and then, if this response is inadequate, to implement the available response deliberately. It is only at the third, final stage, then – Total Breakdown – that true reflection emerges:

> When there is a serious disturbance and even deliberate activity is blocked, [the human agent] is forced into still another stance, *deliberation*. This involves reflective planning. In deliberation one stops and considers what is going on and plans what to do, all in a context of involved activity.[31]

It is only when the human agent cannot see any obvious way forward at all that he not only encounters his problem self-consciously, but actually attempts to reason through it. It is only at this final stage, then, that we see the human agent seeking out reasons

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[31] ibid., pg. 72.

for and against a particular course of action and weighing these reasons up. To return to the scenario above one last time, here we might see the pamphleteer resisting my efforts so determinedly that I find that I must stop, give up on moving forward for the time being, and concentrate much more explicitly on extricating myself from the situation.

As it happens, this tendency to resist entering into full-blown reflection is actually recognised by Raz himself, though, unsurprisingly, his treatment of it is rather different. At issue here is his notion of "exclusionary reasons"[32]. Raz sets out his motivation for advancing this special category of reasons in the following way, noting a certain problem with the standard reason-based account of action:

> The pervasive use of this terminology suggests that all practical conflicts conform to one logical pattern: conflicts of reason are resolved by the relative weight or strength of the conflicting reasons which determines which of them overrides the other.[33]

The problem Raz diagnoses, then, is that the reason-based view he himself advocates places all of our decisions on an equal par, as it were. When we actually look at the way human agents move through the world, however, we find something very different. The following scenario, offered by Bernard Jackson, helps draw this out:

> A driver finds himself at the crossroads of a small country town at 3.00 a.m. in the morning. The traffic lights are red. The driver's vision is completely

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[32] Joseph Raz, "Practical Reasoning and Norms", pg. 35.
[33] ibid.

unimpeded in all directions, and there is no other moving object in sight (or hearing). The driver knows, moreover, that the village is policed by one local constable, who will certainly at that moment be in bed in his cottage some distance away. Realistically, therefore, he runs no danger either of causing an accident or of being apprehended if he violates the red traffic light. Nevertheless, he waits for the signal to change. We may ask why he does so.[34]

Contrary to what the weighing view might lead us to expect, then, the driver here does not weigh up the various reasons. He does not balance up the likelihood of accident or arrest against the inconvenience having to wait causes him. Indeed, he appears to make a deliberate choice here not to perform any such weighing of advantage and disadvantage. He does this, we imagine, because there is a legal rule involved:

No doubt he will tell us: "because the light is red." On further interrogation, he may volunteer the information that there is a rule that you stop at a red traffic light. This, he implies, is a good enough reason to stop.[35]

Scenarios like this clearly present a problem for the standard reason-based analysis of intentional action. They are also particularly relevant where understanding of the workings of the law is sought. What the scenario requires is, first of all, an explanation for the lack of reasoning we see, and secondly, the way in which this lack of reasoning contributes to obedience to the law more generally.

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[34] Bernard Jackson, "Making Sense in Jurisprudence", pg. 175. Note that this is not an example Raz offers himself. The point I am making here is that Raz's own examples appear to have little to do with legal life, and that something like this one, offered by Bernard Jackson, in fact is more appropriate. The similarities to the scenarios Raz himself offers should be clear, as related in Chapter One, on pg. 15. Once again, it is not my intention to suggest that Raz considered this example, nor that he would analyse it in the way that I have.
[35] ibid., pg. 176.

In a series of similar examples[36], Raz took the opportunity presented by problems of

this type – where we make a decision to opt out of reasoning – and sought both to

contribute to the basic account of practical reasoning and to create a bridge between

the weighing view of reasoning and the rule-based account of law Hart proposed. To

explain the failure to reason we see in the scenarios he offered, Raz's solution was to

retain the basic structure of the explanation, but propose that different reasons belong

to different levels, that there are in fact first- and second-order reasons[37]. According to

this view, second-order reasons provide reasons to act for a reason or to refrain from

acting for a reason. Exclusionary reasons are second-order reasons to refrain from

acting for a reason[38]. When the human agent faces a conflict such as the one above,

then, the possession of an "exclusionary reason" will lead him to resolve it not by

weighing up the various reasons involved, but by opting out of the reasoning process

altogether. What Raz envisioned, then, was a relatively modest adjustment. Indeed, as

we are always inclined to do, Raz here takes the path of least resistance. Rather than

questioning the basic account in any deep way, he opts simply to extend or elaborate

it, adding elements he feels are missing and which, when included, allow the basic

account to explain everything we see. In preserving the basic structure of the original

weighing account, Raz retained the self-conscious, deliberate character of the account.

In the view he advocated, the human agent continues to work with reasons in a self-

conscious way.

There is a problem with this explanation, though. While the scenarios he offers do

indeed support Raz's notion of an "exclusionary reason", we must acknowledge that

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[36] Two of the examples Raz offers are related in Chapter One, on pg. 15.
[37] Joseph Raz, "Practical Reasoning and Norms", pg. 40.
[38] ibid.

the scenario is a rather contrived one. Bernard Jackson's traffic light example illustrates this, I think. Our experience of stopping at traffic lights in the course of day-to-day life in fact is quite unlike the scenario offered. Indeed, more often than not, we do not think of reasons of any sort at all. In the ordinary run of things, the driver will simply stop without thinking too much about what he is doing. What we find, then, is that Raz's notion of an exclusionary reason is of little help to us here, in our effort to understand the operation of norms generally. In giving the driver an explicit reason not to reason, we clearly distort the process involved. It would be to suggest that the driver knows that he is not reasoning through his situation and that he knows why he is not reasoning through his situation. This may be true in the scenario described above, but it is simply not the way traffic lights work in day-to-day life. *In the ordinary run of things, the driver stops because it is in the nature of the circumstances he finds himself in that he should do so.* He stops because he feels that it is the appropriate thing to do in the circumstances. In the example above, reasons are contemplated only *because of the exceptional nature of the circumstances he finds himself in.* There is something "wrong" with the scene he finds himself in, in other words, and it is this that causes him to seek reasons for his decision[39]. Where there is nothing wrong with the scene, however, it is likely that the driver will not think about the traffic lights at all. It is not an exclusionary reason that impedes the weighing of reasons, then, *but a failure to see a need for reasoning.*

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[39] This way in which the unfamiliarity or the ambiguity of what should be effortlessly clear gives us an example of what Karl Llewellyn referred to as a "trouble case". See Llewellyn, "The Cheyenne Way", pg. 29: "The case of trouble, again, is the case of doubt, or is that in which discipline has failed, or is that in which unruly personality is breaking through into new paths of leadership, or is that in which the ancient institution is being tried against emergent forces. It is the case of trouble which makes, breaks, twists, or flatly establishes a rule, an institution, an authority. Not all such cases do so. There are also petty rows, the routine of law-stuff which exists among primitives as well as among moderns."

Insofar as it is offered as an explanation for our observance of norms, then, Raz appears to make a critical mistake. Having noted that the reason-based explanation does not really match our experience, he attempts to remedy this defect by extending the same scheme – that is, by coming up with a special variety of reason. In doing so, however, he badly misrepresents the nature of the process itself, for what we have here is not a human agent *choosing not to pursue* the various reasons he might call upon, but one for whom *reasons do not really occur*. What is required, then, is a completely different sort of explanation. In the end, if we are to explain what we see in these circumstances, we will have to dispense with consciously appreciated reasons altogether and instead take the view of intentional action I have myself offered in this chapter. We must see human agents as moving from familiar episode to familiar episode as if on rails, responding unthinkingly in whatever manner is most appropriate. Reflection plays little or no part in any of this so long as there are no surprises and the way forward is clear. It is only when a problem emerges that the process of reflection is initiated, though even here, it will be applied as a repair strategy, the means with which the desired easy way forward is sought. More often than not, then, even when some self-conscious thought is involved, what we see is not a genuine, thoroughgoing attempt at reflecting on the problem or action involved, but instead is aimed simply at removing ambiguity or doubt sufficiently to allow the human agent to get moving again.

Backward reasoning

Further support for the approach taken here can be found in the way in which judges reason through their cases. It is often noted that legal reasoning must be a variation on practical reasoning more generally, and it is worth asking: Is the secondary, surface-to-depth view of reflection advanced here evident in what we know of legal reasoning? On the face of it, we are likely to be tempted to dismiss this proposition. While the rather uncharitable view taken of ordinary citizens here is plausible – as moving forward through their lives in an unthinking manner, as if on rails – surely the same cannot be said of judges? Judging is clearly a thoroughly reflective enterprise. Judges stand apart from life, reflect long and hard on the problems they face, and issue careful, thoughtful decisions. Yet, as we will see, the portrait remains relevant. Indeed, if we are truly to understand legal reasoning, we must have just this portrait in mind. Like everyone else, the judge must have a view of his immediate circumstances *before* he can go on to reflect on it. At his most reflective, the judge may well reflect on just this initial sense-making act, "rolling back" on this view and unmaking it. Nevertheless, even in these instances, the reflective act must be seen as working backwards from, and working within, the initial view taken.

For readers familiar with discussions of legal reasoning, talk of "backwards reasoning" should strike a chord, for there is in fact a long-standing debate on just this point. The debate concerns the degree to which legal reasoning is a formal, logical activity. The formalist or logical position is very much in the spirit of the dominant model and places its emphasis on the operation of legal rules. According to this view, the judge is given the facts and the law on the matter separately, going on to combine these logically to produce a decision. Often, much is made of deduction and syllogistic reasoning in all of this, with the decision-making process thought to rest

heavily on the way in which the combination of premises actually *produces* the resulting conclusion. The idea here is that the judge simply feeds the immediate facts into the rule, which in turn spits out the required conclusion mechanically. An important part of the appeal of this view is its autonomous character. As it is the rule itself that here supplies the conclusion, the judge cannot be accused of contributing anything of himself to the decision-making process. The judge can therefore be thought of as a mere technician, someone who is asked simply to implement the rule in a straightforward, uncontroversial manner. That the logical, deductive account takes for granted the self-conscious, deliberative model is clear from the degree of detachment we see in the judge as he goes about his task. The judge is thought to arrive on the scene as something of a blank slate, bringing nothing of himself to the encounter. He is not thought to need any particular sort of background experience to carry out his task, for instance. Instead, the material he is supplied with is thought to provide him with all he needs to arrive at the right decision[40].

Legal Realists have long pointed to a very different view of legal reasoning, however. Where the formal and logical view related above places all of its emphasis on the rule itself, effectively excluding the judge himself from the account, Realist thinkers take the opposite view, placing much more emphasis on the psychological reality of judging. One example is Frank's famous notion of "hunching". According to Frank, the process of reasoning judges enter into is not an explicit logical one, but is rather more mysterious and intuitive. Frank's position is that judgements in most cases are

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[40] For an example of criticism of the deductivist account, see Jackson, International Journal for the Semiotic of Law V/14 (1992). Note that attempts are often made to excuse the failure of such accounts to explain actual decision-making by claiming that they are accounts of justification rather than decision-making. This issue will be addressed in Chapter Six.

worked out backward from conclusions tentatively formulated[41]. In other words, the

judge begins with his own intuitive sense of how the facts and the law "fit" in the case

before him, drawing his final decision from this intuitive sense. *Having taken this*

view, the judge works backward to produce an explicit case to support it. The explicit,

logical part of the process, then, in fact comes *after* the decision has already been

made, even if only tentatively, serving much more as a means with which to test and

justify the initial position taken. The premises do not lead to the conclusion, then.

Rather, the judge begins with a tentatively formulated conclusion and then looks for a

way of presenting the combination of premise, premise and conclusion which serves

his hunch.

The Realist approach is a popular and influential one, largely because it matches our

experience so well. The problem with the approach, however, with notions like

"hunching", or with Llewellyn's notion of "situation sense", is that they can appear

somewhat incoherent from a theoretical point of view. My hope is that the model

offered in this thesis will be seen to provide the required background. According to

the model I have presented, reflection is indeed backward-looking in precisely the

way that the Realists describe. "Hunching" and "situation sense" are not mysterious at

all, then. Like everyone else, judges do not "parachute into" the various contexts they

inhabit as if from nowhere. They do not encounter the facts and the rule in the

immediate case without any preparation at all, as a blank slate, as it were, but instead

do so with "practice-informed eyes"[42], seeing "a field already organized in terms of

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[41] Jerome Frank, "Law and the Legal Mind", pg.100: "The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around – with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it." See also Dewey, "Logical Method and the Law", 10 Cornell Law Quarterly 17, 20.

[42] Stanley Fish, "Dennis Martinez and the Uses of Theory" 96 Yale Law J, 1773 (1987).

perspicuous obligations, self-evidently authorised procedures, and obviously relevant pieces of information"[43]. Like the rest of us, judges make their way through life becoming ever more familiar with the contexts and circumstances they customarily inhabit and encounter, becoming more and more "fluent" in just those contexts and circumstances. This growing "fluency" comes from the way this repetitive experience informs the basic process of scene-setting which precedes all self-conscious, reflective thought. When a judge first applies himself to a case, then, the scene-setting process leaps ahead and presents the judge with a way of seeing his immediate circumstances, a "hunch", which is drawn from the judge's previous experience of similar such encounters. Self-conscious reflection will not only come after this initial scene-setting has been carried out, but will take it as a point of departure.

There is another sense, too, in which legal reasoning is clearly backward reasoning, though in this case we must look at hard cases, rather than easy ones. The feature I have in mind here is what Ronald Dworkin has described as "local priority"[44], the way in which judges tend initially to limit their investigation to the immediate point of law, casting their net wider and wider only where, and only to the extent to which, such a widening is necessary. The judge begins, then, by seeking his answer locally, hence the term, "local priority". If the case is found to resist resolution locally, however, the judge will then have to make a wider survey of the law on the matter, expanding his area of study in a series of concentric circles to include other areas of law, and in extreme cases, to the law as a whole. When facing a hard case, then, the

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[43] ibid. Note that by "self-authorised", Fish's point is that there is no need for explanation or authorisation for the obligations and procedures if they appear real. Mere intelligibility confers authority, in other words. Bruner makes the point in the following way in "Acts of Meaning", pg. 47: "Folk psychology is invested in canonicality. It focuses upon the expectable and/or the usual in the human condition. It endows these with legitimacy or authority."
[44] Dworkin, "Law's Empire", pp. 250-254.

judge does not simply launch into a fully reflective mode, reassessing the law from top to bottom. Instead, he will seek to retain his unreflective attitude for as long as possible, looking to resolve his problem at the earliest opportunity.

Now, when we place this apparent reluctance to enter into reflection in hard cases alongside what we have seen in easy cases, the view of judges and judging we are left with is striking. *What we must accept is that judging is not really so reflective an enterprise after all. It is interpretive by default rather than by design.* This view of the matter is difficult to accept, of course. When we take the account of reflection presented in this chapter into account, however, this claim ceases to seem so counter-intuitive. Think again of the three phases Heidegger identified: Malfunction, Temporary Breakdown and Total Breakdown. Now compare it with the "spectrum" or "continuum" Villa identifies when describing easy and hard cases. At the far end of this spectrum, we find easy cases. These present the judge with:

> … legal materials which are not only undoubtedly part of what we have called "paradigmatic instances of positive law", but also whose normative content does not give rise to serious interpretive problems.[45]

A little further on, we find the cases becoming progressively harder:

> … [similarly] "paradigmatic instances of law" (that is, whose identity, as positive law, is not contested), whose normative content, nevertheless, poses serious interpretive questions, because it is susceptible of different –

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[45] Vittorio Villa, "Legal Analogy between Interpretive Arguments and Productive Arguments, in "Legal Knowledge and Analogy", ed. by Patrick Nerhot, pp. 165-182.

sometimes alternative – interpretations, each of them being equally able to

pass the test of "normative coherence".[46]

At the far end of the spectrum, we arrive at the hard case:

> … [In these instances] paradigmatic instances of positive law are completely
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> lacking... Here the difficult matter... is that of finding the "pertinent" law for
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> the cases in question, going beyond the "paradigmatic" legal dimension, up to
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> the deeper dimensions which legal principles and values belong to.[47]

Villa's use of the phrase, "paradigmatic instances of law" is particularly interesting,

for I have argued that the most important contributor to our experience, and

consequently, to our decisions, is way in which "guiding paradigmatic situations"[48]

culled from previous experience allow the human agent to receive his immediate

surroundings in an already-interpreted form. Under the view advanced here, the

process proceeds by applying these "guiding paradigmatic situations" in series.

Ideally, this sequence will pass seamlessly, leaving little scope for reflection. It is only

when this seamless movement is impeded in some way, where the sequence breaks

down, that reflection emerges. The greater the breakdown, the more extensive the act

of reflection entered into.

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[46] ibid.

[47] ibid.

[48] Compare "guiding paradigmatic situations" with "narrative typifications" as offered in Bernard
Jackson's semiotic theory. Once again, however, the difference is found in the way in which this
guidance is acquired and deployed, the way in which it builds up cumulatively in answer to concrete
experience. To distinguish between them, the question that must be asked is this: How is the underlying
material understood to exist? Is it imagined to sit in the mind, ready-made, a thing-in-itself, deployed
again and again in the very same form? Or is it much more provisional and fluid, something the process
has, ready-to-hand at just that moment, found in just that form only at that moment and never again?
See pg. 156 above.

When we place Villa's sequence alongside Heidegger's account, the parallels are striking, I think. At the beginning of the sequence, we have the easy case. In these instances, the judge's established ways of coping are sufficient to enable him to "see at once" just the right interpretation. As the immediate case approximates previous cases so closely, the sense-making process will itself provide the judge with a ready-made decision. In this case, the life of the law is indeed not logic, but experience, with explicit reasoning used not to arrive at the decision, but merely to test and justify it. As cases increase in difficulty, however, the judge will find his established ways of coping offer him less and less in the way of obvious guidance. As this occurs, his efforts will become more and more deliberate and explicit, the process becoming more and more genuinely reflective. At this point, however, the problem is merely one of temporary breakdown. Though some reflection is required, it remains relatively superficial. The right interpretation is sought deliberately, yes, but this is not really so demanding. It is only when we arrive at the far end of the continuum, where we have "total breakdown," that the judge will be left truly to find the pertinent law on his own, in a completely explicit act of deliberation. In doing so, he will move far away from his initial point of law, seeking his answer increasingly in the "deeper dimensions" to which legal principles and values belong.

With all of this in mind, we can put Dworkin's efforts into perspective. Dworkin's emphasis on hard cases leads him to think of all law as interpretive and contentious. In fact, interpretation is entered into only reluctantly, only where it cannot be avoided, and even then, it is pursued only so far as is necessary. This allows us to see the law as a whole as better represented by easy cases, with the law operating far more

frequently in a more automatic manner. This is not a trivial point, for there is more than mere legal reasoning at stake here. When the law is seen to be essentially an interpretive enterprise, citizens are encouraged to approach all contexts and activities with a view to drawing out and cultivating whatever potential there might be for adjudication. In fact, this cultivation of conflict is undesirable as it makes day-to-day life difficult, with individuals looking to the law not to aid coordinated movement through the world, but instead to seek always to disrupt this movement, to gain some advantage by doing so. The view of legal reasoning advanced here, however, is consistent with just this need for consensus and coordination in the larger life of the community.

Chapter Five

An unthinking, habitual portrait

We arrive, finally, at the law itself. We can now ask the question we have been putting off for some time now: *Is the law an affair of rules?* To address the law itself so late in my thesis may appear an odd way to proceed, but it in fact makes perfect sense given the approach I have taken. As should be clear by now, what I am attempting to offer in this thesis is primarily a psychological explanation of legal life, rather than one more directly concerned with legal rules. This being the case, the late appearance of elements more conspicuously legal in nature should make perfect sense. Indeed, by my own way of thinking, I have been addressing what is central to the matter all along. Under the view advocated here, our experience of the law has much more to do with the workings of our mental processes and our experience of social life than it does anything we might attribute more directly to the "the law" itself. In setting out my own explanation, then, I have attempted to set out just those psychological mechanisms responsible for our day-to-day, moment-to-moment experience. In this chapter, I will draw together the various insights I have set out in the previous chapters, insights into the habitual character of our everyday activity, for instance, or the limited capacity we have for reflection, using these insights to propose a theory of law much more in keeping with what we see in our day-to-day lives.

On the face of it, the emphasis given here to the psychological life of the human agent might not sound the least bit controversial. Indeed, we might be tempted to dismiss it merely as stating the obvious. Yet it is worth recognising how far genuine interest in these matters takes us from mainstream thinking in legal theory. Indeed, when we explore the matter, we see that the standard deliberative approach does not really represent a meaningful attempt at any such account at all. As I have argued, it represents the *absence* of such an understanding rather than the presence of one. Typically, the analytically-minded theorist proceeds by attempting to look directly at the issues concerned, at the rules, reasons or principles involved, for example. This may well seem a reasonable enough approach to take, but it means that the human agent himself will be accommodated within the resulting theory only as an afterthought. No real attempt will be made, then, to work out what is involved in seeing or understanding or responding on the part of the human agent. When we think about the matter in a more realistic way, however, and place this seeing and understanding and responding at the very centre of our account, a very different picture emerges, one far removed from the one the dominant model envisions.

While the reorientation envisioned here is a fundamental one, there are two aspects that will have particular relevance in this chapter. There is, first of all, the way in which we are understood to appreciate our surroundings as we go about our daily activities, and in particular, the way we are understood to appreciate the law as we find it in these surroundings. In the more familiar account, the law is found always in the form of legal rules, with these rules thought to appear to us helpfully distinguished from their surroundings, a wholly separate element we identify quite readily as we make our way through the world. Obviously, where this view is taken, no account

need be given of the way in which the rule relates to the context in which it is embedded, leaving us able to think and speak of judges and ordinary citizens dealing with such rules directly. When we give the matter a little thought, however, we quickly see how wrong-headed this view is. Rules are rarely apprehended as separate in this way because, well, very little is. In fact, our immediate experience of the world simply does not come to us with the various elements helpfully separated out for us in the way the standard view imagines. When I enter a room, for instance, I do not immediately register, in an explicit way, each and every individual object I find there. Rather, I begin by seeing the room as a whole, with this view of the room as a whole organised along whatever lines are most conducive to my immediate activity. Of course, a particular object may well stand out to the human agent, but this will always be a case of the object standing out to the human agent against the background of his experience of the room as a whole. In other words, the human agent may well pay particular notice to this or that object, but this business of paying particular notice comes only after a prior appreciation of the whole room is achieved.

A particular rule may well stand out from its surroundings, then, but it will always be the case that the human agent here is paying *particular notice* to the rule *as he finds it within that particular context*. This continuity between the whole context and the law as it is found within it makes the view advocated here quite different from the one taken by advocates of the dominant view. For them, the matter can be analysed quite narrowly. There is a rule, which the human agent first reads, then implements. That is all there is to the matter. For us, however, the agent's dealings with the law now must be understood in the context of his dealings with the scene as a whole. In every instance of observance of the law, then, we find that we must give some account of

how the human agent understands or appreciates the context as a whole, and of how this understanding underpins and informs his appreciation of the legal aspect found within it. *Indeed, we must ask whether the human agent appreciates the law at all, for there is always the possibility that the law will be found so deeply embedded in the context as to be invisible.* On these occasions, patterns of behaviour in accordance with the law cannot really be described as rule-following behaviour. Rather, the law here exercises its influence *through* this larger context, by structuring the context in such a way as to channel the human agent's behaviour in the desired way. In this chapter, I will explain the operation of the law in just this way. I will argue that we rarely observe legal rules self-consciously, but instead simply "fall in" with the contexts we occupy[1]. According to this view, legal rules are indeed responsible for our behaviour, but this influence is achieved indirectly rather than directly, through the contribution the enacted rules make to the structured way in which we experience our surroundings.

The self-conscious, deliberative view fails, therefore, to accurately reflect our experience of the contexts we move through in day-to-day life. There is more, though. The second point relevant to our discussion here concerns the way in which the model presents the human agent's ability or propensity to abide by, or respond to, the law as it is found within these contexts. According to the model, the ability or propensity in question is thought to be inherently isolable, wholly unrelated to seeing or understanding more generally. Upon meeting the legal rule, then, the human agent is thought to proceed by analysing its content or meaning, going on to act deliberately

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[1] This is, of course, not to suggest that there is no role for self-consciousness in legal life. Obviously, there is a role for self-consciousness, in the lives of both the ordinary man and the judge. My aim here, however, is to displace our tendency to think of the activities of both as *fully self-conscious.* What is sought is the right balance of the conscious and unconscious parts of the process. See Chapter 1, pg. 41, n. 58.

on the basis of this analysis. When we explore the matter even cursorily, however, we see that the human agent's decision-making capacity, too, must be integrated into a larger picture. This was the main argument presented in Chapter Three. There, I argued that there is no sharp line separating our ability to *recognise* a particular environment from our ability to *respond appropriately* to that environment. On the contrary, I have argued that the two are in fact bound together intimately, coming to us as part of a single ability or competence, the "habit of the whole performance", as Mortimer Adler put it. Indeed, we are wrong to place so much emphasis on the faculties themselves. Rather than thinking of the human agent exercising these faculties independently, we must instead think in more global terms, in terms of a general tendency to become progressively more fluent in dealing with our surroundings. The various faculties involved all work in concert to achieve just this fluency. When this is achieved, the human agent can be seen to be "coupled" with his environment in a particular way, as if moulded or cast to inhabit just those surroundings. He is now a "creature" of those surroundings, perfectly attuned to it in his habits of perception and response.

At first reading, this view of the matter may appear difficult to accept, but it is not really so strange when viewed against the right background. I have argued that this tendency towards contextual orientation is simply part of our design, inherent in the sort of beings that we are. We each exist, under this view, to become as a fully a "creature" of our respective environments as is possible. This, I have argued, is the very thing the process responsible for consciousness seeks. The process makes sense by modelling the external environment so closely in perception and response as to allow precisely the sort of unthinking, effortless existence described here. Like the

lower animals we have evolved from, we thrive not by being detached from our environments, then, but by embodying them. When we take this view of the human agent's relationship with his surroundings, we see that interaction with the environment does not necessarily have to take the deliberate, self-conscious form assumed by the dominant model. Where the human agent is coupled with his environment in the manner described here, it is more likely that features within his immediate environment will appear not as things-in-themselves, but rather as *cues which elicit automatic responses.* When placed against this background, we see that there is more than one way in which to think of the operation of the law. We see that the law need not necessarily evoke thoughtful, measured responses. *Rather, there is always the possibility that the legal element in question operates simply by "triggering" a pattern of behaviour which has become entrenched over the course of a series of similar encounters.* In this instance, the legal aspect of a particular context is found not in a consciously appreciated rule, but in some more modest cue, a familiar aspect of the scene or episode which elicits a pre-determined response in keeping with the requirements of the law.

With just these two insights – the unconscious, largely automatic way in which we respond to whole contexts – we can already see a very different picture of what it is to live a life under law taking shape. Under this view, our encounters with the law do not take the form of self-conscious encounters with detached, abstract rules, but instead are rather less thoughtful responses to familiar scenes or contexts. A good example would be, say, an encounter with a red traffic light at an intersection. In this instance, the legal rule in question is found so deeply embedded in the context as to be invisible to the human agent. He will not "see" the legal rule at all, then. Instead, upon

approaching the intersection, the driver will recognise it as a familiar scene or context, in much the same way he recognises any other scene or context. The point is an important one for us, because it means that when the driver responds, this response will come in answer not to the rule, but to the scene or context he recognises. The precise nature of the response, too, is important. The human agent here must be understood to come to the scene or context already equipped with a way of responding that is deeply entrenched. He will have a "way of coping" with the scene that allows him not only to negotiate it, but which in fact will direct his behaviour. Crucially, the deployment of this "way of coping" is largely a matter of habit or reflex, and is pointedly not a conscious, reflective matter.

When we take in this picture as a whole, the contrast with the standard picture of legal life could not be greater. It suggests, first of all, that the law is not an affair of rules at all. It suggests, moreover, that life under the law is not a self-conscious, thoughtful enterprise but is rather more habitual in nature. The human agent is presented here as moving through the world more often than not in an unthinking, automatic mode, as if he is happy enough to be carried along by the stream of life. As we will see, while this might appear a considerable departure from our customary view of these matters, it in fact sits far more happily with our experience in day-to-day life than does the more intuitive deliberative account. This is true, particularly, of our experience of the law as it is felt on the ground, reflected in the experience of ordinary citizens as they go about their day-to-day dealings with it. The formal or official life of the law – the law as it is experienced by the judiciary – is a slightly different matter, of course. I will leave my discussion of that aspect of the law for the next chapter. To make sense of this particular aspect of legal life we will need to draw upon the insights we have

gained into reflection. This is the third issue we have explored in this thesis, the

ground covered in Chapter Four. As the basic portrait presented here is so much at

odds with our expectations, it is worth concentrating on the more accessible part of

the picture. I will therefore concentrate on the ordinary citizen for the time being and

return to reflection in Chapter Six.

Internal and external

As noted above, my aim in this chapter is to place our experience of rules and rule-

following into the appropriate psychological context. In thinking of rules and rule-

following more generally, my view is that we are overly taken with the rules

themselves, according them far more importance than they merit. This excessive

attention paid to the rules themselves is hardly surprising, of course. Rules are robust,

and exhibit a pleasing clarity. Against this, the underlying processes I am myself

concerned with are somewhat shadowy, remaining always hidden from view. Yet our

relationship with these rules cannot be understood without some understanding of

these underlying processes. According to the model advocated here, our psychological

processes exhibit a "tip-of-the-iceberg" structure, with what is revealed above the

surface bearing a relation always to aspects of the process hidden beneath the

threshold of consciousness. Indeed, as the phrase "tip-of-the-iceberg" suggests, what

really matters is what is found beneath the surface, for it is this that is responsible for

the greater part of our experience. When we pay attention to these underlying

processes, we see that the mechanism responsible for the greater part of our

experience is a tendency for repetitive action to be coalesced into habits of behaviour. When this mechanism is recognised, we see that the human agent does not encounter scenes afresh on each occasion, but instead becomes familiar with them cumulatively, building up a "way of coping" with these scenes over repeated encounters. A decision to act in this or that way may well be made in a self-conscious manner early on, then, but over time this decision to act will come to be entrenched as an unthinking "way of coping" the human agent employs whenever he finds himself in just those circumstances. Thereafter, it is this acquired "way of coping", rather than any self-conscious reference to rules, say, that determines the action the human agent will take.

This is in keeping with our experience, I think. Consider all of the examples of structured, organised behaviour we see in our day-to-day lives that do not appear to involve the use of rules at all. While the notion itself might strike us as strange – structured, organised behaviour which does not arise from the observance of rules – in fact there is no shortage of examples. Think, for instance, of the way we go to sleep every night on this rather than that side of the bed, or get out of bed every morning on this rather than that side. Think of the way we use the same toothbrush every morning, or the same coffee mug. Think of the way we opt always to travel to work every morning by the same means, and along the same route. In these and endless other examples, we appear to live in the world as if bound to a fairly rigid, structured map or plan. Yet nowhere in any of this is reference made to explicit rules of any sort. We do not imagine that we are consciously abiding by a rule to the effect that we must get out on this rather than that side of the bed, for instance. In other areas of life, however, rules are taken for granted as central to similar regularities in our behaviour. Every time an individual stops at a red traffic light or joins a queue at a post office,

we might imagine that he or she is consciously observing a rule to that effect. My argument in this chapter, however, is that *even where explicit rules are involved, what we have is essentially the same process as we see operating in the "getting-out-of-bed" and "which-toothbrush-to-use" decisions.* In both types of decision, we must look at precisely those issues covered in the preceding chapters – namely, the relatively small capacity we have for deliberate, reflective thinking and the brain's overriding tendency to automate repetitive cognitive work by including it in the "total, factual background" the individual experiences at the time of his or her act.

My submission, then, is that the sense-making process responsible for our experience does not distinguish between different instances of repetitive behaviour. Rather, it seeks simply to automate all such regularities, whether public or private, whether or not there is a remotely "legal" dimension to the decision. This is the point of a psychological explanation, after all. What matters here is the manner of operation of the sense-making process itself. In all instances, then, whether it is getting out of bed or getting on a bus, the process looks to preserve its resources, and therefore will automate the pattern of behaviour if this is at all possible. All of this is quite clear in the bed and toothbrush examples, I think. Here, the questions are simply not important enough for us to consider over and over again, day after day after day. We find a way of acting that works and thereafter stick to it, proceeding in precisely the same way again and again, day after day after day. In a system which operates with fewer resources than it would like, and must prioritise the issues to which it devotes conscious attention, it is easy to see why "decisions" such as these would be automated in the way that they are. *Once again, however, my argument is that all of this is equally true of the traffic light and post office queue examples.* Here, too, the

process finds a way of acting that works and thereafter sticks to it, proceeding in precisely the same way again and again, day after day after day.

The claim made here is therefore a dramatic one. The law is not an affair of rules at all, not on the ground at any rate. This is because these rules are not necessarily perceived as rules in moving, practical life. Once again, we need only look to our own experience to see that this is in fact the case. As we move through the world, "legally constituted" regularities do not show up for us as "legal", distinct from customary or spontaneous ones. The law is not experienced in a separate "stream" or channel, as we might put it. As I walk down the street, cross the road at a pedestrian crossing, buy a newspaper at a newsstand, turn immediately to the back to read the sports news, board a bus, pay for my ticket, give up my seat for an elderly passenger… throughout all of this, I am simply identifying familiar fact-patterns in life, and negotiating them on the basis of the guidance past experience provides. Critically, this drawing on past experience is not a matter of conscious reflection, but will, wherever possible, be handled beneath the threshold of consciousness. It will be provided as part of the basic sense-making process itself, the process through which the human agent's very experience of the world is "made". It is only where no such guidance is forthcoming, where the immediate problem is truly novel, for instance, or where for some reason past experience cannot serve adequately, that experience of the regularity becomes a self-conscious matter. At this point the legal character of the regularity may well become evident to the human agent.

For mainstream thinking in legal theory, the rather poor view taken of rules here could not be more radical, of course. For a sense of just how far we have travelled

from the standard position, though, we must contrast what is offered here with Hart's well-known "internal aspect of rules". Hart's effort in this respect is particularly relevant as it represents an attempt on his part to take seriously the psychological reality of rules and rule-following. To this extent, his efforts are very much in line with my own in this thesis. As I myself have, Hart makes an important distinction between external observers on the one hand, and involved participants on the other. For Hart, though, it is the involved participant who conducts himself on the basis of rules. They have these rules in mind, and always act in the manner prescribed by them. External observers look on from outside, left to guess at the precise nature of the organisation they recognise within the playing of the game[2]. As they do not have access to the rules themselves, the best they can do is follow the example set by others. Obviously, this leaves them with a much poorer grasp of the game or practice, leaving them, for instance, without the same ability to criticise others for deviation from the rules.

Superficially, all of this is intuitive enough, but there are problems very close to the surface. One such problem is that Hart's view of the matter requires too sharp a distinction between practices and regularities in life which clearly implicate rules and those which do not. Hart's view is really plausible only where our concern is with what is clearly a rule-based practice, where there are indeed rules for the insiders to know. This is not a problem where our concern is exclusively with the law, of course, and nor is it a problem where our concern is exclusively with the various games we

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[2] Hart, "The Concept of Law", pp. 56-57: "This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have similar habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition, they have a reflective attitude to this pattern of behaviour: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but 'has views' about the propriety of moving the Queen in that way."

are familiar with. It is a problem, however, when we attempt to make sense of the larger picture of human behaviour and social organisation. If we are to produce an account which makes sense across all of the various practices – modern law, customary law, the professional activities of doctors and lawyers, the habitual behaviour of the rest of us in day-to-day life – we will have to use "inside" and "outside" in exactly the opposite way. Under this scheme, an insider is someone who is *inside a familiar practice or context or narrative.* So, for example, an individual is either inside or outside the "brushing my teeth" narrative, or the "taking the kids to school" context or narrative. The distinction is crucial, because when the human agent is inside such a context or narrative, he or she will have a relatively limited perspective, missing much of the detail we typically assume is perfectly clear to him. When the human agent is outside of such a context or narrative, however, his lack of familiarity with the context or narrative will have the effect of widening his perspective. Consequently, more of what is there will be evident to him.

For an illustration, think back to our discussion of banknotes in Chapter Four. As I go about my day-to-day life in this community, I see banknotes merely as banknotes. The various institutional arrangements which stand behind the banknote itself are lost to me, so familiar am I with its use. If I were to travel to another community, however, one which used, say, shells as their form of currency, the strangeness of the circumstances would likely cause me to think explicitly about just those arrangements. For me, a banknote is just a banknote. What it is and how it works is experienced directly. As an outsider, however, I would not see shells as currency in anything like so direct a manner. I would use these shells with some awareness of the underlying "rules" involved. Returning to Hart, we can see that this represents a

complete reversal. For Hart, it is the rule-user who has the insider or internal

viewpoint, while those who act with less insight into the processes themselves, who

simply go along with established patterns, are thought of as outsiders, as estranged

from the "real" centre or core of organised behaviour. I should have the institutions in

mind when using the banknote, while using the shells thoughtlessly and uncritically.

Under my own view, however, the opposite is true. For me, it is the outsider who is

more likely to have recourse to rules. This is because rules are most often formulated

as a sort of remedy for inscrutability[3]. The outsider does not "see at once" what the

insider does, and finds that he has to explain choices and patterns of behaviour which

cannot really be explained. Rules fill this gap.

This reversal of inside and outside brings to mind a particular controversy in

discussions of customary law. There is a tendency for anthropologists to think of pre-

legal societies as organised through use of abstract, explicitly formulated rules, even

where abstract rules of this sort are nowhere to be seen within these communities[4].

For the anthropologist Pierre Bourdieu, the prominence given to abstract rules in these

instances is wrongheaded, and comes from the external standpoint taken up by the

anthropologist:

> The anthropologist is condemned to adopt unwittingly for his own use the
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> presentation of action which is forced on agents or groups when they lack
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> practical mastery of a highly valued competence and have to provide

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[3] Thomas Kuhn, "The Structure of Scientific Revolutions", pg. 47: "Rules should therefore become important and the characteristic unconcern about them should vanish whenever paradigms or models are felt to be insecure."

[4] We have already seen Norton's criticism of Hart for making just this mistake, see Chapter Three, n. 2 on pg. 87 below.

themselves with an explicit and at least semi-formalized substitute for it in the form of a repertoire of rules.[5]

Bourdieu's point here is that while the anthropologist imagines that he is uncovering something that is already there lurking beneath the surface, in fact these rules are not there at all, but are *read in* by the anthropologist himself. The rules here must be seen as a *product of analysis.* This is true of rules more generally – they are creatures of conscious thought, what you get when you attempt to bring into the bright glare of conscious attention something which in its natural state is unexpressed and inexpressible[6].

The larger point made here can be illustrated, too, by looking again at the discussion of novices and experts offered in Chapter Three. Indeed, Bourdieu's description of the anthropologist fits the novice like a glove, an agent who, lacking practical mastery of the competence in question, has to adopt an explicit and semi-formalised substitute in the form of rules. We saw all of this quite clearly in our discussion of skill acquisition. The novice begins with nothing, and seeks entry into the "world of the skill" by drawing out explicitly what he imagines are the implicit rules seasoned practitioners make use of. It is easy to see parallels with the anthropologist. He, too, seeks entry into an unknown domain. Beginning with nothing, he proceeds by drawing out, in explicit form, the patterns in behaviour he perceives there. As these are patterns in

[5] Pierre Bourdieu, "Outline of a Theory of Practice", pg. 2.
[6] It is important to stress this: There is no such thing as an unconsciously operating rule. Rules are found above the surface, not below, and where they are found, are almost always *descriptions* of behaviour, rather than the cause of behaviour. Rules do sometimes guide behaviour, but these are peripheral rather than central instances, where the rules are used by novices or outsiders, for instance, or where the practical mastery the expert possesses fails him for some reason. In all of these instances, the practical mastery in question must be excavated and presented in rule-form to help the novice or the outsider gain the practical mastery in question, or to help the expert work around the impediment he faces. Rules must be seen, then, always in relation to practical mastery. The rules exist to help us gain this mastery, to pass it on to others, or to help us adapt when our habits are found to be lacking.

apparently chosen behaviour, he naturally conceptualises these as consciously observed rules. *It is important to recognise, however, that both the novice and the anthropologist represent outsider viewpoints.* They are defined precisely by the *lack* of the sort of competence each is meant to embody or represent. As we saw in that chapter, the novice can only be said to be competent at precisely that point at which he or she ceases to observe these rules. The same is true of the anthropologist. The rules will continue to hold their appeal to him for as long as he maintains his outsider status. If he joins the community, however, and comes to live alongside them day after day, he will eventually acquire a more sophisticated grasp of the way of life in question. He will cease to think of the familiar, daily operations as guided by rules and will come to see these courses of action simply as "appropriate in the circumstances".

When we give the matter a little thought, then, we see clearly that Hart has the matter backwards. If he were correct, for instance, we would have to accept the rule-wielding novice as the true representative of the skill in question. We would hold up trainee doctors and nurses as our exemplars, and consider their seasoned counterparts – those who do not rely on rules but simply "see at once" what is required of them in the circumstances – as estranged from what is really involved. The stilted, precarious character of the novice's command of the skill renders this an unlikely position for us to take[7]. The same is true of the anthropologist. Few would suggest that it is the anthropologist who truly grasps what is appropriate and what is not. Clearly, the members of the community themselves stand as most representative of their practices. While this is plainly true of these particular examples, *my point here is that all of this*

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[7] We will return to this point in the next chapter when we look at judges.

is true even where explicit rules are actually part of the practice in question. It is true of games like chess and football, for instance. In these games, though there are indeed rules, seasoned players of these games do not actually act with these rules in mind. Indeed, it is just this forgetting of the rules that marks the seasoned player out from the novice. Instead of having the rules explicitly in mind, seasoned players come to see the board, the pitch, the players and pieces, all as "things" in their own right, with powers and potential the player is familiar with and ready for. In the end, they forget the rules and come to navigate the landscape set up by the rules in a much more direct manner[8]. All of this is equally true of the law.

The passive aspect of law

My argument in this chapter, therefore, is that the law as it is experienced on the ground is not really a conscious, reflective matter, and nor is it really an affair of rules. Instead, our behaviour in conformity with rules and laws has at its heart what I have described as "ways of coping" or "practical mastery" derived from experience of the particular contexts or scenes involved. Where rules do appear, they are found as a sort of satellite phenomenon, arising wherever this "practical mastery" is insufficient for some reason or other. In the ordinary run of things, however, rules are not required at all, and even when they are present, exercise only an indirect influence on the

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[8] In chess, for instance, truly advanced players see configurations in familiar patterns. This business of "seeing configurations" is simply not possible if the player continues to think of the rules explicitly. Like a driver who must absorb the physical mechanics of driving first, then go on to thinking about this or that plan for getting to work, chess players must begin by learning the rules of game. These rules, however, must eventually be left behind if the player is to be able to concentrate on the specific configurations.

human agent. This unthinking, habitual view of the process is profoundly counter-intuitive, of course, and stands in marked contrast to our present way of thinking about the law. Indeed, if there is one thing legal theorists can be said to agree upon, it is precisely this point. Across the spectrum of opinion, and however dramatically the various theorists diverge in their thinking on other issues, it can usually be taken for granted that the law itself is regarded as a self-conscious, reflective enterprise. Even for rivals like Hart and Dworkin, for example, there is consensus on just this point. For both of them, the law as we know it today is notable precisely for the thoughtful attitude it requires of us. Indeed, for both of them, it is just this attitude that distinguishes life under modern law from the habitual way of life that preceded it[9]. What matters to Hart, for instance, is that there is a "critical reflective attitude to certain patterns of behaviour as a common standard"[10]. The resemblance to Dworkin's account of the emergence of an "interpretive attitude" is striking. For him, too, modern law begins only where law-abiding behaviour ceases to be "unstudied deference to a runic order,"[11] where a complex "interpretive" attitude towards that

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[9] Hart, "The Concept of Law", pg. 56: "When a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. In order that there should be such a habit no members of the group need in any way think of the general behaviour, or even know that the behaviour in question is general; still less do they strive to teach or intend to maintain it. It is enough that each for his part behaves in the way that others also in fact do. By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole."

[10] ibid., pg. 57: "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'."

[11] Dworkin, "Law's Empire", pg. 47: "Imagine the following history of an invented community. Its members follow a set of rules, which they call "rules of courtesy," on a certain range of social occasions. They say, "Courtesy requires that peasants take off their hats to nobility," for example, and they urge and accept other propositions of that sort. For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But then, perhaps slowly, all this changes. Everyone develops a complex "interpretive" attitude towards the rules of courtesy, an attitude that has two components. The first is that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle – in short, that it has some point – that can be stated independently of just describing the rules that make up the practice… Once this interpretive attitude has taken hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order."

practice has emerged. What we can see, then, is that neither theorist really addresses the habitual character of the ordinary man's relationship with the law[12].

While Hart and Dworkin characterise the law as we know it today as having at its heart a "critical reflective" or "interpretive" attitude, our concern in this chapter is with life on the ground. When this aspect of the life of the law is taken into consideration, the critical reflective and interpretive attitudes discussed are clearly inappropriate. Both encourage us to think of human agents as moving through the world, analysing the detached, abstract rules they find there for their content or meaning, and acting, finally, always on the basis of that analysis. At the same time, the depiction both Hart and Dworkin offer of what preceded this species of law bears a remarkable resemblance to the unthinking, habitual social behaviour I am myself setting out here. For all that this self-conscious, reflective attitude is taken for granted, however, often these same theorists are forced to acknowledge the very habitual, unthinking mode of operation they are so quick to consign to history. This is sometimes referred to as the "passive aspect" of the law. The phrase is Hart's[13], but it is accepted by both Neil MacCormick and Lon Fuller. In his article, "Law as Institutional Fact", for instance, MacCormick drew attention to the contracts of carriage that exist for each individual passenger who boards a public bus[14]. Yet he

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[12] As noted in Chapter One, for instance, Dworkin's theory is really a theory of adjudication rather than a theory of law. Similarly, Hart's failure to do justice to life as it is lived on the ground might lead us to think of his theory, too, as offering us a description of the official's attitude to the law.

[13] Hart, "The Concept of Law", pg. 61: "The ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations. He keeps the law which is made and identified in this way, and also makes claims and exercises powers conferred by it. But he may know little of its origin or its makers: some may know nothing more about the laws than that they are 'the law'. It forbids things ordinary citizens want to do, and they know that they may be arrested by a policeman and sentenced to prison by a judge if they disobey. It is the strength of the doctrine which insists that habitual obedience to orders backed by threats is the foundation of a legal system that forces us to think in realistic terms of this relatively passive aspect of the complex phenomenon which we call the existence of a legal system."

[14] Neil MacCormick, "Law as Institutional Fact" in Law Quarterly Review, No.90, 1974, pp.102-129.

accepts, too, that the existence of such contracts occurs to few of us in the ordinary run of things. Instead, we board buses, pay our fares, and take our seats, without once considering ourselves as having entered into a contract of any sort. It is only when the familiar experience of "riding a bus" breaks down in some way – when there is an accident and the passenger begins to think about making a claim against the bus company, for example – that the existence of this contract becomes apparent to us. This tendency for the rules themselves to appear only in exceptional circumstances is not lost on MacCormick, though, like Hart, he goes on to dismiss this troublesome fact as being of only peripheral importance. What matters for him is the existence of the rule, and it is this he holds to, even when it must be offered in the face of evidence to the contrary.

Fuller, too, takes much the same view, drawing attention first to the unthinking, habitual way we live with the law today, before going on to dismiss just this insight. He asks, for instance, why we should consider it so important that laws be promulgated:

> After all, we have thousands of laws, only the smallest fraction of which are known, directly or indirectly, to the ordinary citizen. Why all the fuss about publishing them? Without reading the criminal code, the citizen knows he shouldn't murder and steal. As for the more esoteric laws, the full text of them might be distributed on every street corner and not one man in a hundred would ever read it.[15]

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[15] Fuller, "The Morality of Law", pg. 51.

Fuller's question is a good one: Why do we take the promulgations of law so seriously when we seem happy in ordinary life to remain largely ignorant of these laws, attending to them deliberately only after some problem has arisen? Indeed, in this respect the law appears to exist not to guide practical action, but rather as a resource we draw upon only when faced with ambiguity or when we are attempting to resolve a grievance. The citizen knows that he shouldn't murder or steal, and this knowing appears to have little to do with the law as promulgated. It is only when the orderly way of life has broken down in some way – where a murder or what appears to be a murder has been committed – that knowledge of the law as separate from knowledge of the way of life becomes important[16].

Now, it seems clear to me that there is something profound in this lack of attention to the law itself. In responding to his question, however, Fuller takes this same course as MacCormick and Hart, sweeping aside what is clear from his own observation in favour of a position more in keeping with his underlying view of the law. As a result, his explanation is unconvincing:

… in many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better

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[16] Where Hart, MacCormick and Fuller appeared sanguine about this role for the law only *after the fact*, the Realists thought the point much more significant. Consider the following passage by John Chipman Gray (here cited by Jerome Frank, "Law and the Modern Mind", pg. 35): "Practically… in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all ex post facto. When a man marries, or enters into a partnership, of buys a piece of land, or engages in any other transactions, he has the vaguest possible idea of the law governing the situation, and with our complicated system of Jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all of the legal consequences it involved, the contract would never be made or the act done. Now the law of which a man has no knowledge is the same to him as if it did not exist."

informed than themselves. In this way knowledge of the law by a few often influences indirectly the actions of many.[17]

Fuller suggests that "many men" habitually follow the pattern set by others, while direct knowledge of the law is rather more exceptional. Yet he proceeds then to regard the exceptional case as the more representative[18]. In my own view, however, the more prevalent case must be seen as the more representative. *The law works because men are indeed inclined to follow the patterns set by others.* We are simply designed to "fall in" with the patterns we see in our surroundings. What the "passive aspect" of the law reveals, then, is precisely the view of the matter I have taken here. As far as the individual human agent is concerned, consciously articulated rules are peripheral, not central.

Contrary to what Hart and Dworkin think, then, the law as we know it today does not represent so great a break from the past, and continues to remain largely a matter of habit for us. This is not to dismiss a self-conscious attitude to rules altogether, though. There *is* a sense in which the law is indeed an affair of rules and it is this: While lawful behaviour comes from practical mastery of our environment, *rules are part of the way we now go about establishing these environments.* Indeed, my argument is that it is just this role for rules that truly distinguishes present day law from customary law. *Where communities previously lived with inherited forms of social life they imagined were inevitable and immutable, we now have a mechanism which enables us*

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[17] Fuller, "The Morality of Law", pg. 51.
[18] Fuller's overall explanation for the need for promulgation on pg. 51 of his book makes this clear. Again and again, he looks to the exceptional man: "Even if only one man in a hundred takes pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the law generally available. This citizen at least is entitled to know, and he cannot be identified in advance."

to alter and re-engineer these forms. The inception of modern law saw the introduction of an interface of sorts, then, *an institutionalised process through which the backgrounds we accept uncritically in moving, practical life can be drawn into the circle of self-conscious, reflective attention.* When the background is held in this circle, we are able to improve it in various ways, making it more effective or just, for instance. We then use rules and mechanisms of enforcement to re-establish this new, improved background in moving, practical life. As we are incapable of maintaining a detached attitude for very long, we soon absorb these new rules, "seeing at once" these rules now as embedded into the very surroundings and circumstances we inhabit. This is the crucial point: While these rules are now responsible for social organisation, we do not actually live by them in moving, practical life. *The rules are used to alter or set up the form of social life in question, but once this form of life is up and running, the rules themselves play little or no part.*

This, then, is the right way in which to think of the progress we have made as societies in this respect. We do not really live differently, nor do we really exist as transformed beings in any way. We have simply developed an institutional mechanism which ensures that our forms of life can be evaluated and altered where required[19]. This last point – that change here has come at the level of the community as a whole but not at the level of the individual – is an important one. Think of the

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[19] Note that while there is some similarity in spirit, what is suggested here is quite distinct from what Hart had in mind when he wrote of a transition from a society structured by primary rules only to one characterised by a union of primary and secondary rules. Hart understood pre-legal societies as having a set of unchanging primary rules. The introduction of modern law saw the addition of a second set which allowed the community to make changes to the first set. What I am suggesting here is that the progress we recognise in the transition from one form of organisation to the other has everything to do with the introduction of the rule-form itself. Where, under Hart's view, the community begins with an understanding of social life as structured by rules, in my own view, progress comes precisely because the rule-form is taken up.

way in which Hume's "fact-value" or "is-ought" distinction is generally taken[20]. This insight is thought of as among the greatest and most secure achievements of philosophy, and rightfully so. The problem, however, is the way in which this insight has been taken on by its admirers. The typical approach is to assume that, Hume having sorted the issue out, we now all walk around with a clear view of the difference between facts and values in our day-to-day lives. As Hume has cleared away our ignorance and set our understanding on a new footing, we imagine that we can now safely confine our mistaken thinking to history.

Against this background, it is hardly surprising that we continue to be puzzled by our attitude to institutional facts, and by the apparent factual basis of the law. Clearly, there is an error here. *Just because a philosopher has pointed out the difference between facts and values, it does not necessarily follow that all of us now walk around with this difference effortlessly clear to us*. Indeed, this is true even for the philosopher himself. Just because he or she is able to distinguish between facts and beliefs when reflecting on the issue, it does not necessarily follow that this philosopher thereafter walks through the world "seeing at once" this distinction. We have already seen how easily Hume himself slipped back into everydayness[21]. I am quite sure that, when moving through the world in practical life, Hume took banknotes to be banknotes, and marriages to be marriages, and did not "see at once" either as complex the institutional constructs they really are. My point, then, is this: *Even where we recognise the difference between facts and values, in moment-to-moment, day-to-day life we inevitably slip back into uncritical immersion*. The circle of explicit, reflective attention inevitably closes back on itself fairly rapidly. When it

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[20] See Chapter Two.
[21] See Chapter Four.

does so, however, amendments to the social order continue to persist, becoming part of the landscape the human agent goes on to absorb and cope with unthinkingly in his day-to-day life.

When speaking of an "interpretive attitude" or a "critical reflective attitude", then, we cannot simply take this as an historical achievement and leave the matter there. We need a more subtle explanation. To achieve this we require the dynamic view presented in this thesis. Under this view, the "interpretive attitude" is not a permanent condition. We are capable of it only in short bursts. The *products* of this interpretive attitude can be thought of as historical achievements, though. When in this mode, we can make permanent alterations to our environment which thereafter can come to be embodied in the practical mastery we acquire of this environment. This, in my view, is the right way to think of the relation between deliberation and the laws we observe. While we do not make a self-conscious decision to observe the laws at the time of their observance, we do make a choice to institute these laws. We engineer patterns and regularities in our environment while in the thoughtful mode, deciding deliberately on particular forms of organisation we find desirable or necessary. Once these rules are set in place, however, this thoughtful mode is less and less in evidence. Instead, we absorb the regularities these rules describe in a more profound way, coming to see our surroundings with these rules embedded within them. Rule-based law does indeed represent a thoughtful, deliberate intervention into our way of life, then, an effort to engineer behaviour of particular sorts. As we are capable of conscious, reflective thought only in short bursts, however, the nature of this intervention is more involved than we imagine.

Clear patterns in life

The wrong-headedness of the rule-based view of law is most powerfully illustrated by the fact that where the law is indeed understood to exist in the form of legal rules, *it is that much less likely to exert a hold over us.* The point can be illustrated by looking again at the traffic light scenario presented in the last chapter. There, we saw the driver becoming aware of the fact that there was no good reason for him to stop. As there was little likelihood of accident or arrest, there was nothing, really, to stop him running the red light. There was, however, a legal rule in place. The driver was left, then, with a stark decision as to whether or not he would abide by the rule. At this point his compliance with the law fell squarely on his commitment to legal rules generally and to this rule in particular. As it is clear to the driver that he has no good reason to stop at the traffic light, his decision to abide by the rule would be exactly that, an explicit decision to abide by a legal rule, one taken against his own immediate interests. For theorists like Raz and Hart, this state of affairs is not the least bit exceptional. Indeed, for them, explicit attention to legal rules is the way in which the law is thought to operate all the time. By this way of thinking, all of us are presented with just such a decision whenever we encounter the law, whatever the context, with enough of us making the right decision, enough of the time, to make the enterprise a meaningful one.

Consider the traffic light scenario again, though. If the circumstances described were encountered as a common occurrence within a particular community, with several

different drivers encountering the same problem every night, how many of these drivers would actually wait for the lights to change?[22] Could legal order really be sustained on this basis? Can we trust people always to choose to obey the law? My argument in this thesis is that the greater our awareness of the artificial character of the constraint, the poorer its hold over us, and consequently, the greater the likelihood that we will simply shrug it off and pursue the course we feel is most profitable. To see why this would be the case, we need only place ourselves in the driver's shoes. When we do so, what we find is this: The simple fact that there is self-conscious recognition of a rule in place proscribing or prescribing this or that course of action *automatically brings to mind both the purpose the rule exists to serve, and the possible sanctions that might be applied were he or she to be caught contravening it.* In other words, conscious awareness of the rule brings to mind much of the background to the rule, why it is there and how it is meant to operate. This is not a trivial point, for this awareness of the background to the rule changes the individual's relationship with the law in a dramatic way, transforming it from one of simple compliance – the point of the rule, surely – to one in which personal evaluation plays a large part.

With an awareness of the purpose of the rule, for instance, the individual will find himself thinking about the worthiness of the rule, whether or not the rule is in fact a good one, a rule worth observing. Even if he supports the purpose the rule exists to serve, he may well have reason to consider the relevance of the rule in the immediate circumstances. He may decide, for example, that the rule is a good one but one that, in his judgment, does not really apply in the immediate circumstances. This would allow

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[22] In the next section we will see that there are different classes of individuals, some more likely to wait at the traffic light, others less so.

him to justify a deviation from the course of action prescribed by the rule in this particular instance while preserving, in his own mind, a long-term commitment to the law both generally and on this point. This is problematic, obviously, because it gives the law something like a discretionary character, one contrary to the whole point of the law[23]. The law exists, more than anything else, to give clear guidance as to the way in which life in the community in question characteristically unfolds, guidance all parties use to coordinate their behaviour. This is particularly clear in the case of traffic lights, of course, but it is true of the law more generally. Where individuals are given an opportunity to consider the background to particular laws, however, the law increasingly becomes a matter open to interpretation. As the courses of action particular individuals take in answer to this or that rule diverge – inevitable where interpretation is involved – the law's ability to coordinate behaviour is undermined. The law guides behaviour now only in a much looser sense.

Awareness of the sanctions that might be imposed, too, is problematic. While we are inclined to imagine that the threat of sanctions can in and of itself ensure compliance with the law, in fact this is a relatively inefficient, indeed, precarious way in which to go about achieving the desired result. This is because the strategy requires a formidable enforcement apparatus, a policeman on each and every corner, we might say. In practice, however, the life of the community simply cannot be covered with the required comprehensiveness. This means that, where sanctions carry the burden of compliance, the law will only operate effectively in well-policed pockets, with large

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[23] This is a particular problem with Dworkin's theory of law. As an interpretive theory, it simply cannot be extended to cover the ordinary life of the law, because the law on the ground, at traffic lights, for instance, simply cannot be interpretive. What is required is clear guidance as to the way in which life unfolds, guidance all parties can use to coordinate their behaviour. The problem for followers of Hart, however, is that explicitly stated rules actually encourage divergent interpretations. So they are not really much better off.

stretches of the way of life standing exempt from its influence[24]. *This being the case,*
awareness of the possibility of sanctions is itself corrosive, because it will inevitably
lead in many instances to recognition that no such sanction is likely[25]. To think of the
sanctions that might apply, in other words, is more often than not to think of the
sanctions that will not be applied. This is precisely what we see in the traffic light
example. Matters are made worse by the fact, well recognised, that human beings tend
always to view their immediate circumstances in the manner most conducive to their
immediate aims[26]. We are inclined always to "read" our circumstances in whichever
way is most pleasing to us, in whichever way is most successful at justifying or
excusing the course of action we find most agreeable or comfortable. When judging
the application of the rule or the likelihood of detection, then, the human agent will
likely produce a distorted judgment, one that is most in keeping with his own
immediate interests. Even where the threat of sanctions is likely to be backed up by
the authorities, we will often find individuals pursuing the proscribed course of action
nevertheless.

While Hart was content, then, to simply distinguish between those likely to observe
the rule and those likely to ignore it[27], when we give the matter a little thought we see
that the matter is much more complicated. Indeed, given all of the difficulties

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[24] Indeed, as a rule, whenever a legal order arrives at a point where its authority is derived in the main
from its power to threaten and to apply punishment, the legal order in question is already in a bad way,
on the road to tyranny or collapse. A truly healthy legal order is one in which threats and punishment
supplement, rather than constitute wholly, the basis of compliance.

[25] This is known to bullies everywhere, that threats are most effective where they go unchallenged, and
work best of all where they retain a vague, inchoate character.

[26] See Owen Flanagan, "Varieties of Moral Personality", pg. 320, on "unrealistic optimism": "When
asked their chances of experiencing a wide variety of negative events – for example, auto accidents, job
trouble, illness, depression, or being the victim of a crime – most people believe they are less likely
than their peers to experience such negative events." And later: "Over a wide variety of tasks, subjects'
predictions of what will occur correspond closely to what they would like to see happen, or to what is
socially desirable, rather than what is objectively likely… Both children and adults overestimate the
degree to which they will do well on future tasks… and they are more likely to provide such
overestimates the more personally important the task is."

[27] Hart, "The Concept of Law", pp. 55-58, on the internal and external aspects of rules.

involved, we see that the surest way of ensuring observance is to *remove the human agent's awareness of the very possibility of divergence.* In other words, the rule must be embedded so thoroughly in the individual's understanding of his environment as to leave him with no awareness of any alternative course of action. As we saw in Chapter One, the Scandinavian Realists took just this view. For them, the operation of law requires that citizens *believe* in it, characterising this belief in the law in terms of a fantasy or delusion. If the law is to work, then, it must cast a spell. This is precisely what is argued here. Unlike the Scandinavians, though, we now have a psychological model with which to make sense of this observation. Indeed, we now find the detail of their analysis coming to life. Looking again at Olivecrona's description of the ordinary man's life under law, for instance, or his emphasis on familiarity and a "whole setting", we find all of it makes perfect sense.

According to the psychological model presented in this thesis, the unconscious part of the process works all the time to absorb regularities in the environment, translating these regularities into expectations which allow the individual to negotiate that environment as comfortably, and, crucially, as thoughtlessly, as possible. Concrete experience here translates into "know-how", entrenched plans of action which are triggered by contextual cues and which operate beneath the threshold of consciousness. Where the law is embedded in the "whole setting" of his life, then, when the relationships of cause and effect it describes seem so familiar to him that they seem "a part of the order of the universe like the rising and setting of the sun", then the law will be absorbed and automated as part of the particular contexts the human agent inhabits and moves through in his day-to-day life. When this is accomplished, we will see precisely the seamless embedding of law in practical life

Olivecrona depicted so effectively, the ordinary man simply going about his life, interacting with the law at almost every point, yet only rarely thinking of it. And this not thinking of it is key, for while he remains ignorant in this way, the purposes of the specific laws and possibility of detection that stand behind them will not occur to him at all. Instead his immediate tasks and goals will distract him from possibilities for divergence, his sense of the "right" way in which to go about the specific tasks and goals securing compliance far more successfully than threats of punishment, a social contract or anything else we might imagine.

With all of this in mind, we can distinguish Hart as offering what we might describe as a "bureaucratic" view of the operation of law. As a positivist, it was important to Hart that the law be seen entirely as a matter self-conscious invention on the part of the community. When we take this view, the existence of the law is a relatively straightforward one. All that is required for a legal rule to exist is enactment by the appropriate authority, according to the appropriate procedure. Where the basic existence of the law can be taken for granted in this way, it is subsequent issues like enforcement and political legitimacy that tend to exercise us. The existence of the law itself is rarely in question. Under my own view, however, *the law exists for particular human agents only if it is adequately incorporated into the "form of life" or "life-world" these human agents perceive as they go about their day-to-day lives.* If this is to be the case, the creation of the law is a good deal more involved than generally is accepted. Enactment in the appropriate way, by the appropriate authority is less important than ensuring that human agents actually "see" the law as present in their environment. *In other words, the law must present the human agent with patterns in life clear enough, and stable enough, for this human agent to be able to "fall into" as*

he or she goes about his or her day-to-day life. Where this is the case, law exists. Where this seamless embedding is not achieved, however, then no law can be said to exist, regardless of whether or not the appropriate procedural requirements have been met.

For an example of this need for "belief" in the law, for an experience of clear patterns in life on the ground, consider the consciousness-raising activity that must be undertaken to support laws relating to speeding and drink-driving. Think, too, of lawless inner-city communities. Indeed, the word "lawless" appears particularly appropriate for it is not that the community here is ignoring or choosing to depart from the law. Rather, we must accept that the law simply *does not exist* in these communities. Enactment in the appropriate way, by the appropriate authority means nothing if the law is not implemented in such a way as translates into clear patterns in the day-to-day lives of those communities.

Context and competence in legal life

The arguments presented above all are interesting from a theoretical point of view, of course. As I have noted, however, there are profound practical implications, too. One such practical consideration concerns our understanding of the failure of laws. When we accept the self-conscious, deliberative view in these matters, there is little, really, that we can say about the sort of people who break the law. Nor are we left with much to say about the circumstances in which these offences characteristically arise. As

law-abiding behaviour is thought always to revolve around a choice to abide by a consciously appreciated rule, where the law does not appear to be effective, this can only be explained in one way: As a deliberate choice on the part of the particular individual involved to ignore or depart from the requirements of the law. This may seem reasonable enough, but it is problematic in that it leaves us with no way of distinguishing between different individuals or between different locations or contexts. We have no way of explaining, for instance, why criminal activity is more likely to be found within some neighbourhoods than in others, or why individuals with certain histories are more likely to commit crimes than are others. The point is not a trivial one, for it leaves our criminal justice policies with a certain lack of insight or direction. Our policing policy suffers from its lack of any real understanding of what offending is or why it arises, or instance, leaving police authorities with little guidance as to how their resources should be deployed. Similarly, sentencing and penal policy, too, is unfocused and incoherent. As we do not really understand why the offending arises in the first place, we are left with no idea, really, as to what to do with offenders after they are convicted.

When we think of the matter in this way, then, we begin to see just how poorly served we are by the dominant model and by legal theory as it currently stands. As we have already seen, the model fails what is perhaps the most rudimentary descriptive test we can set it, failing to account for the "passive aspect" of the law. Even more dramatically, however, the view actually impedes our ability to properly implement the law. This, essentially, is my argument in this section. While the standard theoretical understanding of the law has failed in this way, those charged with making a practical contribution in these matters have forged ahead in precisely the direction I

have suggested, offering strategies very much at odds with the picture we are more familiar with. Most prominent in this regard are what are often referred to now as "broken windows" or "zero tolerance" policing strategies. Where these strategies are pursued, the police perform more of a "night watchman" role than that of a professional crime-fighter[28]. Rather than respond to crimes after these crimes have been committed, the police here are asked to concentrate on maintaining an orderly, lawful environment. They are asked, in other words, to *maintain clear patterns of lawful behaviour in the life of the community*. Great emphasis is therefore placed on petty, low-level social disturbances – sometimes described as "incivilities" or "disorders" – which collectively signal a breakdown in the orderly life of the community. While these low-level disturbances are often not so grave in and of themselves, advocates of this form of policing insist that, if left unchecked, these disturbances in fact spawn more serious crime. This is in keeping with the view I have advanced here. Low-level crime, if sufficiently visible and persistent, obscures or annihilates the desired sense of organisation in the environment, organisation which, more than anything else, is responsible for law-abiding behaviour.

While this approach to policing has become popular in recent years, it cannot truly be said to be wholly understood. In practice, considerable emphasis is placed on *perception*, though why perception should be so central is never adequately explained. Consider the following description of the process:

> "Disorders" are conditions and events widely interpreted as *signalling* a
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> breakdown in the realisation of conventional norms about public behaviour.

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[28] Wilson and Kelling, "Broken Windows", The Atlantic Monthly, Vol. 249, No. 3, March 1982, pp. 29-38.

Their presence appears to provide *observable evidence* of neighbourhood decline. Disorders include *visual signs* of physical deterioration and behavioural evidence of social disintegration. Deterioration is *apparent* in the widespread *appearance* of junk and trash in vacant lots, poor maintenance of homes, boarded-up buildings, vandalism of public and private property, graffiti, and the presence of stripped and abandoned cars in the streets and alleys. Disorganisation is *signalled* by bands of teenagers congregating on street corners, public solicitation for prostitution, begging, public drinking, verbal harassment of women in the street, and open gambling and drug use.[29] [my italics]

The passage above is notable for its use of words and phrases like "signalling", "observable evidence" and "visual signs". When asked to explain why it is so important to address these visual signs of breakdown, however, theorists, on the whole, have great difficulty responding. More often then not, the effect is explained through reference to "informal social controls", the ability of ordinary law-abiding citizens to enforce community values and standards through, for example, the supervision of youths, the watching over of each other's property, and a willingness to challenge strangers and those who seem to be up to no good[30]. Under this view, the perception of disorder impedes positive action. Law-abiding citizens keep to themselves and do not actively exert a positive influence on their community. This allows undesirable elements to dominate the life of the community, and so begins the decline.

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[29] ibid.
[30] ibid.

My own view of the role played by perception is a little more demanding, though. My argument is that *the perception of disorder actually encourages disorderly behaviour*. The point can be made by considering the original "broken windows" experiment, related here by Wilson and Kelling in their influential "Broken Windows" article:

> Philip Zimbardo, a Stanford psychologist, reported in 1969 on some experiments testing the broken-window theory. He arranged to have an automobile without license plates parked with its hood up on a street in the Bronx and a comparable automobile on a street in Palo Alto, California. The car in the Bronx was attacked by "vandals" within ten minutes of its "abandonment." The first to arrive were a family--father, mother, and young son--who removed the radiator and battery. Within twenty-four hours, virtually everything of value had been removed. Then random destruction began--windows were smashed, parts torn off, upholstery ripped. Children began to use the car as a playground. Most of the adult "vandals" were well-dressed, apparently clean-cut whites. The car in Palo Alto sat untouched for more than a week. Then Zimbardo smashed part of it with a sledgehammer. Soon, passersby were joining in. Within a few hours, the car had been turned upside down and utterly destroyed. Again, the "vandals" appeared to be primarily respectable whites[31].

It is important to recognise the problems the detail of this account presents for the "informal social control" explanation. Under this explanation, the breakdown in law-abiding behaviour is thought to arise from an inability on the part of the community to

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[31] ibid.

actively enforce its values. There are two obvious problems with this explanation. First of all, it makes sense only if the breakdown in law-abiding behaviour occurs gradually. Secondly, the explanation takes for granted a clear distinction between law-abiding individuals and undesirable ones. Under the explanation, signs of breakdown encourage action from this undesirable element. This action then causes the law-abiding section of the population to retreat, creating more opportunities for the undesirables, which in turn leads to further action, which causes a further retreat, and so on. The picture is therefore a gradual one, with the downward spiral itself powered by a particular group within that community.

What is so striking about Zimbardo's experiment, however, is both the speed with which the community's values appear to break down, and, even more disturbingly, the way in which this breakdown implicates, from the very start, individuals who otherwise appear to be perfectly law-abiding. When we dispose of the dominant model altogether and understand human agents as moving through the world in the unthinking, habitual manner described here, however, all of this makes perfect sense. Rather than a failure of informal social control, our explanation now takes this form: *The breakdown in law-abiding behaviour arises from a failure to maintain the clear patterns in life required to bring about the desired pattern of behaviour.* Under this explanation, the pristine state of the car communicates to the various individuals a sense of the "total, factual background" in place at just that moment. As the range of options available to those individuals is largely determined by this sense of a total, factual background, their behaviour inevitably will follow the path it sets down. Both the immediacy of the effect and the dramatic change in the behaviour of the individuals themselves now are quite understandable, then. And nor is this sensitivity

to context really so controversial. That human beings take their lead from form or patterns in their surroundings is well established within social psychology, after all. Indeed, Zimbardo himself is best known for another experiment he conducted – his Stanford prison experiment – which demonstrated just this sensitivity in a rather dramatic manner.

The contextual or "ecological" approach to understanding crime and criminals stands as one of the more prominent research traditions within modern criminology. Equally prominent, however, is a more person-centred approach, one in which concern centres on the nature of the individuals involved in offending. Early, rather simple-minded efforts included the work of Lombroso, well-known for his measurement of the skulls of offenders. This approach, too, has become increasingly popular, though recent efforts have obviously taken a more sophisticated view of the criminal "type" or "trait" sought. Today, emphasis is given to possible psychological and neurological disorders, and on perceived deficiencies in certain skills, especially those relating to language. Histories of social difficulties – drug use, a childhood spent in the care system – are also taken seriously as perhaps predisposing individuals to a life of crime. Much of the enthusiasm for this approach has come, I think, from the extraordinary prevalence of just these problems within the prison population. Under the typical view little can be made of statistics which point to a disproportionately high incidence of dyslexia within this population, for instance, or of a history of drug use or a childhood spent in care. While legal theorists can shrug these statistics off and proceed with the models of their choosing, those charged with making a difference in the real world do not have the same luxury. Whether or not there is a

coherent theoretical background in place, it is clear to them that some investigation must be made into just these factors.

The psychological model advanced here goes a long way towards providing the required theoretical underpinning. Under this model, an important part of our ability to function in the world comes from our ability to build up a familiarity with the tasks and contexts we characteristically encounter. This growing familiarity allows us to automate those parts of the task or context that can reliably be expected to occur. Operations which are likely to be complex when we first encounter them become easier and easier as our growing familiarity allows the basic sense-making process to take care of more and more of the work involved. My argument here is that social norms operate primarily through this way in which our responses to familiar contexts come to be automated. If this is the case, we should not be surprised to find that certain individuals should prove so resistant to norms and social organisation. First of all, there will be those whose innate ability to absorb patterns in social life and automate responses is impaired. This is where psychological and neurological disorders would be relevant. There are good reasons to believe that disorders like dyslexia stem from more general problems, problems which could find a range of different expressions including offending. There will also be those whose life experience has been so disordered as to leave their ability in this regard, if not permanently impaired, then at least diminished to a considerable extent. This would help explain the high incidence of histories of family breakdown and experience in care among the prison population.

That some such *natural* "context-competence" should prove so central to the matter is not really so difficult to accept, I think. Indeed, support can be found even in the law-abiding population. Consider the relative law-abidingness of women, for instance. It has long been noted that crime is much more a male problem than it is a female one, yet convincing explanations of why this might be the case are difficult to find. According to the model advanced here, however, this would come from the greater innate "context-competence" that women exhibit. This is to argue that women are naturally better equipped at perceiving organisation in the various contexts they encounter, and are more inclined to conform to this organisation. This point is more contentious, of course, but there is well established evidence pointing in this direction. Women are generally recognised as possessing more advanced verbal skills[32], for instance. While this is most often taken as an isolated detail, in fact language skills are highly dependent on the underlying process of skill automation I have described in this thesis. Meaning is use, after all, with the individual's grasp of language coming through the perception and internalisation of patterns of language use experienced in life. We should not be surprised, then, to find women naturally more advanced at both language use and law-abiding behaviour. In both cases, what is at issue is an ability to discern organisation in the environment and internalise it. Once again, this last point

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[32] This has been taken for granted within cognitive science for some time now, though in recent years it has come into question. Increasingly, the view taken is that while differences are quite pronounced in young boys and girls, these differences diminish as men and women age. What is not disputed is that girls appear to "take to" language more readily than boys. Boys have a slower start, proceed more unsteadily and are more likely to suffer from language disorders or deficiencies of various types. For further detail, see Halpern, D, "Sex Differences in Cognitive Abilities", Kimura, D, "Sex and Cognition" and Maccoby, E.E, "The Development of Sex Differences". In this chapter, I am suggesting that there is a shared underlying mechanism involved. I am suggesting that girls take to social organisation more readily, find it easier to "see at once" how social environments work and tend to fall in with these forms of organisation with less effort. In boys, however, the process is less reliable. As a result, boys tend to have a slower start, proceed more unsteadily, and are more likely to fail, particularly if there is no strong external structure to provide the learning process with some measure of discipline.

is admittedly controversial, but the relationship is surely a significant one, deserving of further investigation at the very least.

While a deficiency in the human agent's natural "context-competence" would provide one factor, another would be provided by certain features of the *historical* development of this competence. Under the model offered here, human beings come progressively to internalise the organisation they perceive in their surroundings. Even where the individual's natural ability to internalise this organisation is intact, then, there is always the possibility that the surroundings they have been exposed to over time will not have been sufficiently organised, or not organised in the right way, to allow them to have internalised any, or the right sort, of organisation. Indeed, even without considering failures of this nature, there is a more basic example we can cite: *young people, and young men in particular*. It is well-established that crime is committed, overwhelmingly, by young men. As older people have had longer to absorb the patterns in life around them, it should come as no surprise that older people take "the nature of things" more seriously than younger people do. With their relative paucity of experience, young people have not yet had an opportunity to internalise the organisation around them to the same extent, leaving them with greater freedom to act. There will always be a particular challenge involved, then, in getting young people, young men in particular, to conform to the established norms of the community. This is simply a fact of life and must be factored into our law and order policies. Indeed, we might go so far as categorising young men, alongside the very old, the very young and the infirm, as representing a perennial burden on society, a "problem class" human societies will always have to make provision for in one way or another.

With both of these insights in place – context and competence – we can truly do justice to our experience of crime. Our explanation would take this form: Maintaining clear patterns in life has both long and short-term consequences. In the short-term, it is the immediate situational orientation of the human agent that is most relevant. To grasp the importance of this immediate orientation, we must see human beings as essentially fluid in their capacity for behaviour. Given this underlying fluidity, what holds the individual in check, as it were, is the context he understands himself as inhabiting at any given moment. Even small changes in this context therefore can lead to quite dramatic changes in behaviour. This is the primary, most obvious lesson of Zimbardo's "Broken Windows" experiment. This is only half the story, though, for there is also the long term to consider. If a particular context is held in place consistently over the life of the human agent, we then will see him internalise the specific forms of organisation he recognises in this context. Where this is the case, the human agent will become less and less fluid in his responses to the various cues he receives, his ability to perceive and respond to the world having crystallised along lines suggested by long-term experience. Immediate situational coherence leads, then, to social and moral coherence, with older individuals proving much more resistant to fluctuations in their immediate environment than their younger counterparts.

With both of these factors in place, we are now much better equipped to understand the "Broken Windows" experiment. When the car in Palo Alto is left intact, the whole community recognises this as communicating a particular fact about the life of the community. In this case, a clear pattern in life – the law-abidingness of the community – is maintained, and action in conformity with this pattern follows. This

would not affect the "usual suspects", though – certain young men and those others poorly equipped to conform to the message – who, if given the chance, would likely attempt to vandalise the car anyway. For this group to be restrained, special measures would indeed be required, the informal social controls the standard explanation envisions. At the other extreme are those individuals who do not really need any such immediate pattern in life to ensure their law-abidingness. This would include the elderly and those we would ordinarily characterise as most moral or "upright". These would be those members of the community for whom the "values of the community" were must actively and explicitly pursued in the course of their average day. *What is so interesting about the experiment, however, is the way in which it reveals a large group in between these two extremes, a section of society who in fact can go either way.* Unlike the natural vandals, whatever inclination members of this group might have to damage the car is held in check by perceived organisation in the environment. Unlike the more moral section, however, their aversion to this sort of behaviour is not naturally so strong as to survive the "lifting" of this check. When the car's windscreen is broken, then, the "spell" of law-abidingness is broken and the way is open to a course of action which likely had not even have been contemplated just moments before.

With all of this in mind, a picture quickly emerges of what is required if orderly, lawful behaviour is to be maintained within neighbourhoods and communities. First of all, special measures must be put in place to address the problem presented by those least able, for whatever reason, to conform to the desired form of organisation. This would include, for instance, active moves to provide a structured life for those individuals and families whose natural circumstances do not provide this structure.

Care must be taken to ensure that young men, in particular, are adequately absorbed into clearly structured practices and institutions. Secondly, measures must be put in place to ensure that clear patterns in life are maintained within the community's life in general. This would capture the largest part of the community, those who, as I have put it above, could go either way. What we signally must *not* do, however, is make no provision at all for this creation and shoring up of structure in personal and social life and instead set up what amounts to a series of "moral tests". Where this approach is taken, disorder is given free reign at every level and resources are concentrated instead on addressing individual expressions of this disorder only after they have emerged. Unfortunately, this is precisely the approach that underpins much of our criminal justice policies. It is particularly likely where the self-conscious, deliberative view is accepted.

Chapter Six

The formal life of the law

No doubt my reader will agree that the argument offered in the previous chapter is a radical one. There, I argued that the law as we know it today does not represent so great a break from the past as we are inclined to think, that social organisation and coordination as we know it now operates along more or less the same lines as was the case in pre-legal societies. Indeed, under the view advocated here, the introduction of modern law has brought about very little significant change in the way we experience and move through the world in practical life. When moving through the world, we do not really "see" the law at all. Where laws do have an effect on us, my argument is that this effect comes overwhelmingly from the way in which the law is embedded in what we take to be the physical surroundings we inhabit. The law operates, then, not as a separate aspect of social life. Rather, it supplements the objects of experience and the larger landscape itself, "writing in" attributes and relationships of cause and effect, all of which are accepted uncritically by the human agent. It is this supplementation of the view taken of the surroundings that does the work of constraining the human agent, rather than any more direct or explicit demand for compliance. We stop at traffic lights for no better reason than that it is in our understanding of traffic lights that we should do so, for instance. Similarly, we queue up in post offices because we accept that this is what happens in post offices. As Roger Barker famously put it, we

"act post office"[1]. In all such cases, we "fall in" with an interpretation we have given our surroundings, happily taking up what we take to be the appropriate place for us in the given picture or episode.

While this notion of an unthinking "falling into line" with context is difficult to accept initially, it in fact makes perfect sense when offered within a realistic and searching account of the workings of our mental lives. Indeed, the more intuitive deliberative view comes from not thinking about these workings at all. It is, in a sense, an account of agent-less agency, an account built around the options themselves with little or no thought given to what must be involved in apprehending these options, in having a view on them in the first place. In pursuing the sense-making process itself, then, we are finally doing justice to the complexity of the task. This is desirable in its own right, of course, but there are other, more tangible benefits, too. As we found in the last chapter, the sense-making view allows us to make sense of much of our outward experience of the law. We now are in a position, for instance, to finally make sense of the "passive aspect" of law, acknowledged even by those thinkers and writers most impressed by the self-conscious view. It allows us, too, to bring our theoretical understanding of the law and lawful behaviour in line with what criminologists find when they study actual criminals and criminal behaviour. Particularly satisfying is the contribution the sense-making model makes to our understanding both of situational or "zero tolerance" policing, and of the role played by the lack of a certain sort of competence in offending.

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[1] This is a reference to Roger Garlock Barker's theory of ecological psychology. See his books "Ecological Psychology" and "Habitats, Environments and Behavior".

The sense-making view therefore makes an impressive contribution to our understanding of the law as it is experienced on the ground. This is valuable enough on its own, of course, but what of the formal life of the law? While the model presented here sits very well with the ordinary citizen's experience of the law, the legislature and the judiciary appear to experience the law quite differently. As noted above, ordinary citizens do not appear to think very much about the law itself, but instead are motivated by their immediate plans and goals and are constrained in their pursuit of these plans and goals by their understanding of the particular contexts they find themselves in. The law therefore acts upon these individuals indirectly, through its incorporation into the "design" of these plans, goals and contexts themselves. In the case of the legislature and the judiciary, however, engagement with the law appears much more direct, with legislators and the judges thinking and speaking openly about the law in a way that ordinary citizens do not. Indeed, in legislators and judges we find precisely that which we sought but could not find in the ordinary citizen: *a self-conscious interest in legal rules*. Where the ordinary citizen moves through the world largely ignorant of the legal rules which constrain and direct him at every turn, legislators and judges draw these rules out and attend to them explicitly. With this more attentive attitude in mind, we must ask whether the view taken here has anything to offer us. Is it at all applicable, or is the standard view appropriate? Is the law, for judges at least, indeed an affair of rules?

Well, yes and no. While rules do indeed play a central role in the formal life of the law, we must be a little more circumspect in our thinking concerning these rules than legal theorists generally tend to be. When recourse is made to rules in theory, the account presented always takes a certain form. The rules themselves are thought to be

autonomous, essentially linguistic in nature, and applied always in a fully self-conscious, deliberate manner. This view of rules translates easily into legal theory, and indeed, is found at the very centre of Hart's view of law. In practice, however, the relationship with rules that judges and legislators enjoy is a good deal more problematic. Legal Realists like Karl Llewellyn and Jerome Frank have demonstrated convincingly, for instance, that judges do not really reason with rules in the linear, logical manner so often supposed[2]. Indeed, when we actually pay attention to what really happens in the courts, we find that the business of judging has much less to do with the logical or linguistic properties of rules and much more to do with the psychological reality of the process, with cognitive "coping strategies" like "hunching" and "situation sense". The question for us, then, is this: *What, really, is the role of rules in the law? And just what are these rules in the first place?*[3] As we will see, in pursuing answers to these questions, we will travel far from mainstream thinking on these issues. By the end of our investigation, we will arrive at a position no less radical than the one we arrived at in our discussion of the ordinary citizen.

More broadly, we will concentrate on two general questions, the same two that occupied us when we looked at the ordinary citizen. First of all, to what extent is the application of the law in any given instance of adjudication a deliberate, self-conscious exercise? And secondly, how important, really, is the law as it is found in

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[2] Indeed, in the deductive, rule-based picture of legal reasoning favoured by positivists, we see precisely the agent-less approach described above. As I have put it, it represents an absence rather than a presence. When this view is taken, the judge himself is left conveniently out of the picture, his messy humanity set aside for fear of compromising the clarity and certainty we seek in our account. We are encouraged instead to study the logical form of the rules themselves, with these rules conceived in the form most amenable to scientific and philosophical study: stable, discrete and precisely formed. No thought is given to the psychological reality of judging, no concessions made to the cognitive limitations which may well bear on the process of legal reasoning itself. See Frank, Chapter Four above, n. 2 on pg. 137 below.

[3] Rules have an obvious role to play in the justification of decisions. As it is so obvious, there is a temptation to speak or write exclusively about this justificatory role. My aim in this thesis is to address the more problematic question of actual decision-making. See n. 52 on pg. 259 in particular.

written form? Indeed, to what extent is the law a textual or written enterprise? The relevance of the first of these concerns – the self-conscious, deliberative manner of execution – should be obvious. In thinking of the formal life of the law, our concern is with *the reflective life of particular communities*, after all. This, I think, is precisely what the legislature and the judiciary embody. In their respective ways, both institutions exist to reflect on social organisation and to act on this reflection. Nor is this emphasis on the reflective life of communities particularly novel. As we saw in the last chapter, it is widely accepted that modern law begins with the emergence of a "critical reflective attitude"[4] or an "interpretive attitude"[5] towards the forms of organisation accepted and experienced in day-to-day life. It is this that is thought to distinguish legal from pre-legal social organisation. While all of this is uncontroversial as far as it goes, in fact the underlying notion of reflection emerging within a community is poorly understood. An important part of our task, then, will be to think about this notion of reflection emerging within a community and becoming enshrined in some sort of institutional structure. As will become clear, it is absolutely central that we gain a clear view of this if we are to understand the law.

This concern with reflection leads to our second concern in this chapter, the degree to which the law is a textual or written enterprise. Typically, we imagine that texts and writing are central to this enshrining of reflection in an institutional structure. The products of reflection are thought to be set down in statutes and law reports, for instance, which thereafter are thought to "hold" the law for us. Texts and writing in this way come to be seen as the primary instruments through which reflection on social organisation has its effect on the community. As we will see, though, this view

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[4] Hart, "The Concept of Law", pp. 56-57.
[5] Dworkin, "Law's Empire", pg. 47.

of the role played by texts and writing stems, too, from a rather poor understanding of the various processes involved. In this chapter, we will therefore have to look closely at this notion of texts "holding" the law. As with communal reflection, we will find this matter, too, is a good deal more complex than we are inclined to think.

The reflective life of the community

Let us begin with reflection. To get a clearer idea of what reflection for a whole community amounts to, we must begin with the account we have of reflection as it emerges within the individual. As noted in Chapter Four, we typically take for granted a particular view of the process. Under this view, the theoretical, reflective mode of thought is the basic one, our default state, as it were. This is in keeping with the standard view, which sees human beings as possessing an inherently acontextual view of the world around them. This leaves the human agent always with a clear view both of his immediate circumstances and of the possibilities for action available to him at any given moment. Having accepted this vision of the human agent as the essential one, we then go on to think of immersion in particular contexts as a derivative state, as a modification of the more basic one. Our day-to-day use of the phrase, "caught up in the spell of the moment", reflects this imagined order of priority very clearly. When so "caught up", we are thought to lose our naturally "clear-eyed" appreciation of the world, going on to make decisions which inevitably rest to some degree on hidden assumptions and expectations that come with our appreciation of the moment itself. This last point is not in itself so objectionable. Contextual, practical thinking is indeed

compromised in just this way. *The problem comes, however, in thinking that we can remedy this defect.* As the detached, acontextual mode of thought is considered our natural state, we assume that mental acts free of such assumptions and expectations are possible, indeed commonplace. We assume that we can escape the "spell of the moment" and stand in a wholly reflective or theoretical space, one untainted by unconscious assumption and reflection.

As I hope is clear by now, this view of reflection bears little relation to reality. It does not take a great deal of looking to see that we are not the detached, acontextual beings the we typically imagine, but in fact lose ourselves only too readily in our immediate circumstances, becoming "caught up in the spell of the moment" not only in exceptional circumstances but as a matter of course. Indeed, the view of the process responsible for consciousness taken here places immersion at the very centre of our account, with this taken to be the primary goal of the sense-making process at any given moment. As I have put it, the process exists always to create a state of readiness appropriate to a particular place and time, with whatever is salient marked out as salient, and the appropriate responses ready to hand. This tendency towards immersion had obvious relevance when we were looking at moving, practical life, of course, but it is relevant here, too, because it allows us to see the correct place for reflection. *It allows us to see that it is not immersion that is the derivative state, but reflection.* Recall Hubert Dreyfus's phrase, his description of reflection as a "privative modification"[6]. When we take this view of our experience, we see that reflection is an unnatural state, something we enter into only when necessary, and maintain only for

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[6] Hubert Dreyfus, "Being-In-The-World", see Chapter Four above, n. 10 on pg. 150 above.

as long as is necessary. It is an uncomfortable departure from our natural "way of being"[7].

Placing immersion before reflection in this way has far-reaching implications for our understanding of our own reflective efforts. This is because it leads us to recognise these efforts *all as inherently contextual themselves.* This is not a trivial point. As reflection is entered into always at a particular time and place, against a particular background of unconscious understanding, we must accept that our reflective efforts are always "compromised" by unconscious understanding to some degree, in precisely the way that our more obviously contextually-oriented thinking is. Think back to the description of immersed activity offered above: When we are "caught up in the spell of the moment" we make decisions which inevitably rest to some degree on hidden assumptions and expectations that come with our appreciation of the moment itself. *When we enter into reflection, just such a "compromised" position is our starting point, for we are always "caught up in the spell of the moment" to some degree*[8]. The reflective life of the community is not a separate sphere at all, then, but

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[7] As argued in Chapter Four, the process aims to achieve the most comfortable fit between the organism and the environment, with reflection entered into only as a repair strategy, the means with which the process restores this balance. Ideally, there will be no need for reflection at all. See Chapter Four above.

[8] This brings to mind the distinction Basil Bernstein makes between elaborated and restricted codes, here related by Bernard Jackson: "[Bernstein] distinguishes between "restricted" and "elaborated" codes. A "restricted code" is one where meanings are embedded in a particular social context, and where as a result language needs to be less explicit, since values and understandings are shared (and known to be shared), and therefore do not require explicit statement. "Elaborated codes", on the other hand, arise out of contexts where less is taken for granted, and more needs to be made explicit." See Jackson, International Journal for the Semiotics of Law, v.13 (2000) pp. 433-457 at 447. We must supplement this scheme, however, in the following way: Our default state is to work with a restricted code, with this code becoming progressively more elaborated only where there is a need for this elaboration. As the process seeks the most comfortable, effortless fit with the immediate environment, it seeks, above all else, to establish a restricted code suited to just that environment. When events unfold in an unexpected manner, however, the code must be elaborated to assimilate these new circumstances. Once this is achieved, the human agents return to using the restricted code, now adapted in such a way as to accommodate the novel developments. Note that Bernstein associated "restricted codes" with orality and "elaborated codes" with literacy. For my purposes, however, the distinction between orality and literacy is less important than the more basic distinction between unreflective practical life (speech in practical settings, for instance) and the sort of reflective activity associated

in fact must be seen as emerging in little pockets *within* moving, practical life.

Crucially, it must be seen as emerging almost always as an *answer* to demands felt

there, *demands set up or structured by the initial situating or contextualising activity*

that preceded it. This last point – the essentially *responsive* character of reflection – is

particularly important, because it means that reflection always arises *with its work and*

its materials already set out for it. As we will shortly see, this has far reaching

consequences for our understanding of the products of reflection generally, and for

the law in particular.

Reflection is not, then, a fully-fledged, independent "way of being" – a distinct sphere

of life uncoupled from its practical counterpart – but instead excavates or uncovers

what, for the most part, *is already there*. It is not a free-floating capability, a spotlight

we can direct first here, then there, all the while producing a perfectly objective and

autonomous analysis. On the contrary, reflection is not only always reflection *in*

particular contexts, it is always reflection *applied to just those contexts, from within.*

Heidegger puts this point very well:

> In interpreting, we do not, so to speak, throw a "signification" over some
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> naked thing which is present-at-hand, we do not stick a value on it; but when
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> something within-the-world is encountered as such, *the thing in question*
>
> *already has an involvement which is disclosed in our understanding of the*

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with universities and courts (speech and writing in "literary" settings). The distinction between orality
and literacy, on its own, tends to mislead thinkers into thinking that the distinction is significant in and
of itself. Once again, the reflective-unreflective distinction is more basic. We might say that an
emphasis on orality and literacy encourages us to take an expression of the mechanism for the
mechanism itself.

world, and this involvement is one which gets laid out by the interpretation.

(my italics) [9]

Heidegger here captures the matter perfectly. The standard picture of reflection assumes that the reflective act itself floats free from the rest of the cognitive work involved in the encounter. It assumes that we are able to encounter a "naked thing" in a neutral cognitive act[10] and go on then to "stick a value on it". In fact, no such neutral cognitive act is possible. *On the contrary, the reflective act always starts part-way through its own work, with a view already taken of the object in question. The reflective act then folds back on this view already taken, drawing it out and bringing the structure of assumption involved to the notice of the experiencing agent himself*[11]. Reflection is not, then, a process by which an autonomous position is built up from first principles. It is, rather, much more in the nature of an uncovering, a coming into awareness. As I have put it above, it is always backward reasoning. Reflection is therefore best thought of in the following terms: *As a growing self-consciousness towards a view already taken, a growing awareness of the unspoken assumptions that underpin effortless, uncritical experience.*

While all of this may well sound rather esoteric and remote from our understanding of the law, in fact it has profound implications for us, for when we return to the emergence of the "critical reflective attitude", we must see this attitude, following the discussion above, as one that *issues from*, and *operates always in relation to, a*

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[9] Heidegger, "Being and Time", pp. 190-191.

[10] See also John McDowell, "Mind, Value and Reality", pg. 82: "The appetitive state should be capable in principle of being analysed out, leaving a neutrally cognitive residue."

[11] Bartlett, too, describes reflection in this way: "[man] learns to utilise the constituents of his own 'schemes', instead of being determined to action by the 'schemes' themselves, functioning as unbroken units. He finds how to "turn around upon his own schemata"… a reaction literally rendered possible by consciousness and the one which gives consciousness its pre-eminent function." ("Remembering", pg. 801).

particular set of practices that are already in place. It suggests that the reflective life of a community is not a separate sphere, but in fact is found at the very heart of its practical life. This may sound perfectly reasonable, even banal, yet it stands in marked contrast to the view that is characteristically taken by legal theorists. As noted above, for most theorists, modern democratic law is understood to be quite distinct from its predecessors. In contrast to the thoughtless, deferential character of what came before, modern law has at its heart a desire on our part to take a hand in the "shape" of our collective life, to organise this collective life rationally. This is all quite correct. *The problem, however, is that when thinking of this effort to organise social life rationally, there is a tendency for us is to view this effort as something like a fresh start.* We imagine the community sweeping away its past and setting social life on an entirely new footing[12]. In keeping with this new footing, we imagine that the law is *applied from above*, a form of organisation that is *imposed upon* the contexts of practical life.

When we say that the law arises from reflection, then, we must be careful what we mean by this. What we do *not* mean is that legal forms of social organisation are, as it were, *designed* from within a separate reflective space. It is just this underlying view of reflection – as belonging to a distinct realm, safely insulated from practical life – that leads us to think of the law as *created* in the most straightforward sense of this word. As we assume that we can escape the "spell of the moment" and stand in a wholly reflective or theoretical space, we imagine that we are able to create

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[12] As we saw in the last chapter, for instance, in the writing of both Hart and Dworkin there is a suggestion that the emergence of the critical reflective or interpretive attitude represents a new phase in the life of the community, a dramatic shift which sees the whole business of social organisation transferred to an entirely new mechanism. It is as if the community in question suddenly wakes up to its habitual pattern of daily activity and decides from that moment onwards that life will be lived thoughtfully, through the observance of deliberately formulated rules.

autonomous mental artefacts – definitions and rules, in this case – which break free of our prior assumptions or unspoken understanding. These mental artefacts can then be applied from above as wholly self-contained and autonomous. *The point of the discussion above, however, is to make clear that the reflective life of a community is not really a space or forum devoted to design in this sense. It is, rather, primarily a space or forum for grievance or crisis or "trouble"*[13]. When thinking of the emergence of a "critical reflective attitude" to social practices, then, what we *do* mean is this: *Practices which previously went unnoticed now come to our attention – usually because of a problem or conflict of some sort – and as a result, become subject to some form of self-conscious intervention.* As a result of this intervention, an explicit measure is introduced. What must be grasped, though, is that this measure is not autonomous or self-sufficient, but in fact arises from the initiating set of circumstances. It is not applied to those circumstances from above, then, but instead rises up through it.

All of this has dramatic implications for our understanding of positive law. Indeed, *it forces us to accept a two-tier, tip-of-the-iceberg view of law, with explicit legal rules sitting atop, and arising from, a pre-reflective understanding of the way- or form-of-life.* As it happens, this continuity between the law and the underlying way of life from which it emerges has been noted by several writers. Sumner, for example, famously noted the central role played by what he described as the "mores" of the community[14]. For him, legislation arises from these "mores", and, moreover, remains bound up in them indefinitely. As he put it: legislation "has to seek standing ground

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[13] Karl Llewellyn, "The Normative, The Legal, and the Law Jobs: The Problem of Juristic Method" Yale law Journal 1940 1355.

[14] Sumner, "Folkways", pg. 60: "The mores... are, before any beginning of reflection, the regulators of the political, social, and religious behaviour of the individual".

on the existing mores"[15], and must be consistent with these mores if it is to be strong.

Friedrich Karl von Savigny, too, famously took much the same view. For him, the

matter begins with what might be described as the "spirit of the people"[16]. It is from

this base – the particular faculties and tendencies of an individual people – that

modern, positive law emerges[17]. However reflective the process of enactment, then,

we must accept that the process of reflection itself will take for granted a particular

landscape to begin with. As I put it above, reflection always arises with its work and

its materials already set out for it. This being the case, the resulting legal measure will

always look "outside" of itself in a particular way. It will always take for granted a

particular background of assumption and expectation, all of which remain a part of the

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[15] ibid., pg. 55.

[16] Savigny, "Of the Vocation for Our Age For Legislation and Jurisprudence", pg. 24: "In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attitudes to the view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin." See Roger Cotterrell's description in his "Introduction to Sociological Jurisprudence", pg. 23: "For Savigny law is an expression, one of the most important expressions together with language, of the 'spirit of a people' (Volksgeist). This deeply mystical idea at least involves the notion that law is much more than a collection of rules or judicial precedents. It reflects and expresses a whole cultural outlook. The spirit of a nation or people is the encapsulation of its whole history, the collective experience of the social group extending back through the ages of its existence. The law of such a people or nation written down at any given time is no more than a static representation of a process which is always continuing: the evolution of culture. For Savigny, law is incomprehensible as a social phenomenon except in the perspective of the history of the society in which it exists."

[17] Savigny, pg. 28: "With the progress of civilization, national tendencies become more and more distinct, and what otherwise would have remained common, becomes appropriated to particular classes; the jurists become more and more a distinct class of the kind; law perfects its language, takes a scientific direction, and, as formerly it existed in the consciousness of the community, it now devolves upon the jurists, who thus, in this department, represent the community. Law is henceforth more artificial and complex, since it has a twofold life; first, as part of the aggregate existence of the community, which it does not cease to be; and secondly, as a distinct branch of knowledge in the hands of the jurists." Sumner, too, referred to a "twofold life", when he wrote of the "top-most" layers of the communities 'mores', these top-most layers being the only part of the structure which is subject to change and control, and which, uniquely, are partly constituted by "human philosophy, ethics, and religion, or by other acts of intelligent reflection". See Sumner, "Folkways", pg. 4: "The folkways, therefore, are not creations of human purpose and wit. They are like products of natural forces which men unconsciously set in operation, or they are like the instinctive ways of animals, which are developed out of experience, which reach a final form of maximum adaptation to an interest, which are handed down by tradition and which admit of no exception or variation yet change to meet new conditions, still within the same limited methods, and without rational reflection or purpose." Sumner continues: "…only the top-most layers of which are subject to change and control, and have been somewhat modified by human philosophy, ethics, and religion, or by other acts of intelligent reflection."

resulting measure, giving it clarity and determinacy[18]. We are mistaken, then, in thinking of the law as autonomous, and of rules as self-sufficient. Rather, both must be seen *to incorporate social understanding*, or to be "open to the outside" to some degree. As these notions of autonomy and self-sufficiency stand at the heart of almost all of the issues that are of interest to us within legal theory, the importance of this insight cannot be underestimated.

Literal and obvious

In fact, the autonomy of modern law has a somewhat odd place in our thinking concerning the law. From a commonsense point of view, it does not sit at all well with much of what we know of the law. It is not consistent with what we know of the history of the law, for instance, and nor does it match our own immediate experience of law-making. When contrasting the law with pre-legal forms of social organisation, for example, we do not really imagine some distant "year zero", a distinct point at which pre-legal forms of organisation were suspended and social life set on an entirely new footing. Clearly, the law cannot have emerged all at once, a comprehensive answer to all of the challenges and ambiguities of social life introduced at a stroke[19]. Instead, we are happy to accept a more drawn-out and haphazard genesis, with particular areas of life coming under explicit scrutiny and the

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[18] Indeed, as Llewellyn noted, this "partway, incipient law-stuff" not only gives articulated law its clarity, but is itself law, sitting silently beside or beneath recognised law, waiting to be excavated by a judge in a hard case. See Llewellyn, "Law Jobs", pg. 1358-1359.

[19] Yet consider social contract theory. Advocates of this view of law would not for a moment suggest that the drafting of such a contract is true historically. Instead, what is suggested is that the notion of a contract is true conceptually. Indeed, the social contract view exists to articulate much of what I have described above, that the law stands wholly separate from what came before, that it represents always a fresh start. Yet if the view is not true historically, is it really wise to pursue the view conceptually? My argument in this chapter is that the social contract view of the law is wrong on all counts.

required measures enacted. We accept that it is this piecemeal approach that is responsible for the familiar patchwork appearance the law exhibits, with enacted law found as merely one element in the complex and diverse web of influences responsible for social organisation more generally. When thinking of the efforts of the legislature today, too, this more intimate and complex relationship with practical life is not disputed at all. We are quite happy to see legislators peering over the shoulders of judges, businessmen, journalists and academics, all the while keeping track of developments and responding to problems as they emerge. We see their efforts uncontroversially in terms of *an engagement with just these problems and contexts,* a taking into hand of these problems and contexts with a view to addressing them in some useful way.

When we take a narrower view of the matter, however, and attempt to think about the law in an analytical way, a very different view quickly comes to dominate our thinking. When, in the course of our theorising, we think about the form particular laws take, for instance, it appears to become very important to us that a clear line be drawn between the measure itself and the problems and contexts which give rise to it. The very intimacy accepted happily above now becomes problematic, and it instead becomes important for us to think of the law as an entity in its own right, a "thing" wholly separate from whatever might have inspired it. The distinction made between particular laws and their underlying inspiration is a basic one, featuring prominently in legal textbooks. In his book, "The Scottish Legal System", for instance, David M. Walker provides one such example:

Every principle and rule of law has an historical source somewhere, even though it may not be known, but the principle or rule does not draw any validity or binding force from that source. The historical source merely explains when and how that rule came to be established. It frequently helps also to explain why the rule took a particular form.[20]

For all that the law can be accepted as drawing upon sources in this way, then, and for all that knowledge of such a background might help us understand the particular measure involved, we are nevertheless asked to think of the measure itself as distinct, as if it can be severed from this background and left to stand on its own feet, a self-sufficient entity in its own right[21]. The legislature is thought to consider the sources available to it, absorb these sources in some way, and then, in a wholly separate act, goes on to create a rule in answer which thereafter can be thought of as self-sufficient, as providing us with all we need. Reference can be made to the sources involved, of course, but only for the light these sources shed on what might be "inside" the rule. The sources themselves are not "the law" and cannot be considered in any more direct manner.

There is some tension, then, between the way we see the law as both a contextual, involved social activity, on the one hand, and as an abstract, detached activity on the other. This tension can be glossed over, however, provided we see human beings as able to step in and out of their contexts at will. This, in effect, is what is suggested by the textbook passage above. The legislators begin in an immersed, contextual mode,

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[20] David M. Walker, "The Scottish Legal System", pg. 407.
[21] As Stanley Fish has put it, the law "wishes to have a formal existence". See Stanley Fish, "The Law Wishes To Have a Formal Existence", in "The Fate of Law", edited by Austin Sarat and Thomas Kearns.

participating in social life and drawing knowledge from it. At the point of law-making, however, they are thought able to step out of social life, escape the "spell of the moment", and stand in a wholly reflective or theoretical space. It is this that allows them to create autonomous mental artefacts which break free of the unspoken understanding which comes with their reliance on their participation in social life in the first place. It is this possibility of a wholly reflective act that gives us our confidence in the rule-form, for it is this that holds out to us the possibility of rules that are perspicuous and self-declaring, rules that can be passed as if from hand to hand, moving from person to person and from institution to institution without distortion. This view of rules leads us, in turn, to think of the law more broadly as a largely abstract exercise – an affair of rules – with the institutions and parties involved all hermetically sealed within their respective bubbles of reflective space, communicating through the narrow conduits provided by these perspicuous, self-declaring words and rules[22]. The application of law as a pre-dominantly linguistic or logical exercise follows close behind, setting the stage for what we take to be illegitimate exercises of discretion, indeed "law making", whenever judges find that they must look beyond a purely linguistic or logical analysis of these words and rules.

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[22] Within Integrational Linguistics, this view is referred to as the "fixed code" or "telementation" view of communication or language use. See, for instance, Michael Toolan, "Integrational Linguistics: A First Reader", pg. 76: "Crucial to telementation, or 'ideas-transfer' is the assumption – which is either false, unprovable or irrelevant, and perhaps all three – that when A speaks to B the same idea that A used and encoded into speech is picked out, highlighted, or recreated in B's head. A has an idea and, via the 'conduit' of language, B receives a copy. In telementation, language enables ideas to be faxed or, in a generous interpretation, re-assembled or re-created; what telementation signally excludes, and what a genuinely anti-telementational approach such as Harris's integrational linguistics includes, is the notion that in situated interactions between As and Bs, all parties draw on language to construct or create ideas. It's all the difference between duplication and invention." Maturana and Varela, in their book, "The Tree of Knowledge", call this the "metaphor of the conduit or tube", the idea being that language provides a conduit or tube through which meaning is passed from person to person or institution to institution. See pg. 196: "Our discussion has led us to conclude that, biologically, there is no "transmitted information" in communication... The conclusion is only surprising if we insist on not questioning the latest metaphor for communication which has become popular with the so-called communication media. According to the metaphor of the tube, communication is something generated at a certain point. It is carried by a conduit (or tube) and is delivered to the receiver at the other end. Hence there is something that is communicated, and what is communicated is an integral part of that which travels in the tube..."

We must ask, though: Does the law ever really succeed in becoming autonomous in the manner envisioned? Is it really possible for the law to exist on its own in this way, severed from its origin in practical life? The questions themselves may strike some readers as strange. Certainly, they are almost never asked. We seem to take the notion of a wholly autonomous legal measure to be unproblematic. What is striking, then, is that there is evidence to the contrary everywhere in legal life. We can see this at every level. We have already seen it in the historical and practical reality of law creation. Most prominent of all, perhaps, is the ever-present need for statutory interpretation. The following example is representative. In answer to the problem of racial discrimination, the Race Relations Act was enacted in 1976. Rather than referring to a specific historical problem or set of problems, however, the Act attempts to define "race" in such a way as to allow the Act to operate autonomously:

> 3. - (1) In this Act, unless the context otherwise requires – "racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins; "racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.

As should be clear, the Act pointedly does not indicate to, nor even acknowledge, a pre-existing social problem. The Act certainly does not seek to rely on a grasp of any such problem on the part of the officials charged with applying the law. On the contrary, the Act appears to seek to sweep away all of this background understanding,

as if it intends to place our understanding on an entirely new footing. Indeed, this "sweeping away" of the past appears to be central to the whole project. The official implementing the Act is asked to set his own understanding of racism to one side and draw exclusively on the definition provided in the Act. As so often is the case, however, the definition was found in practice to be insufficient. In a well-known case under the Act, *Mandla v. Dowell Lee*[23], the question arose as to whether or not Sikhs fell within the definition of race offered. The case presented a special problem for the courts because Sikhs are not, strictly speaking, a racial or ethnic group[24]. In the end, the court was left to work out its own decision by drawing on material external to the Act itself. In doing so, the judges drew heavily on their own common-sense understanding of what racism is, and of who the likely victims of racism are[25]. This is, of course, precisely the sort of operation the autonomous definition exists to avoid.

This need for judges to interpret statutes, and to do so by drawing on material "outside" the statute, is common enough, of course. Indeed, "hard cases" such as these are accepted simply as a fact of life. They are regretted, certainly, but are not thought to present so much of a problem as to cause us to lose our faith in rules altogether. The assumption is that the law as a whole is characterised by "easy cases" in which the linguistic form of the rule presents no problems, and in these cases, the

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[23] Mandla v. Dowell Lee, [1983] 2 AC 548.

[24] The heart of the matter was whether or not Sikhs could be considered to be a group defined by reference to colour, race, nationality or national origins. In fact, in none of these respects are they distinguishable from many other groups, especially those living, like most Sikhs, in the Punjab. Lord Denning led a unanimous Court of Appeal in saying that Sikhs were a religious, not a racial group, and that the Race Relations Act did not exist to protect groups defined by religion. This left what amounted to a gap in the law, with groups like Sikhs (and perhaps Jews) unprotected. The House of Lords unanimously overturned the earlier decision, construing the term "ethnic" in a broad cultural and historic sense.

[25] The court used dictionaries, for instance, to ascertain the meaning of the term "ethnic". In the end, though, a New Zealand case in which a similar question was asked concerning Jews appears to have proven most influential. The court asked whether legislation enacted to address racial discrimination could conceivably exclude Jews, decided that this was unlikely (Jews represent a paradigm for victims of racial discrimination, surely), and then extended this principle to Sikhs, who were seen to occupy a similar position.

judge proceeds by looking *solely* to the form of words used[26]. The problem goes much

deeper, however, for the need to look "outside" the law is not confined to "hard

cases" like the *Mandla* case above. Indeed, we must ask: Is *Mandla* really a "hard

case"? The judge there had a perfectly clear handful of words to work with, after all:

"colour", "race", "nationality", "ethnic or national origins". There is no ambiguity in

any of this. The judge could easily have applied the meaning of the words, taking

these alone as providing him with the law on the matter. Yet he did not settle with this

interpretation, choosing instead to widen his inquiry. Why? What made this case

"hard" for him?[27] Clearly, the judge had something else he felt he had to take into

consideration. Indeed, this "something else" appears to have been his priority, for it is

this that appears to have determined how seriously he took the literal meanings of the

words. What was this "something else", though?

For our answer, we need only return to our discussion above, our belief in the

possibility of a wholly reflective act. Our problem here comes from just this belief,

from the way it encourages us to think of the law as an abstract exercise, as one in

which the institutions and parties involved all are sealed off from practical life,

communicating exclusively through words and rules. Having taken this view, we find

that we have no way of explaining the distinction made between "easy" and "hard"

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[26] This is the view represented by Hart and MacCormick. Both acknowledge that the rule-form is imperfect and does lead to indeterminacy from time to time. Nevertheless, they are quite sanguine about this, and feel sure that the rules work well enough most of the time. This is the attitude that stands behind Hart's arguments concerning the "open-texture" of rules, for instance. See "The Concept of Law", pp. 124-136.

[27] Bernard Jackson makes more or less the same point in a slightly different way. Referring to Hart's example of the rule, "No Vehicles in the Park", Jackson asks whether an ambulance would represent a hard case. If so, why? The question of whether or not an ambulance is a vehicle is surely perfectly straightforward from a linguistic point of view. See Jackson, International Journal for the Semiotics of Law v.13 (2000) pp. 433-457 at 436: "But what of an ambulance entering the park to pick up a man who has suffered a heart-attack? Is the ambulance not a "vehicle"? Does this case not fall within Hart's notion of "core meaning", where "the general terms [here, "vehicle"] seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic'… where there is general agreement as to the applicability of the classifying terms?"

cases. When we reject this rather naive view, however, and place our judge much more realistically within the larger life of the law, the answer to the question above quickly becomes clear: *The judge's sense of whether or not a particular case is "easy" or "hard" comes from the more general understanding he brings to his act, and more specifically, from the understanding he has of the "point" of the measure, the underlying problem he believes the statutory provision exists to address.* In practice, then, when applying the legal rule, the judge asks, not "what situations do the words of this rule cover?" but "what typical situations do the words of the rule evoke?"[28] Where the words of the rule fit easily with the judge's expectations – where the typical situations which come to mind match effortlessly with the immediate case – the case is experienced as "easy". The judge "sees at once" just how the rule should be applied[29]. Where the immediate case does not match the typical ones, however,

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[28] The phrase is Jackson's, see n. 27 above. It is important to stress that in referring to "typical situations" in this way, I am pointedly not referring to any concern with the intention of Parliament. What I (and Bernard Jackson, I think) have in mind is something quite different. Though the judge may go on to seek out the intention of Parliament when attempting to resolve the problem, my concern here is with *whatever made him second-guess the literal interpretation in the first place*. It is with whatever it is that makes him experience the case as problematic in the first place. My point is that the judge in this case appeared to come to the stated legal measure already prepared in a certain way, and that it was this preparation that led him to see it as "hard" rather than "easy". Obviously, it is not plausible to suggest that judges come to each provision already equipped with a view of Parliament's intention in enacting the measure in question. Indeed, in many instances, it is not merely implausible, but quite impossible. There is no scope for any such concern where the issue is one that arises under case law, for instance. It is plausible, however, to suggest that the judge comes to such provisions already equipped with a grasp of the *standard form taken by cases brought under the provision*. This is what is meant by "typical situations". What is suggested here, then, is that the judge comes to the cases brought before him always with an expectation that is itself derived from his experience both as an ordinary citizen and as a lawyer and judge. When the immediate case conforms with this expectation, the case will be experienced as an easy one. When it does not, however, then the judge will experience it as hard.

[29] Note that there is a significant difference between my own view and the position taken by Bernard Jackson. The difference concerns the role language plays in the proceedings. In offering my argument, I am attempting to displace language quite radically. My point is that we rarely see language as language, that words and sentences appear to us transformed by the past experience of the individual involved, and the immediate contexts in which the word or sentence is encountered. When I ask "what typical situations does the rule evoke?", then, my concern is with this contextual and experiential background. The words themselves "drop out" fairly quickly. Jackson, I think, has something else in mind. For him, the law remains a linguistic exercise. In his view, however, language comes to us coloured by a particular sort of social understanding. He writes of an "oral residue" which causes us to receive language in particular ways, informed by deeply rooted narratives. See, for example, Jackson, "Studies in the Semiotics of Biblical Law", pg. 75: "Instead of asking: 'What situations do the words of this rule cover?' we may inquire: 'What typical situations do the words of this rule evoke?' While the

then the case is experienced as "hard". Here, the judge must work deliberately to reconcile the rule as stated, the social problems and contexts he understands the rule to serve, and the institutional arrangements which set out what is and what is not an appropriate response from him.

To grasp what is intended here, and particularly the difference between an experiential and a linguistic view of these matters, it helps to distinguish between the *literal* meaning of a particular provision, on the one hand, and the meaning the provision appears *obviously* to intend, on the other. Typically, easy cases are thought to be those cases where the literal meaning is guiding. If the words themselves can be interpreted without ambiguity, then this interpretation must be accepted, however it sits with our wider concerns. According to this view, it is only when the meanings of the words fail to offer a clear interpretation that the case becomes a hard one. It is only at this point that the wider concerns are thought to come into play. Under the view advocated in this thesis, however, what really matters is the degree to which the judge finds the meaning of the provision to be *obvious*, which is not at all the same thing. This obviousness will be determined by the degree to which the circumstances of the immediate case are found to conform to past experience. The closer the match, the more obvious the meaning of the provision will appear. Against this, the question of whether or not the reading is a literal one will be a secondary matter. Of course, where statutes are concerned, it is actually quite likely that the literal and obvious readings will coincide. This is because, unlike case law, statutory provisions are drafted very much in answer to past experience of specific problems. The result, then,

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quest for literal meaning may produce a paraphrase (the substitution of one linguistic formulation by another), the alternative looks to the *typical narrative images* – of situations within human social contexts – evoked by the words." Where I myself am rejecting altogether the picture of judges interpreting texts, Jackson appears to be remaining with this basic picture, but substituting narrative images for the more traditional linguistic formulations.

will be a linguistic statement which, more likely than not, captures just that historical experience. Think back to the definition of racism in the example above, for instance. As the definition is drafted specifically in response to historical experience of the problem, the definition will understandably conform very closely to this historical experience. When a subsequent case emerges that conforms so closely to this historical experience as to facilitate an obvious reading, it is likely, then, that a literal reading will indeed match historical experience of the problem concerned. Though this coincidence is highly likely, it is nevertheless important to get a clear idea of their relative priority – obviousness is guiding, literalness follows as a by-product of this obviousness.

The difference between literal and obvious can be demonstrated, too, by looking at the interpretative strategies judges employ when interpreting statutes. Consider the famous three rules of statutory interpretation: the literal, golden and mischief rules[30]. The rules are generally thought to be applied in a particular order: first literal, then golden, mischief last of all[31]. The idea here is that the interpretation is actually *achieved* in this order – through consideration of the words used within the relevant provision if at all possible, through consideration of the provision or statute or area of law more generally if necessary, and finally, and only as a last resort, by thinking more directly about the underlying problem involved. The impression given, then, is of the judge excluding extra-linguistic considerations completely in the first instance, but gradually admitting these considerations in line with the demands of the problem.

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[30] These rules of interpretation are widely covered, of course. See, for example, Michael Zander, "The Law-Making Process", pp. 108-131.

[31] In their comparative study, for instance, MacCormick and Summers found that judges consistently employed the same interpretive strategy, considering arguments of particular types always in a particular order: linguistic arguments first of all, systemic arguments where the linguistic arguments fail, and finally teleological-evaluative arguments as a last resort. See "Interpreting Statutes", MacCormick and Summers.

This is in keeping with the view we characteristically take of the law as autonomous – the written law provides the judge with everything he needs in most instances, and if he sometimes has to make a broader, more personal assessment, this is rare and cannot be helped. When we look more closely, however, we see that the very same question emerges: What makes the "easy case" easy? In this context, we ask: What is it, exactly, that makes the judge cycle through the options in the way that he does? What is it that leaves the judge dissatisfied with a purely linguistic analysis? If all extra-linguistic considerations are excluded at the outset, what is it, precisely, that makes the judge decide to include such considerations?[32]

In fact, what the interpretive strategy reveals – linguistic arguments first, systemic ones second, and teleological-evaluative ones last of all – is not at all what we are inclined to assume. The order in which the arguments are offered appears to suggest that it is the language of the Act that is of paramount importance. The judge tries first to find his answer there, and moves on only when this strategy fails. *When we look more carefully, however, we see that the order of priority is in fact reversed. What matters most are the teleological-evaluative considerations, followed by the systemic ones, with linguistic arguments thought least important of all.* If we are to recognise this, however, we have to think of the various considerations as occurring not serially – that is, one after the other – but all together in *parallel*. In other words, the judge's initial expectation will be to find an interpretation in which *all three types of consideration are satisfied simultaneously*. When this is the case, the judge will tend to justify his decision by setting out only the linguistic part, and it is this that leads us

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[32] This is, effectively, the point of the discussion of Mandla v. Dowell Lee above. If the judge is initially concerned with only the literal meaning of the words used, then what difficulty causes him to move on to the other approaches to interpretation? What is wrong with "ethnic origins" from a purely linguistic point of view?

astray. In fact, the words here are merely the tip of the iceberg. They stand for a larger picture in which each of the levels lines up perfectly. If the words themselves are not easily reconciled with the judge's own expectations as to the systemic and teleological-evaluative considerations, however, then he will have no choice but to surrender the linguistic level and concentrate on the deeper, more important ones. In the most difficult cases, the judge will simply surrender all pretence and state outwardly what has been true all along, that what matters most to him is the deepest level, the teleological-evaluative one. When push comes to shove, then, the judge insists on interpreting the provision along the lines set out by his own understanding of the nature of the problem the provision exists to answer – his own understanding of the social basis of the legal measure, in other words.

This, then, is why the judge cycles through the different types of argument. He begins by looking for an easy fit across all three levels. In proceeding in this way, the judge hopes that the language used in the specific provision, when taken literally, will fit well with both the Act and area of law as a whole, and with what he understands to be the social problem the Act serves to address. This easy, immediate fit across all three levels is, ultimately, what makes an "easy case" easy – the judge finds that the facts in the immediate case, the language used in the Act, the nature of the area of law as a whole, and his understanding of the underlying problem all sit together in such a way as to make his own response so obvious to him that it does not really appear to require any thought at all. In these instances the law has a clarity which dictates to him the decision or interpretation that is required. When no such easy fit presents itself, however, the judge then is forced to create the fit he seeks. He will have to find a way of looking at all of the material available to him in which as much of it as possible

comes together and offers him an obvious way forward. In this, it is his sense of the underlying problem that will be considered most important, though, for it is this that he characteristically will abandon most reluctantly. In these instances, he has no choice but to say outwardly what he has felt all along – that the measure exists to address a recognised social problem, and must be interpreted in whatever way is most in keeping with this background.

My point, then, is this: Easy cases and hard cases are not so different after all. Both require the judge to take what we might describe as extra-linguistic considerations into account. The difference is that in hard cases, this looking outside the law-as-written is carried out explicitly, while in easy cases it is hidden. In these latter cases, the extra-linguistic considerations are found so much in sympathy with the linguistic interpretation that they do not need even to occur to the judge explicitly. As the cases become progressively harder, the judge engages in backward reasoning of the sort described in Chapter Four, "moving outward from a point" in expanding concentric circles to take in more and more of the law relevant to the immediate point. It is not, then, that the judge's background social understanding becomes more and more a factor in his reasoning. *Rather, it is that this background social understanding becomes more and more explicit even to the judge himself.* Of course, this is not to underestimate the importance of the words used within the Act. These remain an important consideration. The judge is clearly expected to address the problem he faces by acting within the law as it is found in explicit, written form. The best, most obvious way of making clear that this is in fact what is happening is by offering an interpretation that remains as close as possible to a literal reading of the Act[33]. Where

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[33] It is reflected, too, in the fact that, when the judge's own sense of the other levels and the language of the law diverge so completely that the two cannot be reconciled, the judge will defer to the language of

such a literal meaning cannot be reconciled with what is thought to be the "point" or purpose of the Act, however, then this consideration is relaxed. The judge is forced to find other, less obvious ways of showing that he is still acting within the constraints set by the language used within the provision. This more flexible attitude to the language used shows very well, I think, that the words used within the Act, though important, are always secondary to its "point" or purpose. The law is not wholly, nor even primarily a linguistic or logical exercise, after all. Judges recognise this and act accordingly.

Automatic, not mechanical

The very fact that judges perceive some cases as "easy" and others as "hard" makes very clear, I think, that the law is not a purely technical exercise, one dominated by the linguistic or logical form taken by the law or by the arguments put before the court. Indeed, the easy-hard distinction suggests that, for the judge, too, the law is bound up inextricably with lived experience, and particularly, with his understanding of the legal-social landscape. Just as the legislature does not operate in a vacuum, but operates always with an understanding of developments in the life of the community, judges, too, must be thought of in this way[34]. Indeed, when we place these views of

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the law, though usually sounding his own note of puzzlement or protest at the state of the law. Exactly where the two are so far apart as to be irreconcilable in this way is in part a matter of temperament, with conservative judges arriving at this point sooner than their more progressive or activist counterparts.

[34] Judges are more remote from the concerns of the community than legislators are, of course. Judges are not expected to pander to the whims and panics of public opinion as they unfold from day to day and week to week in the way that politicians are. Nevertheless, the judicial role becomes meaningless without some underpinning in the life of the community. For judges, this understanding of the life of the community comes primarily from his or her own experience of the law. The foundation of this understanding is the judge's personal, human sense of how the life of the community "works", with

the legislature and judiciary alongside each other, we find a much more realistic picture of the operation of the law overall. Rather than thinking of the institutions and parties involved all as hermetically sealed within their respective bubbles of reflective space, communicating through the narrow conduits[35] provided by words and rules, we now begin to see all of them as *open to their surroundings in a particular way, and, moreover, as organised around a common concern.* We must see their interaction as something like *a conversation between the various parties and institutions,* a conversation about recognisable social problems. When the judge seeks to implement a particular legal measure, then, we must see him as regarding the measure in just this way, as indicating to a recognisable social problem. The actual language used remains important, of course. This is because the language of the law is taken by the judge as communicating to him the way in which the problem is to be regarded in cases adjudicated *under the law. The words used in a particular Act serve, then, not to create understanding from scratch, but to make clear to the judge to what degree, and in what way, a recognisable social problem is now a legal one.* It both *indicates to* a particular category of shared understanding, and simultaneously attempts to *circumscribe or structure* the deployment of this shared understanding within the legal process[36].

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this foundation deepened and sharpened by his or her professional experience of the law. A judge will come to the bench, then, with a fairly well-developed intuitive sense of what it is to steal, for instance. This basic intuitive sense will then be sharpened by the specific cases he of she addresses over the course his or her career.

[35] This reference to narrow conduits is a reference, once again, to Maturana and Varela. See n. 22 on pg. 240 above.

[36] This view of the relationship between the law-as-articulated and the underlying social landscape was put very well by Lord Atkins in Donoghue v. Stephenson: "The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply" (1932 HL 31 at 44).

If law does indeed represent an expression of the reflective life of the community, then, we must see it not as separate from moving, practical life, but as thoroughly immersed within it. Consequently, when thinking of particular legal measures, we must see each one as embedded in just that unreflective experience, as taking for granted a prior familiarity with both the enterprise more generally, and a particular aspect of that enterprise more specifically. We must see legal reasoning, in other words, always as legal reasoning *within and about the life of a particular community*[37]. For this reason, the law for the judge is not, and cannot ever really be, a purely textual or semantic or logical exercise[38]. It is instead much more a social matter. Judges perform a social role, after all, and consequently take their lead from the way in which the matters under consideration are understood "out there" in the wider world. Judges cannot but draw on their own social understanding, then, because *this drawing upon one's own understanding is an integral part of the whole enterprise. It is integral because the law itself encompasses this "outside".* This is what I meant when I described the law as having a "two-tier, tip-of-the-iceberg" structure. The description aims to draw out the way in which *the law itself* extends down into this shared background of social understanding. If a judge is truly to grasp what is required by a particular legal measure, then, he must engage directly with this shared background of social understanding. *He must do so because this, in a sense, is where the law itself resides.* This is where he will find his understanding of theft, or murder, or embezzlement, for instance. As each legal term arises in answer to a particular social problem, a mature grasp of the term's meaning cannot really be had any other way.

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[37] Roger Cotterrell, seminar paper delivered at the School of Law, University of Edinburgh, December 12th, 2003.

[38] Indeed, language simply is not up to this task. The ultimate indeterminacy of language is one way of entering the present discussion. See, for instance, Stanley Fish, "The Law Wishes To Have a Formal Existence", n. 21 above, on pg. 239 above.

Indeed, for a sense of what I mean by a "mature grasp", it helps to think of the discussion of experts and novices set out in Chapter Three. There, I submitted that rules are offered always either *in the absence of* a deeper, practical mastery of a particular issue or domain, or alternatively, are offered *as an explicit articulation* of this same practical mastery, mastery the individual or community in question *already possesses* but must make explicit for some reason. In the former, the user of the rule has little or nothing in the way of experience to fall back on. Indeed, the purpose of the rule in these instances is to allow the user to acquire precisely this experience. In this case, the rule represents not an end in itself, but is instead more in the nature of a way in, a point of entry. It is a ladder the human agent must climb, then kick away. Novices do, then, act on the basis of rules, but they do so only because they must, and only for as long as they must. In the second of the two variations, however, the user of the rule *already possesses* the required mastery. The rule here is therefore, in a certain sense, wholly superfluous. The user here – the expert – does not really need the rule to perform the act in question. Instead, the rule exists merely as an *outward articulation* of the practical mastery he already possesses and relies on[39]. This outward articulation is generally entered into where there is some need to engage with the practical mastery in question self-consciously, where there is a need to communicate it to others, for instance, or where some sort of correction is required. When thinking of legal rules, then, we must ask which of these portraits applies. Are legal rules offered in place of the background understanding required to make sense of a particular issue or domain, or do they simply make this background understanding explicit, thereby facilitating criticism, clarification and development? The autonomous view is in fact a

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[39] Once again, our concern here is with the causative value of rules, the role the rules play in the decision-making process. The rules play a more important role when the judge justifies the decision. See n. 52 below (pg. 259) in particular.

novice view, with law seen as fresh start. In this thesis, I am arguing for the other option. Under this view, rules exist to draw out, clarify and communicate settled understanding that is already there.

Thinking of this in terms of experts and novices is useful. We might be tempted, for instance, to accept the discussion of rules and practical mastery above, but insist that judges approach the law as a novice might. Though this view might prove tempting – the judge looking at the problem with unprejudiced eyes, drawing on the law and nothing else – it should be clear that this is not really viable at all. Indeed, it is a mistake to think of the novice's use of rules as viable in its own right. Novices are, well, novices. Their defining characteristic is their incompetence, the awkward, stilted performance we associate with them. The novice does not really present us with a picture of competence-by-way-of-rules, then. Rather, his is a portrait of *incompetence-by-way-of-rules*. Once again, the novice becomes an expert not when he masters the rules, but when he *transcends his need* for them. Indeed, this is precisely why we so often give up when, as adults, we try to learn to play musical instruments or to speak foreign languages. We give up because, having failed to achieve the practical mastery we seek, we feel that the rules we have mastered do not themselves offer us anything worth having. A stilted, clumsy performance is no real performance at all, we feel.

We must accept, then, that the judge is no novice. He is not a rule-applier, a technician who "manipulates without insight"[40] the rules handed down to him. Indeed,

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[40] Staten, "Wittgenstein and Derrida", pg. 32, on Husserl in the "Crisis": "…Husserl was passionately concerned that man should not become a mere "technician," manipulating without "insight" the items of knowledge accumulated by his tradition. Husserl urged that in the process of knowledge accumulation we should constantly recover the generative or 'constitutive' activity of thought that is

were a judge somehow to lose this practical mastery in the way advocates of

autonomous rules recommend, he would in fact cease to be able to perform his

function in a competent way. In the end, judgment solely by way of rules is no

judgment at all[41]. This being the case, the rules must be taken to operate in the second

of the two senses set out above: *They must be regarded as articulating understanding*

the judge already recognises. This is not as strange as it might sound. As Bernard

Jackson put it, the judge begins by asking, not "what situations do the words of this

rule cover?" but "what typical situations do the words of the rule evoke?"[42] *In*

approaching the case, then, the judge begins both with a particular view of the social-

legal landscape, and with an expectation that the immediate case will slot into this

landscape quite readily. It is this view of the landscape that dominates the enterprise

overall, and in so far as the law can be said to be a textual exercise at all, it is only in

its manner of articulation. Legal texts exist, in other words, merely to *describe* or

capture particular aspects of that landscape. As noted above, the meaning of theft, or

murder, or embezzlement, all are found in a legal response to a social problem. The

relevant legal texts all exist, therefore, to describe or capture this response to a

problem, and do not set out a rule of mandatory behaviour from scratch. On the

contrary, the rule here has what we might describe as an indicative function, with each

standing as little more than a "mnemonic device", a "useful but hollow diagram"[43]

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required for the original institution of truths or fixing of insights in language, where they will be available for others. Language stores up insights for us, but saves us the trouble of bringing them into being; it is our ethical responsibility to quicken them with the constitutive activity of our own minds."
[41] This is why we do not entrust the judicial role to computers, for instance. What we find is that the role requires not a technical capability, something that we can reduce to a formula. Instead, what matters is a mature grasp of the material in question, one achieved through experience.
[42] Bernard Jackson, see n. 27 above on pg. 243.
[43] Jerome Frank quotes Yntema in "Law and the Modern Mind", pg. 147: "It should be obvious that when we have observed a recurrent phenomenon in the decisions of the courts, we may appropriately express the classification in a rule. But the rule will only be a mnemonic device, a useful but hollow diagram of what has been. It will be intelligible only if we relive again the experience of the classifier." The point is also made by Heidegger. Consider the following, from Hubert Dreyfus's "Being-In-The-World", pg. 101: "... Heidegger's point is that to cope with such signs is to cope not just with them, but with the whole interconnected pattern of activity into which they are integrated. If they are to function

which requires the appropriate background understanding if it is to be of any use at all[44].

The point made here, then, is this: *Legal rules do not stand alone but instead aim simply to articulate outwardly something everyone within the community already understands.* As noted in our discussion in Chapter Three, we are all experts in the conduct of our day-to-day lives. In their origin as responses to practical problems, legal rules in fact articulate outwardly aspects of just that expertise. Rather than thinking of rules as operating in algorithmic terms, then, as a formula judge and ordinary citizen alike apply in a linear way, we must think of these rules instead as *articulating a picture or relationship of cause and effect that both are expected already to be familiar with.* The rule stands as a label for a familiar scene or event or episode. Once again, the response is not "what situations do the words of this rule cover?" but "what typical situations do the words of the rule evoke?"[45] What makes an "easy case" easy, then, is not clarity in the form of language used, but *clarity in social experience*[46]. It comes from the way in which the immediate case comes to us *already recognisable as an instance of the very social problem the legal measure was introduced to address.* This move – dropping the meanings of the words themselves out of the equation and looking directly to the place the words take up in social life –

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as signs for us we certainly cannot just stare at them, and we cannot use them in isolation. "The sign is not authentically 'grasped' if we just stare at it and identify it as an indicator-thing which occurs"... Moreover the sign does not simply point to other objects occurrent in the situation – e.g., the street or the direction the car will take – it lights up the situation itself." And later: "Signs can do their job only because we already know our way about in the world... A sign's signifying must take place in a context, and it signifies, i.e., it can be a sign, only for those who dwell in that context."

[44] This indexical quality is most readily apparent in legal measures which include terms like "reasonable force". Whenever such a term is used, the law explicitly asks the judge to draw upon his own understanding of a social standard, a sense of appropriateness he shares with other citizens. In these cases, the law says to the judge: "You'll know it when you see it". My point here, however, is that *all* legal measures have this quality, even those which appear to be defined precisely.

[45] Jackson, see n. 27 above on pg. 243.

[46] Conversely, what makes a hard case hard is a lack of this clarity, the fact that the problem is so novel or unexpected as to leave both the judge and the rest of us lacking clear guidance as to how to proceed. This is the true source of the "open texture" of law. It is not ambiguity in language, but in experience.

is not as controversial as it might appear. Consider Hart's treatment of the "plain case":

> The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic', are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.[47]

When Hart makes this point, though, he does so taking for granted an intermediate role for the form of language used. Under his view, the familiarity of the instances is such as to make the interpretation of the rule that much easier. Under the view advocated here, however, the words themselves are not really interpreted, but exist primarily *to call to mind those very instances*. The rule is not really interpreted, then. Indeed, the forms of language used barely appear to us. Instead, we see what is intended directly[48]. The meaning of the provision is obvious, not literal.

The irony, then, is that while the plain or easy cases appear to present us with the law at its most autonomous, with the judge applying the rule and not consulting his own experience and understanding at all, in fact, *easy cases are experienced as "easy" precisely because the judge is able to draw upon that experience extensively*. The rule

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[47] Hart, "The Concept of Law", pg. 123.

[48] This is the crucial difference. Hart may be conceding that judges sometimes respond automatically, but his point is that they respond automatically *in arriving at their interpretation of the form of words used*. My own point is that the words themselves are little more than labels. The judge responds automatically not by associating each word to its individual conventional meaning and then summing the various words to form an interpretation. Rather, he responds automatically by associating the legal provision to a particular social problem and its related political and legal history. He responds as if by saying to himself: "Oh, it's one of these...", an act of simple, immediate recognition in which the meanings of the particular words plays only a minimal part. The words perform the function of a sign-post or label, indicating to something found elsewhere.

here is at its most "hollow", with the words contained therein having, on the whole, little effect on the judge's decision-making process. The rule here merely labels or indicates to a category of experience, calling to mind the "typical situations" the judge is to draw upon. Once this identification is made, however, the rule itself falls away, with the greater part of the work taken up now by the judge's understanding of just those typical situations. Insofar as explicit attention *is* given to the rule, in these instances it will be given later on, serving to justify the decision after this decision has already been made[49]. While the judge relates explicitly what appears to be the process of reasoning responsible for his decision, in fact, what he is really doing is testing this decision to ensure that it is sound, doing so both to satisfy himself that his intuition has served him well, and to persuade his audience that the decision is the right one. If the case truly is an "easy" one, this testing will vouchsafe the judge's hunch, revealing an explicit fit – logical and semantic – every bit as satisfying as the automatic, intuitive one.

This difference between arriving at a decision in the first place, and testing and justifying this decision after the fact, is often cited. For a sense of the confusion that can sometimes appear on this point, however, consider the following passage from Neil MacCormick's "Legal Reasoning and Legal Theory":

> … some people have denied that legal reasoning is ever strictly deductive. If
> this denial is intended in the strictest sense, implying that legal reasoning is
> never, or cannot ever be solely deductive in form, then the denial is manifestly

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[49] This is one of the best known arguments offered by the American Realists, of course.

and demonstrably false. It is sometimes possible to show conclusively that a

given decision is legally justified by means of a purely deductive argument.[50]

Notice the way in which Neil MacCormick begins by referring to deductive

reasoning, but ends with deductive justification[51]. We must ask, then: which is it? If

the claim is that legal reasoning is even sometimes solely deductive, then it is

certainly wrong. Legal reasoning is never solely deductive. A judge approaching his

task in this way would be considered unfit for his job. He would be seen to be treating

the interests of the parties to the case shabbily, as if taking the case to be a logical or

linguistic puzzle of some sort. If the claim is that it is the justification of the decision

that is deductive, then this is often correct, but it is relatively uninteresting.[52]

The point made here, then, is that the rules themselves do not really control the

judge's decision, even in "easy cases". Where this appears to be the case, what really

controls the decision is the legal-social context. Within the judge himself, however,

this role for the legal-social context is performed by the judge's own expertise. As an

expert, the judge's ability to perform his task comes from the way in which all of his

capacities, his reflexes of perception and judgment, all are perfectly calibrated to the

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[50] MacCormick, "Legal Reasoning and Legal Theory", pg. 19.

[51] This same point is made by Fernando Attria, in his book, "On Law and Legal Reasoning", pg. 176:
"… MacCormick himself sometimes equivocates between presenting his thesis as one about legal
argumentation (deduction has a role to play in legal justification) and as one about legal reasoning
(some cases can be decided following a strictly syllogistic line of reasoning)."

[52] This, essentially, is the argument offered in Chapter One. That legal decisions can sometimes be
justified deductively tells us nothing about how judges actually arrive at those decisions in the first
place, surely the more important part of the process. It does nothing to explain why different judges
might be inclined to seek to justify different decisions, for instance, or what the difference might be in
the way in which experienced and inexperienced judges approach their task. It leaves us with nothing
to say, too, about the difference, for the judge, between new and well-established laws. Even worse, the
casual side-stepping of discovery leaves legal theorists with no resources with which to make sense of
the ordinary man's experience of the law. Nor are they able to explain customary law, or the process by
which customary law evolves into modern law. Indeed, the emphasis on deductive justification leads
theorists, whether they realise it or not, to characterise the whole of the life of the law in self-conscious,
deliberative terms. In my view, to fail to give an account of discovery is to fail, truly, to give an
account of law.

world he inhabits and operates within. This particular aspect of the judicial role is ground we have covered, of course. In Chapter Three, I offered this account of expertise or practical mastery to explain the judge's way of working. I offered it as explanation his reliance on intuition and "hunching", for example, or the importance of his ability to "see at once" what is required in the circumstances. In the context of this particular discussion, however, I am in fact taking this idea a little further. *Here, what I am suggesting is that the answers to the specific problems themselves come from prior, repetitive experience in just this way.* In other words, it is not merely what we might call judging "skills" that come with experience, but *the judgments themselves*. What makes an "easy case" easy, then, is the regularity with which the problem and answer combination appears before the judge[53]. With this repetition, the judge's own sense-making response is increasingly calibrated in such a way as to make the appropriate response more and more automatic. The application of the rule here is *not mechanical, then, but automatic*. Where what is intended by the rule is recognised effortlessly, it is not because the rule itself is working optimally, in other words, but because *the immediate instance so resembles the typical situations, and therefore matches so readily, that the judge will not even realise that he is engaging in any such pattern-matching activity at all* [54].

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[53] Note that this "problem and answer combination" does not have to have come before the judge only in legal contexts. The easiest cases of all will be those entrenched in the day-to-day lives of all members of the community, the judge included. Note, too, that in writing of experience of a particular "problem and answer" combination, I do not necessarily mean personal experience in the most literal sense. A person can understand very well that the taking of someone else's bicycle amounts to theft from his day-to-day experience of life in his community, without ever having his own bicycle stolen. Innumerable "problem and answer combinations" like these are learnt, not with rules, but in the course of social interaction. See "Habits for the Individual, Customs for the Group", Chapter Three above.

[54] It is important to recognise that the automatic, easy cases written of here will be concentrated in the cases that are dealt with by the lowest courts. The account offered here is therefore best suited to the business of judging as it is conducted in Magistrates Courts, for instance. Here, the cases that come before the magistrate are likely to be what he or she immediately takes to be instances of the "typical situations". The magistrate is unlikely to experience difficulties in determining the precise nature of the legal problem involved. His or her task will instead be in deciding what to do about the problem. As we rise up through the hierarchy of the courts, however, the balance will shift ever more towards hard cases. We are not likely to find easy cases coming before the House of Lords, for instance. At this

Expertise, not rules

At this point, we can draw together the various insights we have achieved over the course of this chapter. Perhaps the most prominent of these concerns the autonomy of written forms of law. As argued above, these written forms of law are not autonomous at all, but in fact operate always against a background of social understanding, a background the judge requires if he or she is to have a mature grasp of the meaning of the provision. In practice, then, whether a legal problem occurs to the judge as easy or hard depends not on clarity or determinacy in the form of language used to express it, but rather on the degree to which the social background in place provides the required guidance, the way in which this background "brackets in" the immediate instance. In practice, whether or not this is the case will depend on the degree to which the immediate problem conforms to the community's historical experience of just that sort of problem. Where the immediate case appears as merely the latest in a long line of instances of the same problem, the way forward will be effortlessly clear. The judge will find that he has a ready-made decision close to hand, "seeing at once" what is required by the circumstances of the case before him. If the immediate case is a novel one, however, the judge will find his experience to be much less useful. In these latter instances, the judge will find no ready-made place for the immediate case in the

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level, the typical portrait of the judge as general-purpose reasoner is most appropriate. Note, however, that the judge operating at this level will often feel out of his depth, with little of his own judging experience providing him with useful guidance. There is a reason the highest courts are the least accessible, after all.

social-legal environment. Lacking this ready-made place, he will be left to establish one himself.

It is important to get this notion of a relationship with the social-legal environment right, though. In "Law, Language and Legal Determinacy", Brian Bix attempts to apply Wittgenstein's writing on rule-following to the problem of legal indeterminacy. Bix finds Wittgenstein's insights most useful where clear cases are involved, though he explores some possibilities for the analysis of hard cases (pg. 55): "In such cases, everyone involved does not react in the same way; there is no broad 'agreements in judgements'… in some cases people react differently because they have (or 'participate in') different forms of life. The social contexts, cultures, practices, and training are different. Within the subgroups of people who share the same form of life, there would (by definition) be no divergence in reaction, and these same cases would seem to be 'clear cases'." [55] In fact, this notion that people can walk the same streets and speak the same language and yet not share the same form of life is simply not credible. Characterising hard cases as arising from what we might describe as "cultural clashes" is not in keeping with our experience. Indeed, it is easy cases where this is most likely to be true – where people from failing communities are brought before courts which take for granted certain values and practices, values and practices which are not successfully implemented in those failing communities. *Hard cases arise not where the parties do not share a form of life, but where the shared form of life is ambiguous on the particular issue in question.* For a sense of this, think of the sort of cases that characteristically make it to the House of Lords.

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[55] Brian Bix, "Law, Language and Legal Determinacy", pg. 55.

In all of this, it is important to recognise how little important the form of language used really is. This is true of both easy and hard cases. When a case is experienced as easy, for instance, it is likely that the meanings of the specific words used will indeed appear to us as straightforward, apparently offering the judge clear guidance in how to proceed. It is a mistake, however, to imagine that the judge here is actually using these words to arrive at his decision. Ultimately, what makes an "easy case" easy is the effortless way in which the right interpretation appears to the judge. This effortlessness arises from way in which the immediate case fits in with past experience. Where this sense of a right fit is achieved, the particular form of words used in the legal measure will remain largely irrelevant, playing a significant role only in the testing phase the judge enters into after he has made his decision. If we think back to the Mandla case, for instance, and imagine a case brought under the Race Relations Act by, say, someone of Afro-Caribbean origin, we might be inclined to think of the case as an easy one precisely because the definition offered within the Act appeared so suitable. This would be a mistake, though. In such an instance, it would be the paradigmatic character taken by the immediate case – discrimination against people of Afro-Caribbean origin is, for us, a paradigmatic example of racial discrimination – that does this work. What matters, then, is the way in which the immediate instance fits into our larger understanding of the point of Act, our background understanding of the social problem the Act exists to address. However clear the form of language used, then, the form of language itself will play only a modest role in the process.

In hard cases, the forms of words used will indeed be more significant. In these cases, the judge does indeed pay close attention to the meanings of the particular words

used, after all. The problem, however, is that in these instances the judge will find that the words themselves offer very little in the way of guidance. This is because the forms of words used in legal measures are always composed on the basis of the easy cases, the paradigmatic instances. The definitions offered in statutes will always stand, ultimately, as descriptions of those easy cases. As the difficulty experienced with hard cases arises from their dissimilarity to the easy ones, such a description is therefore unlikely to be all that helpful. The best the judge can do is read between the lines and discern, in the periphery, some indication of an intention to include or exclude this or that variation of the problem. This is precisely what happened in the Mandla case. There, we saw the judge studying the language of the law very carefully indeed, only to find that the definition offered within the Act simply did not address the issue under consideration at all. The best that could be said of the definition in this respect was that its explicit stipulation of "racial or ethnic group" might be taken to signal an intention to exclude religious groups like Sikhs and Jews. Even this scant guidance was rejected, though, the court deciding to include Sikhs and Jews. This no doubt was due to the fact that Jews, like those of Afro-Caribbean origin, also represent paradigmatic instances of victims of racial discrimination for us. When faced with a choice between what little guidance could be discerned from the form of words used and their own understanding of underlying social problem, then, the court opted for the latter over the former.

The popular notion that the law-as-written is central to the enterprise is therefore profoundly misguided, arising itself from a deep misunderstanding of what the law is and where the law comes from. The mistake, specifically, is in the way we are inclined to see the law as *applied to* the life of the community from above rather than

as *arising from it*. At the heart of the positivist approach is what I have described as an origin for the law in *design*. For them, the law originates in an *intention to do something about a problem experienced in social life*, and takes the form of an explicit *direction*, a general standard of conduct *imposed upon* the population as a whole. In fact, the law is nothing of the sort. To get an accurate view of the law, we must take its origin in a response much more seriously. The law is not imposed from above, in other words, but *arises from below*. It originates not in an intention to do something about a problem, but in what is recognised as *required by that problem*. The distinction is a subtle one, obviously, but it is crucial. This is an important difference because when we think of the law as applied from above, it becomes quite natural for us to think of it as existing primarily in written form, as a body of rules of mandatory behaviour. When we think of the law as *excavated from the life of the community* as it already stands, however, the law itself becomes an experiential matter, something with a "know-it-when-we-see-it" quality. Against this background, the written aspect of the law is there merely to articulate this more intuitive grasp outwardly. It is merely a label we pin to the experience of the problem, as I put it above.

And so, while the form of language used does not itself discipline the efforts of the judge, in fact the end result is nevertheless not so far removed from the one envisioned by the positivists. When we take into account the psychological model presented in this thesis and the implications it has for the judicial role, we see that the indeterminacy of language need not lead to an interpretive free-for-all, to "free-play" with language, as it is sometimes put[56]. In rejecting rules, we do not need to see the

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[56] This criticism of interpretive theories is quite general and can be levelled, for instance, at Derrida.

whole life of law descending into interpretation in the way that Dworkin does.

Instead, we can see the regularity and certainty envisioned by the positivists secured

through the relatively unreflective attitude taken by the judge, and in particular, by the

role played by his experience, his expertise in the matter. This, in the end, was the

solution we arrived at in our thinking about the ordinary citizen in the last chapter.

There, we saw that it was the individual's everyday expertise that ensured compliance

with the law. Here, we see the judge's professional expertise achieving the same end.

In the view taken here, the judge's ability to arrive at the right decision comes from

the way in which he embodies the law, the way in which his experience of the law

shapes his very ability to see and understand and respond. Provided that the cases

before him are sufficiently similar to those that have come before, then, his response,

shaped by this experience, will be both adequate and predictable. The law will have

come to speak through him.

Indeed, as was the case with the ordinary citizen, we find that here, too, the emphasis

on consciously appreciated rules and on conscious interpretation is not only

inaccurate, but in fact is actually undesirable. In the last chapter, we saw that the

ordinary citizen was most likely to depart from the law in just those instances where it

is presented to him openly, where he is encouraged to think deeply about the law,

about the reasons for its existence and the likelihood of capture or punishment. When

we turn to the judge, however, we might be inclined to assume that matters would be

different. Judges are supposed to reflect on the law, surely? Yet even here, we find

that the very same concern must be raised, for even with judges, the law actually

works best where self-conscious awareness is suppressed. There are two senses in

which this is true, one obvious, the other less so. The first sense concerns divergence.

The point is a relatively simple one: The more judges think about the law, the more deeply they think about this or that issue, the less likely it is that they will arrive at a clear common position. The fact of the matter is that any given point of law has within it the potential for a range of different interpretations. The more energetic the judge in pursuing the possibilities the point of law affords him, then, the more elaborate and outlandish the potential interpretations. A system which actively encourages interpretation on the part of its judges is therefore one which would quickly come to be characterised by divergence rather than convergence.

The second problem is less obvious, though, and for this reason is a little more interesting. The question in this case is the competence of the judge, his ability to perform the task we set him. More often than not, we think of judges as general-purpose reasoners. This is in line with our view of intellectual skills and bodily abilities more generally. The human agent is thought to acquire an ability or skill which thereafter is employed in exactly the same way, and with exactly the same level of competence, regardless of the more specific characteristics of the various contexts of use. Language offers the most obvious example. The human agent is thought to acquire a capacity for language which reduces to general purpose words and rules, with these same words and rules thought to be applied uniformly wherever language is used. What is envisioned here, however, is rather different. As set out in Chapter Three above, the skills and abilities we acquire are not general-purpose in nature at all, but are instead always context-specific. We don't learn how to use language and then use it uniformly from context to context. Instead, we learn how to communicate in particular contexts, evolving a plan or script for particular contexts as we go, adapting these for use in other, less familiar contexts. Nor do we learn to drive in a

general-purpose way, going on then to use this general purpose ability to drive here or there, always with the same degree of mastery. Instead we get steadily better and better at navigating specific routes, at driving to work, or to the supermarket, for instance.

That what we have here is not an exercise of the same one general-purpose skill in all instances, but the extension of an existing readiness-for-action bound to one context into another sufficiently similar one, is revealed by the drop in the standard of performance we see as we move from a familiar exercise to an unfamiliar one, and by the degree to which this drop in performance correlates with the degree to which the new context is unfamiliar. This drop shows clearly, I think, that the competence itself is organised around a paradigm or prototype[57], a sort of best or most familiar example. In the present context, however, these drops in performance as the human agent applies his skill in unfamiliar contexts has special significance. When we think of the judge's ability to reason as a general-purpose one, we imagine that we can put any case before him however familiar or novel, and expect the same, high quality response. By this way of thinking, judges are simply good at answering legal questions. Under the view taken here, however, the judge's ability to judge, his expertise at judging, arises from his particular experiences of judging. It is know-how constituted on the basis of the concrete. This has important implications for us, for it means that we must think carefully about the sort of cases we put before judges. It means that judges are at their most expert only when faced with problems that are familiar to them. The more unfamiliar the case, however, the more they find their expertise leaves them. In the most unfamiliar cases of all – where the issue under

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[57] In referring to a "prototype" I here follow Eleanor Rosch. This concern for drops in performance is at the heart of her seminal work. See Rosch, "Cognition and Categorization".

consideration is brought before the judge on the basis of an abstract right, for instance, but where the issue, in concrete terms, is entirely novel[58] – we will find the judge no better off than the ordinary man. Like everyone else, the judge is able to extend the guidance the familiar experiences offer him, but he can only do this so far. Truly unfamiliar cases will leave him virtually empty-handed, as we are when we arrive at a foreign country for the first time[59]. Given our current enthusiasm for rights-based law, this should give us pause.

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[58] The point here is that, in a legalistic environment, even previously settled issues can be problematised. As hard cases arise because of ambiguity, they can actively be cultivated where they otherwise would not appear. Brian Bix suggests that "essentially contested concepts" may be responsible for hard cases ("Law, Language and Legal Indeterminacy", pg. 55). Note that legal rights are indeed "essentially contestable concepts". On the other hand, concrete guidance as to how particular, concrete contexts work ("No Vehicles in the Park", for instance) is clear enough for the most part. A shift towards rights-based law is therefore a shift towards legal ambiguity, a shift from law dominated by clear cases to one dominated by hard cases.

[59] Varela, Thompson and Rosch, "The Embodied Mind: Cognitive Science and Human Experience", pg. 10.

Conclusion

Having set out my own account of legal life in the previous chapters, it is appropriate to end this thesis, I think, by returning to Chapter One's discussion of what makes a particular theory of law a worthwhile one. There, I argued that a successful theory of law must satisfy both a descriptive and a practical test. First of all, it must reflect what we see of the law in the world around us, not in just this or that respect, but comprehensively, and at every level. It must be true of what we see of the law in the lives of ordinary citizens, in the courts, and in the law-making activity of the legislature. This is the descriptive test, of course, so basic to scientific and philosophical study as to almost go without saying. As I put it in Chapter One, scientific study is always the study of something, our efforts standing or falling on the clarity and verisimilitude with which the "something" in question is explicated. The practical test follows naturally from the descriptive one, and asks whether the understanding gained has led, or could potentially lead to, useful applications. Does the account offered of why some people break the law while others do not lead to more effective policing policies, for instance? Does the account offered of how judges go about applying the law help us draft laws more effectively, or better understand the sorts of laws judges should be asked to apply and those they should not? Does it help us ensure that judges are able to draw on their experience in such a way as to ensure that their decisions are the best they can be while at the same time ensuring that those same decisions are impartial and carefully considered?

Given the limited space I have had, in this thesis I have had to be content with merely setting out my model and giving my reader some sense of how well it satisfies the first descriptive test. I have made an attempt to give my reader brief glimpses of the practical potential the approach holds, certainly, but really that is work for another time. I will, however, shortly sketch out two promising lines of research I hope to pursue in the future, both of which build in some way or another on ideas introduced here. First, though, we must ask: How well does the account of law offered here satisfy the descriptive test? The claims made in this thesis can broadly be divided into two categories. In the first, the concern of Chapters Two, Three and Four, I looked at a number of specific, relatively well-defined puzzles, each of which is broadly psychological or philosophical in nature, though all have come to occupy legal theorists in one form or another. These include the fact-value distinction, the nature of institutional facts, our experience of and attitude to rules, the role experience and intuition plays in the exercise of professional skills and capacities, and, finally, the nature and role of reflection and deliberation in practical life. All of these address what we might describe as the psychological and philosophical background to our understanding of the law. Readers are encouraged to compare the accounts offered on each of these points with the ones offered or assumed by the likes of Hart, MacCormick, Raz and Dworkin. Of the various explanations offered, which is the most true to our experience? Which is the most coherent theoretically? Do we really distinguish between facts and values as we move through the world, for instance? In creating our moment-to-moment experience of the world around us, does the brain really have the time and resources to carefully distinguish between the two, correctly identifying every fact as fact, and every value as mere value? Or is the failure to make

the distinction with such a high degree of accuracy both more characteristic of our experience and more reasonable in the circumstances?

Beyond making simple comparisons on each of the issues, there is another way in which to judge the accounts offered here against their competitors. For this, readers are asked to note the integrated way in which the various issues have been addressed in the thesis. Rather than answer the questions in a disconnected, fragmented way, fashioning a purpose-built solution to each one, I have instead attempted to use the questions themselves as an opportunity to work out a better understanding of the processes and forces found beneath the surface of legal life. I have offered not separate solutions to each of the puzzles, then, but solutions which all derive from and illuminate the same underlying psychological model. Indeed, this has been my goal all along, to present my reader with just such a model. That such an understanding is necessary within legal theory seems obvious to me. The law is a human enterprise, after all, driven and determined, ultimately, by the way in which human beings understand and move through their environment, how they spontaneously organise themselves into groups and coordinate their activity. The law is bound up in the way this group activity and organisation emerges and evolves over time, in answer to its own natural tendencies and the pressures of life. Achieving a reasonably detailed and comprehensive understanding of this background seems to me a preliminary requirement of all legal theory, and this is what I have attempted here.

The value of such an approach should by now be clear, I hope. Certainly, it represents a considerable advance on the analytical approaches which currently dominate the field. Not least of all, it provides us with a great deal more in terms of resources when

we are attempting to understand particular issues of interest, affording the solutions we arrive at greater depth. Several examples of this can be seen in the preceding chapters. Take institutional facts, for instance. As we have seen, while the rule-based account offered by Searle and later taken up by MacCormick and Weinberger is impressive within the narrow confines of the particular question asked, the account cannot really be extended to cover ground beyond that narrow area of interest. It is an explanation for rule-based practices only, for practices like the law and well-defined games like chess. What it cannot account for, however, are less-well defined practices and activities. Crucially, this includes the customary form of law that preceded modern, explicit law. It includes, too, the customary aspect of the form of life which remains today, supporting the law by filling in its many gaps. The same problem can be seen in Joseph Raz's notion of exclusionary reasons. Once again, this represents a "path of least resistance" solution, designed to address the problem in the narrowest terms possible. While this might appear to answer the immediate question satisfactorily – people don't reason through their decisions because they apply a reason not to reason – the solution offers us very little when we attempt to broaden our inquiry to other, related questions. What is the role of experience and intuition in decision-making, for instance? What do the Realists mean when they write about "hunching" and "situation sense"? When people do reason through their decisions, why do they appear to "move outward from a point", as Dworkin put it? Raz's notion of exclusionary reasons has nothing to offer in answer to any of these questions.

The approach taken here in fact has something much more profound to offer us, though, for when we achieve an understanding of the processes working beneath the surface of the visible life of the law, we see that the life of the law encompasses a

good deal more than the surface manifestations that come so readily to mind. I have used the phrase "tip-of-the-iceberg" repeatedly in this thesis, and it is appropriate to use it once more at this point. In my view, what we see of the law represents merely the tip of the iceberg, while the greater part of its life remains hidden from view. The greater part of legal life is not explicitly legal, in other words, but instead is found in its purest and most powerful form in just those contexts and activities which appear least to concern the legal, where it succeeds in silently articulating the social environment into distinct paths and channels which facilitate the peaceful and efficient pursuit of goals and projects in day-to-day life. Conversely, the visible manifestations of the law all must be seen not to represent the law itself, the law in its purest or most natural form, but instead must be taken to signal the very opposite: the absence or failure of law. All are repair mechanisms employed where the successful operation of the law breaks down. This is an important point, because if I am right, it means the legal theorists typically mistake what is peripheral for what is central in the life of the law, mistaking exceptional repair mechanisms for those responsible for the basic existence of the legal order itself.

This is problematic for two reasons. First of all, when what are in fact mere repair mechanisms are taken to be responsible for the existence of the law in the first place, theorists and policy-makers will likely fail to recognise the real forces responsible. This has obvious implications for the successful operation of the law. Secondly, the failure to place the visible manifestations in their proper perspective leads to a distorted view of how the institutions and resources in question are to be used. This can lead to too great a burden being applied to mechanisms which in fact are designed, as it were, to bear only a modest load. We see both problems, for instance,

in our attitude to the courts. Where the courts are seen as peripheral within the life of the law, they are understood to supplement the more central processes at work by addressing exceptional controversies and ambiguities in the life of the community. Where this view is taken, the potential for divergence in day-to-day life is minimised, with consensus sought wherever possible and the courts becoming involved only where this cannot be achieved. Where the courts are thought more central, however, the way of life itself comes to be seen as inherently controversial and ambiguous. Accordingly, citizens are encouraged to approach all contexts and activities with a view to drawing out and cultivating whatever potential there might be for adjudication. This is essentially Ronald Dworkin's view of law, and is a feature of rights-based law more generally. While Dworkin paints an encouraging view of this role for law in our societies, both of the problems described above make it rather undesirable. The cultivation of conflict is undesirable because it can make day-to-day life difficult, as is amply demonstrated by the effects of what is known as the "compensation culture". The cultivation of conflict is undesirable, too, for the burden it places on the courts themselves, a burden which can see the quality of the work of the courts compromised. One recent manifestation of this can be seen in the problems the legal aid system in this country currently faces.

This question of the role of the courts in our society – central or peripheral, essential or exceptional – is the first of line of inquiry I hope to pursue in the future. The second concerns crime and policing. Traditionally, the police, the courts and the prison system have been thought of as wholly responsible for the control of crime in society. When the tip of the iceberg view is taken, however, we see that the police and prisons have a relatively modest role. Instead, the criminal justice system is designed

for modest use, to apply pressure strategically where the social mechanisms which are really responsible for law and order are weak and require some shoring up. The criminal justice system is simply not "designed", in other words, to carry the whole burden of maintaining law and order. Where it is asked to take on the whole burden of law and order in a particular community, it simply cannot but fail. As noted above, this failure to cope with the problem takes two forms. First of all, the mechanisms which are in fact responsible are easily missed, with greater and greater resources poured into the criminal justice system without any real proportionate improvement. In the worst cases, crucial social factors like stability and density of population, the degree to which the community's values are instantiated in public life, the degree to which individuals are embedded in an almost tangible webs of patterns of activity, all will not only be ignored by the authorities, but in some cases will actively be undermined by the social and economic policies those same authorities pursue. When crime rises in response to this, more and more resources will be poured into the criminal justice system, but with little effect. More than this, the criminal justice system itself will begin to buckle under the pressure. Prisons will simply fill up, leading the authorities to release convicted offenders early, or to divert them into community-based punishments. The exclusive emphasis on explicit mechanisms leads, therefore, to the expansion and ever-greater encroachment of these mechanisms into the life of the community. Paradoxically, however, this same expansion sees them ever weakened. More money spent on law and order, more men in prison, and a higher rate of crime.

The third and final line of inquiry I hope to pursue concerns what is commonly known as "legalism". As noted above, the argument offered here is that too often the visible

manifestations of the law are mistaken for the whole of the law, when in fact there is an invisible part of the body of the law that is more important. "Legalism" provides an example of just this phenomenon. Here we see judges and lawyers mistaking the law as it is found in written form for the whole of the law, as if the law on this or that particular point is captured in its entirety in a particular form of words. Where this occurs, the application of the law can become, in extreme cases, a purely linguistic exercise. The term "legalism" is used to describe just this failure to recognise the social aspect of the law, a failure to recognise the spirit behind the letter of the law. Typically, legalism is thought of as a personal failure on the part of the judge, though, rather than a systemic problem in the way in which the law is understood and applied. Against the background I have set out, however, legalism can be seen to indeed have a systemic origin, and more interestingly, a particular manifestation that, too, is more systemic than personal.

The basic problem is illuminated particularly well by the account provided here, I think. Excessive attention to the outward form taken by the law is natural where there is inadequate recognition of the degree to which the law itself extends to social understanding that is typically thought of as extra-legal, the communal values and priorities which, though not articulated in the letter of the law, nevertheless remain central, providing not only the motivation and raw material for the articulation, but also the guiding context. As argued in Chapter Six, the law as we find it in written form does not stand alone, but in fact represents a collection of reports of "trouble cases", particular instances which have become pressing concerns and must be addressed explicitly, then recorded for future guidance. The recorded instances do not then stand free, though, but instead represent historical acts in which the deeper well

of communal values and priorities is excavated and guidance set out on the basis of what is found there. When we recognise this, we see that the law itself is not exhausted by these recorded instances, but instead extends beyond them, the instances themselves providing mere glimpses into the underlying social understanding, the values and priorities found beneath the law as it is articulated in statute as case law. This persistent connection with a deeper social understanding makes the business of law much more complicated than we are inclined to think. This is because we must view all explicit statements of law as provisional, as an historical articulation, offered always in the light of specific circumstances, which may well require revision as the same underlying aspect of social understanding is brought into question by a subsequent, unforeseen instance.

Those with experience of the law will be familiar with instances where the letter of the law on a particular issue is dissolved by the judge and a new, more appropriate articulation is offered which is felt both to remain consistent with the original articulation but which manages simultaneously to capture the new instance more comfortably. In such instances, the judge or judges in question often are described as having "made" new law, or as having extended or developed the law in some unprecedented way. Almost invariably, however, judges take action such as this in the belief that while the new articulation changes the letter of the law, in fact the rearticulation is aimed at better capturing the existing spirit of the law, the real law found beneath the form of words used. The evolution of the law in the courts takes this form, with judges working always to remain true to the underlying spirit of the law – understood to remain constant – while tinkering with the surface articulation to better reconcile that underlying spirit with the changing pressures applied to it by the

social life of the community. This is a familiar enough in specific areas of law, but as noted above, it can sometimes be found on a much larger scale. In other words, it is not just specific offences which sometimes must be rearticulated to better represent the underlying values and priorities of the community, but sometimes much more fundamental aspects of the legal system, too, have to be rethought in just the same way. In my view, the mens rea requirement within the criminal law presents one such instance.

In recent years, tensions have emerged in respect to a family of criminal offences, all of which concern the mens rea requirement applied within the criminal law, and in particular, the conception of intention involved. The offences include corporate crime, for instance. Acquaintance rape and the related subjective standard of recklessness provide another example. In both of these instances, the movements for reform in these areas of law have won considerable support over the years, but nevertheless have not been able to offer a coherent legal argument for change. As a result, progress through the courts has been limited. The causes are so popular, however, that change looks certain to arrive through the political process, with changes to the law which, while welcome in their effect, nevertheless leave the law in a somewhat less coherent state. In future work, I hope to show that all of the various reform proposals can be accommodated through a single change to the area of law concerned. Under the approach I am developing, negligence and recklessness must be accommodated much more centrally than presently is the case. To achieve this, our very idea of what it is to perform a criminal act and what it is to have the appropriate mental element must be revised quite dramatically. We must begin to think of the criminal law as it stands as setting out something like a landscape of values and priorities. The law sets out what

matters, where care should be taken. "Ignorance of the law" therefore takes on a special character, with human agents now expected to be cognisant of, and pay sufficient attention to, those aspects of the landscape of values and priorities explicitly recognised by the law as they go about their day-to-day lives. One way to think of this is to think of it as a Donoghue v. Stevenson or neighbour principle "turn" in criminal law, with the ultimate consideration being, after Lord Atkins, that individuals take reasonable care to avoid acts or omissions where "injury" is reasonably foreseeable. Intention in criminal law would no longer be understood in terms of a deliberate, fully self-conscious intention to cause a specific sort of harm, then, but rather a failure to observe a "duty of care" as regards this or that particular criminal law offence. The proposal is really quite intuitive. If it is an offence to commit rape, for instance, then all citizens are expected to understand what rape is, to recognise rape-like behaviour, and to seek to avoid behaviour and harm which can reasonably described in those terms. The precise nature of the behaviour and the harm caused is not particularly important. It is not an offence to commit rape in one way, but acceptable to commit rape in another way, after all. Nor does the mental element involved need to conform to any precisely defined formula. It is enough that the individual is in control of himself and knowingly acts in a manner he should reasonably have recognised as sufficiently rape-like in its form and effects.

Where the "duty of care" approach is applied to the problem of corporate crime, and corporate killing in particular, the doctrine of identification or "controlling mind" is transformed, allowing us to address the peculiarities of corporate crime in a more natural, coherent way. Under this approach, the management of such a corporation would be under an obligation to ensure that the context for action established within

the corporation – including internal standards, information flows and structures of responsibility and accountability – was sufficient to ensure that the types of offences addressed by the criminal law do not arise through the actions of the agents of the corporation, agents bound and blinded by the corporation's boundaries and 'understandings'. Once again, what is essential here is not a deliberate intention to commit a crime which can be attributed to management, but a failure on the part of management to anticipate undesirable consequences which can reasonably be foreseen as likely to arise from the way in which their operation is set up. In effect, then, the law would require corporations to take the notion of a "controlling mind" seriously, requiring management to take all steps to ensure that the various agents and processes the corporation unleashes all are anticipated and managed with a view to avoiding all foreseeable criminal offences. A failure to maintain that sort of oversight and control would itself satisfy the mens rea requirement.

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