Max Weaver
weaverm@lsbu.ac.uk

Disjunction, conjunction and categories

'[W]hat goes without saying often goes even better with saying'[1]

'What's one thing to do with another?'[2]

Abstract/Introduction

This paper examines some taken-for-granted themes from an unusual angle. It might be analytical, but (it is hoped) none the worse for that.[3]

We cannot deal only in single instances. Our brains would be overwhelmed.[4] So, we take refuge in generalisations of one kind or another that can be containers into which single instances can conveniently be put. This paper explores some of the containers we use: sets; categories; norms; rules; principles. With an eye on the notion of a 'common law method', it attempts to illuminate their characteristics and usages. In so doing, it must confront: (i) separation-combination ambiguity and (ii) conceptions of similarity and difference.

Although concentrating on the 'how?' of categorisation, this paper also suggests that, in the necessary categorisation process, we overestimate the separateness, and underestimate the malleability and temporality, of the categories we contrive. In short, the process and its resulting categories are — despite their appearances and common attitudes to them — mind-dependent and not Platonistic.[5]

1 Appiah, Kwame Anthony, *The Ethics of Identity* (Princeton NJ: Princeton University Press, 2005) p.xvi.

2 Ben, in Pinter H. *The Dumb Waiter* (London: Samuel French: 1960).

3 *Cf.* Schuringa, Christoph. 'The never-ending death of analytic philosophy' (Noteworthy-The Journal Blog 28 May 2020 https://blog.usejournal.com/the-never-ending-death-of-analytic-philosophy-1507c4207f93.

4 Tversky, B., *Mind in Motion; how action shapes thought* (New York: Hachette, Basic Books, 2019) 43-44.

5 This — perhaps over-simple — position is relied upon to avoid discussion of idealism, essentialism, realism, etc.

Separation-combination ambiguity

We accumulate this, that and the other.We might call the result a ‘rag bag’, but we choose that expression because we disregard any particular relationship between all the items. We ‘just have’ that old phone cable *and* those buttons that were in the pocket of an old jacket that we gave to jumble yesterday — and so on. We probably ought to sort this stuff out sometime. If we do, we will probably develop categories: family photos; purchase and repair receipts; buttons; cables for long-gone electronic equipment; etc. Even if we decide to dump it all, we will need to sort it into the categories that the recycling centre uses.

Then we have breakfast: perhaps fried bacon *and* eggs; muesli *and* yoghurt; smoked salmon *and* scrambled eggs; pancakes *and* maple syrup; or coffee *and* croissants. All might count as ‘breakfasts’ — a sub-category of the category ‘meals’. We might call meals a *species* and breakfast a *genus* within which there are *families* such as ‘English’’, ‘Continental’, ‘healthy’, ‘cereals’, etc.

Because we are unlikely to eat bacon *and* muesli or eggs *and* maple syrup, we might say that we have sub-consciously hyphenated ‘bacon-and-eggs’ to create a portmanteau *concept* (but not a portmanteau *word*, *e.g*. kedgeree[6]). But we have not sub-consciously hyphenated ‘cables and buttons’, in which phrase the ‘and’ is primarily *dis*junctive. In both cases, the conjunction ‘and’ addresses *difference* — a rasher of bacon is not an egg; a cable is not a button. However, bacon and eggs ‘go together’ in a way that cables and buttons do not. We hyphenate to signal that the combination is, can or should be regarded, in some contexts, as a unity.[7] And sometimes we disjoin deliberately, for example, ‘enslaved person’ for ‘slave’.

Over-simplifying, amongst the meat-eating mammals, there is a cat family (*Felidae*) that includes sub-families of: ‘big cats’ (*Pantherinae*); cougars and cheetahs (*Felinae*); and domestic cats (*Felis Catus*). Amongst the last, there are Tabbies, Siamese, Manx, etc. Whilst all these members of the family evidence family resemblances, a Tabby is not a Siamese. Members of the

6 Which is composed of curried rice, smoked fish, boiled eggs, parsley and lemon juice.

7 Is the ambivalent ‘duck-rabbit’ a unity?

Max Weaver
weaverm@lsbu.ac.uk

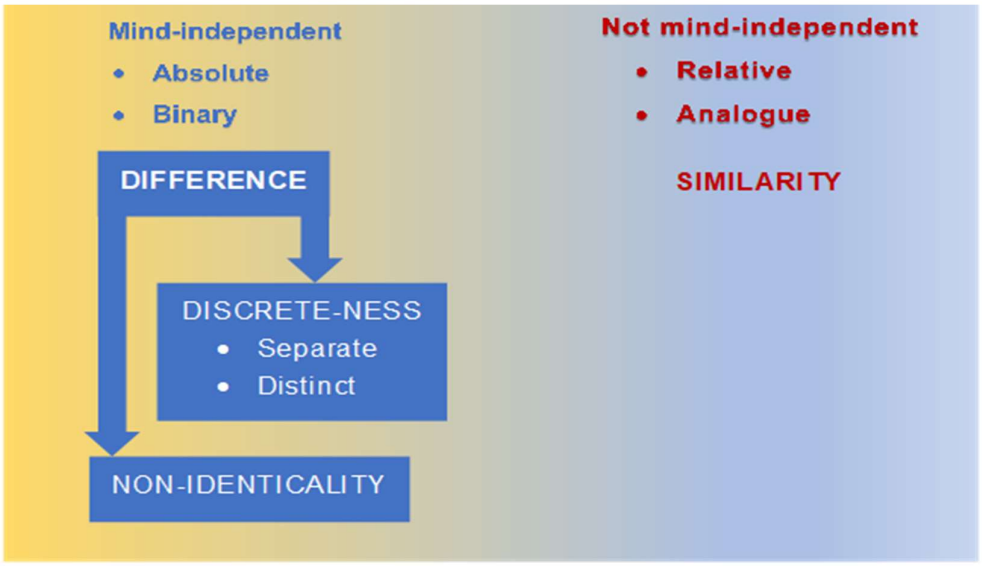
cat family differ from all non-members in family-distinguishing respects and are similar to members of in those respects. We can deduce that:

A. Similarity — as distinct from identicality — entails difference

B. If there is sufficient similarity, difference will not prevent inclusion in a category — indeed there is often scope for 'normal novelty'[8] or acceptable variation.

C. The recognition or construction of similarity or difference is crucial to categorisation

Figure 1



We might think DNA would be conclusive in defining the cat family and note that they share some 99 per cent of their DNA. Tabby cats and ginger cats share nearly all their DNA. Tabby cats and Siamese cats share a little less DNA. However, tabby cats and tigers share 95.6 per cent of their DNA.[9] Whilst, for some purposes, we regard all these as 'cats', for other purposes — like deciding which to keep as pets — we differentiate. We treat the differences as more material than the similarities.

The legendary Chelsea goalkeeper, Peter Bonetti, was nicknamed 'the cat' because his movement through the air exhibited a degree of agile control that reminded fans of feline agile control. The fans were not thinking about

8 This expression comes from an email from Richard Mullender 31 August 2021.

9 Cho, Y., Hu, L., Hou, H. *et al.* The 'tiger genome and comparative analysis with lion and snow leopard genomes.' (2013) 4 *Nat Commun* 2433, https://doi.org/10.1038/ncomms3433

his DNA, although humans and cats share about 90 per cent of their DNA. Apparently, 'Other than primates, the cat-human comparison is one of the closest you can get.'[10] Nevertheless, humans and cats cannot interbreed — a crucial similarity for genetic taxonomy.

That Bonetti exhibited some characteristics that cats exhibit is illustrated and emphasized by his metaphorical[11] nickname. By contrast, we do not think the relationship between Siamese and Tabby cats metaphorical. It is a matter of family membership[12] rather than mere resemblance. However, the similarities between Siamese cats and Tabby cats are vastly more numerous than those between Bonetti and members of the cat family. Cats' agility is clearly notable, but agility is not exclusive to cats. Some dog-owners resemble their dogs,[13] but they are not of the same species. What do *we make* of the likeness, which is apparently caused by the dog-owners' choices?

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10 Wu, Katherine J. 'One More Thing We Have in Common With Cats', The Atlantic, July 28, 2021, https://www.theatlantic.com/science/archive/2021/07/cat-genomes/619587/?utm_source=Nature+Briefing&utm_campaign=f1a94e7161-briefing-dy-20210730&utm_medium=email&utm_term=0_c9dfd39373-f1a94e7161-42374903 (accessed 12 August 2021) citing Leslie Lyons, an expert in cat genetics at the University of Missouri.' See also Dr. Anja Scholze, 'Relatedness' https://genetics.thetech.org/ask-a-geneticist/human-seal-shared-dna (accessed 12 August 2021).

11 Analogy signals similarities between objects that are not normally regarded as falling within the same category. Metaphors are compressed analogies (Perelman C. & Olbrechts-tyteca L., *The New Rhetoric* (Notre Dame: NDU Press, 1969) 399. However, it is often for readers/listeners to divine — or construct for themselves — the similarities and their nature. 'Taken literally metaphors seem nonsensical or false or only trivially true [but they]….mak[e] us aware of some likeliness… between apparently desperate things but without asserting that likeness."' (Sharpe R., 'Metaphor' in Honderich T., Oxford Companion to Philosophy 2nd edn, (Oxford: OUP, 2005) 589-590, 590

12 See de Queiroz, K, 'Ernst Mayr and the modern concept of species' (2005) 102 (suppl 1) Proceedings of the National Academy of Sciences 6600-6607: DOI: 10.1073/pnas.0502030102, noting: reproductive communities; interaction with other species in its environment; and large intercommunicating gene pools. However, within 'species' there are recognisable 'families' and also 'cross-breeds'.

13 Roy, M.M., Christenfeld, N.J.S., 'Do Dogs Resemble Their Owners?' (2004) 15:5 Psychological Science 361-363. https://doi.org/10.1111/j.0956-7976.2004.00684.x

Max Weaver
weaverm@lsbu.ac.uk

And what is the 'likeness'? Where is it conceived? Apart from uncontroversial[14] boundary characteristics of a scientifically establishable nature (such as the possibility of inter-breeding[15]), the materiality/sufficiency of likeness/difference lies in the beholders' minds.

Labels

We often label these various gatherings of items. Random collections might be called[16] 'stuff' or a 'rag bag'. In so doing, we engage in 'grouping', albeit almost arbitrarily. More rationally, we identify and label *family groupings* (Tabby cats, etc.). We also label *functionally interdependent* groupings.

'Concrete' is a mix of cement, water and aggregate (meaning a 'mixture' of sand, gravel or crushed stone). A pocket watch is an assemblage of diverse components, springs, cogs, spindles hands, etc. combined to function to measure and divide time.[17] Similarly, in the normative world of ethics and law, several elements might comprise a concept. The tort of battery only applies when there is an unjustified, direct, intentional touching of C by D.[18] In both examples, the elements are discrete entities functioning as components of something distinct from, say, a clockwork car or the torts of conspiracy or defamation. But there is a stronger family resemblance if we consider a carriage clock or the tort of assault.

14 Twenty years ago, one might have thought human gender both scientific and uncontroversial.

15 See note **Error! Bookmark not defined.**.

16 Of course, our linguistic usages are not fixed. I claim only that there is some typicality. Even when interpretive and contested, words transmit meaning, albeit imperfectly.

17 'The Hebrews divided the night into three watches, the Greeks usually into four (sometimes five), the Romans…into four. [OED].' [T]o 'keep watch' is from late 14c' leading in the 1580s to 'period of time in which a division of a ship's crew remains on deck' and '"small timepiece"' (which apparently developed 'from…"a clock to wake up sleepers" (mid-15c)'. https://www.etymonline.com/word/watch?utm_source=extension_searchhint

18 This formulation misses the important matter of burden of proof. For example, in England and Wales, justification by claimants' consent is for defendants to prove. *Aliter* in some US jurisdictions: see Moore, Nancy J. 'Intent and Consent in the Tort of Battery: Confusion and Controversy' (2012) 61:6 American University Law Review 1585-1654, 1603-1604.

Conceptions of law and morality

Forty-five years ago, I devised and taught a course with the pretentiously imperialistic title 'Law and Society'. Fortunately, the intervening years have seen, from other authors, a steady flow of scholarly modules and books with titles having the form 'XXX Law and ZZZ/QQQ-ology).[19] These explore (i) law *and* (ii) another recognised phenomenon or discipline. The justification claimed for the juxtaposition might be that: (a) the two elements have some common subject matter; or (b) the account each element can present is significantly incomplete without the account that the other presents. Or there might be a more holistic claim to present a unified 'YYYology of Law'.

It is widely assumed that 'law' and 'morality' are 'separate' but — when purporting to govern the same issues — 'overlapping'. This assumption is open to two objections:

1. It over-simplifies and obscures the extent to which law, though significantly more institutionalised than morality, reflects dominant moralities;[20] and

2. It presents both law (despite the obvious fairness in the principle of legal predictability) and morality as monoliths[21]

19 Patrick Atiyah's *Accidents, Compensation and the Law'*(London: 1970) was the first in Weidenfeld and Nicholson's *Law in Context* series. The publisher's foreword included the following: '[W]e felt that the lucidity, accuracy and comprehensiveness of the leading English legal textbooks threatened to inhibit the growth of a more varied literature in which other values might also be given emphasis, among them breadth of perspective, intellectual vitality and closeness to the realities of the law in action….[Atiyah's book] shows what can be done when a first class lawyer *broadens his conceptions of relevance* and adopts a contextual approach' (emphasis added). For the Critical Legal Studies movement or for sociologists of law — the 'law in context' approach was insufficiently radical.

20 *Cf.* 'The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place.' Cardozo B. *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) pp.174-175.

21 Hart H.L.A., *Law, Liberty and Morality* (London: OUP, 1963),51, 68 and 70-71. See also Bicchieri, C. & McNally, P., 'Shrieking Sirens: Schemata, Scripts, and Social Norms. How Change Occurs' (2018) *35*;1*Social Philosophy and Policy*, 23-53.

Max Weaver
weaverm@lsbu.ac.uk

Herbert Hart asserted a very strong presumption against legislation (especially *judicial* legislation[22]) to enforce moral precepts without the justification that harm to others would thereby be prevented.[23] All else is 'not the law's business'.[24] Hart's and Wolfenden's underlying principle is, at bottom, Millian individualistic libertarianism.[25]

22 Hart's main target was *Shaw* v. *DPP* [1962] AC 223, which reclaimed the general licence that, '[w]hatever is *contra bonos mores et decorum* the principles of our law prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish.' *per* Lord Mansfield (1774) *Jones* v. *Randall*, 98 E.R. 706, p.707.

23 But note Hart's caveat, (note 21 p.5), 'I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others.' Hart mentions paternalism (pp.30-34, esp. p.33) and the avoidance of 'public' (in the sense of 'overt') offence to deeply held notions of what some citizens might regard as *malum in se* (pp.39-48). The justification for the latter is a *consequentialist* concern with shock and offence. Hart concedes that the distinction between that and prohibition because of non-consequentialist dislike, disapproval or disgust 'is sometimes a fine one'. Some might think it too subjective to be serviceable.

Furthermore, at pp.5-6, Hart kicks into touch the argument that '[i]t is of course possible simply to assert that the legal enforcement by society of its accepted morality needs no argument to justify it, because it is a morality which is enforced.' See also pp.23-24.

24 *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO, 1957) Cmnd.24, para 61.

25 Of course, Hart (note 21) cites, at pp.4-6, *J S Mill, On Liberty* (1859) (available at https://www.gutenberg.org/files/34901/34901-h/34901-h.htm, accessed 3 July 2021). However, it is a mistake to think that Mill celebrated an *atomistic* individualism. In 1863, he wrote,

> 'The social state is at once so natural, so necessary, and so habitual to man, that, except in some unusual circumstances or by an effort of voluntary abstraction, he never conceives himself otherwise than as a member of a body….[F]ew but those whose mind is a moral blank, could bear to lay out their course of life on the plan of paying no regard to others except so far as their own private interest compels.' Mill, J.S. *Utilitarianism*, (Kitchener, Ontario: Batoche, 2001) p.32, cited by Appiah (note 1) pages. 20-21.

By contrast, Samuel Smiles on the first page of *Self-Help; with Illustrations of Character and Conduct* (London: John Murray, 1860) (https://www.bl.uk/collection-items/self-help-by-samuel-smiles#, accessed 9 July 2021), wrote,

A century before Lord Devlin's interventions,

> 'Sir James Fitzjames Stephen famously took after it with a cudgel: "To attack opinions on which the framework of society rests is a proceeding which both is and ought to be dangerous."'[26]

Whilst agreeing with Hart that some harmless conduct (such as private homosexual activity) should not be criminalised, Gerald Dworkin argued that,

> 'there is no principled line following the contours of the distinction between immoral and harmful conduct such that only grounds referring to the latter may be invoked to justify criminalization'[27]

Rather than rely on Mill's harm principle, Dworkin argued that the criminalization of homosexual sex was wrong because 'there is nothing immoral in it.'[28]

However, my purpose here is not to join that debate but rather to tease out the various conceptions of: law and morality; and of relationships between them. Although law and morality share normativity and hold much of their subject matters in common, neither Devlin nor Hart saw law and morality as one and the same. Although moral and legal norms might be substantively identical and have the same sociological ancestry (*e.g.* prohibitions of gratuitous killing), they have become *separate entities*.

Being a 'legal' norm requires an *institutional* connection. That flows from the Hartian secondary rules of recognition, adjudication and change.[29] Primary rules (*e.g.* don't kill without good reason) are moral norms but not rules of

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> 'Even the best institutions can give a man no active aid. Perhaps the most they could do is, to leave him free to develop himself and improve his individual condition.'

26 Appiah, note, p.33 quoting Stephen's 1873 book, *Liberty, Equality and Fraternity* (Chicago: UCP,1991) p.103. Appiah comments that Stephen 'did his part to make it so'.

27 Dworkin, G., 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 Wm. & Mary L. Rev.927-946, p.928. (https://scholarship.law.wm.edu/wmlr/vol40/iss3/11)

28 Ibid. 928.

29 HLA Hart, *The Concept of Law* 91-99 (Oxford: OUP, 2012, 3rd edn.)

Max Weaver
weaverm@lsbu.ac.uk

'law' unless there is an extant 'legal system' (with some institutionality[30]) that incorporates them and makes them 'legal'.

Figure 2

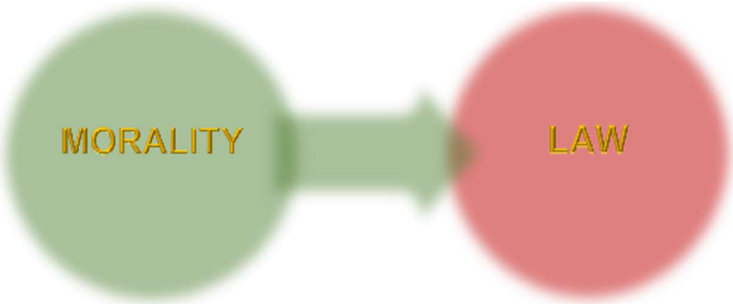
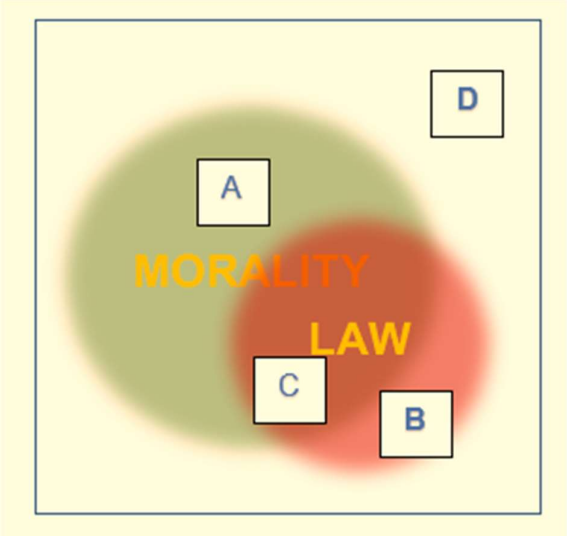


Figure 2 illustrates a simplistic view of the relationship, in which law and morality are two separate entities and the law draws many of its primary rules from the dominant morality.

But we might consider the scope — the subject matter — of morality and law. Figure 4 has four segments:

A. Rather than the norms themselves, segment A represents the issues that are the objects of *social* norms in a society. Segment A extends under segment B to produce segment C. Depicting a vast range of norms by means of one shape obscures the fact of moral normative complexity and conflict in many contemporary societies. Consider, for example, the considerable social tension in the USA about women's rights to choose to have an abortion.[31]

Figure 3



The part of segment A that does not overlap segment B represents issues that are not usually thought of as 'legal'. However, the fact that there has been no parliamentary or judicial decision—whether by default or by conscious choice — to not prohibit NNN, generally

30 As distinct from 'systematicity'. *Cf.* Postema, G.J., 'Law's System: The Necessity of System in Common Law' (2014) 1 N.Z. Law Review, Vol. 2014, 69-106.

31 See (*e.g.*) https://www.reuters.com/world/us/mississippi-asks-us-supreme-court-overturn-abortion-rights-landmark-2021-07-22/ (accessed 21 August 2021).

means that the law is that NNN-ing is permitted. Freedom from regulation signals a freedom to act or not act, but is vulnerable to the retrospectivity of judicial (if not parliamentary) legislation.[32]

B. Segment B extends over segment A to produce segment C. It represents the issues that are the objects of *legal* norms in a society, rather than the norms themselves. The part of segment B that does not overlap segment A represents issues that are legally regulated, but the precise rule is morally indifferent or merely technical (*e.g.* traffic laws about which side of the road we must drive).[33]

C. The area of overlap (segment C) is just that: overlap and not identity. Morality and law both deal with the issues represented by the segment. However, they do not always deal with them in the same way. Suicide Act 1961 Section 2 clearly prohibits assisted dying, although in recognition of moral controversy, section 2(4) requires the DPP's consent to any prosecution — and there is strong moral support for an appropriately controlled assisted dying.[34] Even within the law, different rules can apply to the same issues without merging into one rule. For example, *Donoghue* v. *Stevenson*[35] imposes duties upon manufacturers to their ultimate consumers, as does defective products legislation.

D. The area outwith segments A and B represents human activity about which no-one has normative concerns — whether moral or legal. Of course, segments A and B can expand into segment D (coloured

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32 But cf. *Shaw* v. *DPP* (note 22), which might legitimate retrospective judicial legislation. See Hart, note 21, pp.8-12.

33 Hart, note 29, pp.228-229. 'A rule may exist because it is convenient or necessary to have some clear fixed rule about the subjects with which it is concerned, but not because any moral importance is attached to the particular rule. It may well be but one of a large number of possible rules, any one of which would have done equally well.'

34 Lord Carey, the former Archbishop of Canterbury, is reported to have said, 'Compassion, a central tenet of the Christian faith, should not be a crime, and yet under the current law it is treated as such.' … In a 'survey of more than 5,000 adults, more than half (53 per cent) of those belonging to a religion said their leaders should not have lobbied MPs to try to stop them changing the law in 2015. Less than a quarter of people of faith (22 per cent) believe their intervention was right.' (Sunday Times, 6 June 2021)

35 [1932] AC 562.

Max Weaver
weaverm@lsbu.ac.uk

yellow). There might sometimes be traffic in the opposite direction, with moral desuetude leading to a norm's eventual non-existence. Furthermore, the maxim 'that which is not prohibited is permitted' applies, just as it does to the area of segment A that is not overlapped by segment B.

Figure 4

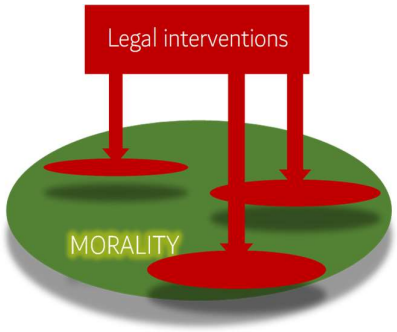

Figure 4 represents another view of the morality-law relationship. It shows morality as historically and logically prior to any number of legal interventions. These might 'hit the spot' and also cast shadows of influence on attitudes and behaviours.

Arguably, all three views capture some aspect of the relationship beyond 'conjunction *simpliciter*' and encourage the rejection of what Zoe Adams believes is a common but mistaken view that there is 'an extra-legal world in which problems exist, and a legal world in which problems are "solved".'[36]

In all three representations, law's institutionality gives it identity and formal (but not substantive) coherence. Morality can be 'coherent' in the sense that it is uncontroversial in its community. Larisa Heiphetz and Liane Young have observed that,

> '[w]idely shared moral beliefs, as compared with controversial moral beliefs, elicit more objectivism.'[37]

In other words, we are more likely to reify that which our social group agrees upon. But such agreement is no guarantee of normative coherence.

Legally, we permit suicide and condemn disability discrimination but criminalise suicide assistance for the disabled — and then rely on the DPP's

36 Adams Z., *Labour and the Wage: a Critical Perspective* (Oxford: OUP, 2020) section 1.1.

37 Heiphetz, L. & Liane L. Young L.L., 'Can only one person be right? The development of objectivism and social preferences regarding widely shared and controversial moral beliefs' (2017) 167 Cognition 167 (2017) 78–90, p.88. See also p.78, 'While some aspects of moral cognition may depend on abundant social learning and cognitive development, the perception that disagreements about widely shared moral beliefs have only one right answer while disagreements about controversial moral beliefs do not emerges relatively early.'

discretion to find some Aristotelean mean. Morally, we might espouse moral principles of autonomy, non-maleficence, beneficence and justice but might still disagree about whether assisted suicide ought to be permitted. We might frequently follow the *consequentialistic* harm principle but also, *deontologically*, claim the right to foreign holidays in the midst of a pandemic. Morality can be inconsistent at individual, group and societal levels[38] and reflection does not guarantee equilibrium.

Form and substance

In 1879, Oliver Wendell Holmes Jnr. claimed that,

> 'as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view.... [A]s the law is administered by able and experienced men who know too much to sacrifice good sense to a syllogism, it will be found that when ancient rules maintain themselves...new reasons more fitted to the time have been found for them...[Each important common law principle] is in fact and at bottom the result of more or less definitely understood views of public policy.'[39]

His biographer, Edward White, commented,

> 'The form of legal rules masked their substantive purposes; those purposes *paradoxically* reinforced doctrinal formalism.[40] '*One had to penetrate form for substance*.'[41]...[R]ules and precedents did not survive merely because they had been in existence [but]...because they were recast in terms of contemporary policy considerations, on which principles were ultimately based.'[42]

38 Cf note 23.

39 Holmes O.W., 'Common Carriers and the Common Law' (1879) 13 American Law Review, 909. *Cf.* Lord Mansfield, ''The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich. 1 to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of the law.' note 22, p.707

40 White, G. Edward, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford: OUP, 1993) 139, emphasis added.

41 Ibid. 140, emphasis added.

42 Ibid. 145. White drew these conclusions from an analysis (pp.139-140) of Holmes note 39 (1879) 13 American Law Review, 909 and Holmes, 'Trespass and Negligence' (1880) 14 American Law Review 1.

Max Weaver
weaverm@lsbu.ac.uk

Adams advances a contemporary — but similar and generalizable anti-formalistic thesis — that David Renton summarises thus:

> '[S]uch categories as "employer" or "worker" are not empty shells waiting for academic lawyers or judges to fill them with content. They are the embodiment of past practices. They participate in the process by which social relationships emerge, develop and are reproduced.'[43]

We might think of formalism as trust in the objective integrity and appropriateness of categories or concepts. By contrast, Holmes (and the succeeding generation of American Realists) mistrusted them. Anthony Giddens identifies the phenomenon of 'trust in abstract systems'.[44]

> 'Facework commitments tend to be heavily dependent upon what might be called the demeanour of system representatives or operators. The grave deliberations of the judge, solemn professionalism of the doctor, or stereotyped cheerfulness of the air cabin crew all fall into this category.'[45]

But Giddens also comments that,

> '[p]rofessions whose claim to specialist knowledge is seen mainly as a closed shop, having an insider's terminology seemingly invented to baffle the layperson — like lawyers or sociologists — are likely to be seen with a particularly jaundiced eye.'[46]

One of the absorbing puzzles of jurisprudence is when do 'the architects of acceptable values'[47] — a category that surely includes judges and the lawyers who feed them cases and arguments — take a Platonistic view and when are they fully aware of the merits and policy issues but content to manipulate the concepts rather than engage in overt policy reasoning.

43 Renton R. (2021) 50:2 Industrial Law Journal 341, reviewing Adams, note 36.

44 Giddens A., *The Consequences of Modernity* (Cambridge: Polity, 1990) pp.83-92.

45 Ibid. p.85.

46 Ibid. pp.89-90

47 The phrase is Ulrich Beck's: see his *Risk Society: Towards a New Modernity*, (London: Sage, 1992) p.66. See also Niklas Luhmann's distinction in his *Trust and Power* (London: Polity, 2017) between 'social trust' (in persons, especially spouses, friends, etc) and 'system trust' (associated with competence of professionals or complex systems). Discussed by Kate Hughes and David Rutledge https://www.abc.net.au/radionational/programs/philosopherszone/trust-risk-and-experts/13441158 (18 Jul 2021)

Categories and Combinations

Sets

In his defence of the legitimacy of calling international law 'law', Hart used the concept of a 'set' — rather than 'system'.[48] Although it lacks 'a legislature, courts with compulsory jurisdiction and officially organised sanctions'[49] and a basic rule providing criteria of validity,[50] it functions, as Bentham wrote, 'sufficiently *analogously*' to municipal law[51] to be worthy of the name 'law'. The inclusion in the set of things called 'law' is mind-dependent.

We might say that all the norms (moral and legal, from different societies and jurisdictions) together constitute a 'set of norms.' That set has limited utility, but so too might many other sets.

Like cases and the concept of categories

Even when 'identical', 'two objects' are not 'the same object', and hence are 'different'. Furthermore, the materiality of any 'difference(s)' will vary with context[52] and from decision-maker to decision-maker.

The mind-dependent conceptions of relevance or materiality that *motivate* — or, which is not the same thing, are invoked to *justify* — judgements of 'difference' or 'similarity' are especially significant. However, such judgements are often obscured by higher-level (or more abstract) legal

48 Cf. 'in most modern societies there are rules of etiquette, and, though we do not think of them as imposing obligations, we may well talk of such rules as existing…*such rules do not form a system but a mere set*. Hart (note 29) p.234, emphasis added.

49 Ibid 232.

50 Ibid 236.

51 Ibid 237, Hart cites Jeremy Bentham, *Principles of Morals and Legislation*. (London: Payne, 1780) XVII 25, note 1. Bentham called the *law of nations* 'an appellation so uncharacteristic, that, were it not for the force of custom it would seem rather to refer to internal jurisprudence.' Bentham would have preferred 'the law *between* nations'.
See also Leslie Green's Introduction to the third edition, at p.*li*.

52 There can also be 'fallacies of relevance', *i.e.* superficially attractive arguments that do not provide good reasons for the conclusions drawn.

Max Weaver
weaverm@lsbu.ac.uk

concepts — such as proximity or remoteness — that lend a deceptive aura of mind-independency. Normative reasoning is not alone in this.

> 'Gödel says that no sufficiently powerful formal system can be perfect, in the sense of reproducing every single true statement as a theorem...Nevertheless, mathematicians began [the twentieth] century with just such unrealistic expectations, thinking that axiomatic reasoning was the cure to all ills.'[53]

However, the sufficiency and materiality of similarity imports mind-dependent teleological considerations — in relation to what purpose might there be sufficient similarity between the precedent(s) and the case in hand?

In 2018, Lord Sumption counselled against the 'unnecessary multiplication of categories', which, he opined,

> 'tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories.'[54]

Whilst 'coherence' founded on the ignoring of differences might be considered false consciousness, Lord Sumption also recognised that to identify a category in which the applicable norm is pitched at a fairly high level of abstraction begs significant questions that quite clearly involve mind-dependent concepts.

> '[T]o say that the result of the decision must be substantively fair…begs the question by what legal standard the fairness of the decision is to be assessed,'[55]

We might choose to apply Lord Sumption's formula to other legal standards. For example,

> To say that only reasonably foreseeable damage is recoverable in negligence begs the question by what legal standard reasonableness is to be assessed.

53 Douglas R Hofstadter, *Gödel, Esher, Bach: An Eternal Golden Braid* (London: Penguin, 1980), p.86.

54 *R (on the application of Gallaher Group Ltd and others)* v*. The Competition and Markets Authority* [2018] UKSC [25].

55 Ibid. However, in a defamation case, Lord Sumption said that 'the inherent tendency of the words must be to cause not just some damage to reputation but serious harm to it.' *Lachaux v Independent Print Ltd* [2019] UKSC 27 [14]. That which is 'inherent' is mind-independent and thus beyond interpretation. But the word 'tendency' perhaps accommodates mind-dependent Interpretation. Beyond analytical and mathematical concepts that are tautologically true, are there any words that have 'inherent' tendencies? Usage is not inherent.

At this level, mind-dependency and interpretivity are easily noticed by those who have eyes to see and whose minds are not dulled by the seductive — but perhaps spurious — coherence of a higher-level category.

We might take twelve-ness as the criterion for a category: a dozen eggs in a box; twelve months in a year; the twelve days of Christmas. Whilst twelve-ness is robustly mind-independent, the resulting category serves no useful normative purpose. By contrast, the category of persons aged 18 or over, serves usefully, but mind-independently, as:

(i) a *proxy* for the *fact* of experience and intellectual competence; and

(ii) a *sufficient justification* of voting entitlement — a *normative* matter.

Whereas,

> 'There is a *logical* category but no *social* category of the witty, or the clever, or the charming, or the greedy. People who share these properties do not constitute a social group. In the relevant sense, they are not a kind of person.'[56]

There is an analogy here with set theory.

> 'In mathematics, a set is "just a way that you collect things together", not necessarily physically. So in mathematics there will be a set which is my right big toe and the Eiffel Tower: that's a set. [One] can just collect things together in [that] formal sense. **And the thing that's collected together, it's important to note, is a set, it's not the things in the set**. So the set of people in this room is not a person, it's a set.'[57]

Although sets can include subsets, they are not usually members of themselves. Thus the 'set of torts' is not itself a 'tort'. And the set is a mind-dependent 'construction'.

Categorisation requires either identicality or similarity. There is a category of vehicle tyre, 'Pirelli Cinturato P7 205/65 R16 96W'. Although separate entities with separate 'identities', all the tyres manufactured to the relevant specification are — saving the occasional manufacturing error — 'identical' in the sense of 'indistinguishable'. There might be errors in human

56 Appiah, note1, p.23 (emphasis added).

57 Mark Colyvan, 'Kurt Gödel and the limits of mathematics', The Philosopher's Zone, 20 February 2010, https://www.abc.net.au/radionational/programs/philosopherszone/kurt-godel-and-the-limits-of-mathematics/2988874 (accessed 2 July 2021). See also https://www.abc.net.au/radionational/programs/philosopherszone/mathematical-objects/13394436 (accessed 13 July 2021).

Max Weaver
weaverm@lsbu.ac.uk

perception, but ‘identicality’ is — in and of itself — mind-independent. However, we are more concerned with similarity, which is mind-dependent and related to the categoriser’s purpose.

We can say that norms entail some categorisation. We might say ‘one ought not to do bad things’ but the category of ‘bad things’ requires some criterion of badness. Random similarity will not do. The criteria of similarity are mind-dependent.

The fact that some men are bald will rarely justify treating them as a category, save when we categorise on purpose of identifying suitable models for hair-dressing demonstrations. And, of course, purpose is entirely mind-dependent.

This is analogous to the factual causation problem of choosing the cause or causes that are important in terms of normative responsibility. There is a vast number of *causae sine qua non*, but for which the particular outcome would not have occurred. A defendant’s ancestors are not morally responsible for the defendant’s driving whilst mobile-phone distracted — despite ‘no ancestors, no defendant, no accident’.

Taking stock:

A. In normative matters categories are essential.

B. Categories require criteria of similarity.

C. Similarity is a matter of *degree* and therefore usually mind-dependent.

D. Similarity usually relates to some mind-dependent conception of purpose.

Whilst C is true, categories are often taken to be labels for ‘kinds’. Despite their non-mathematicality, they are vulnerable to:

E. the designation of some of their characteristics as ‘essential’; and

F. the attribution of a Platonic ‘reality’ as ‘concepts’ *sui generis*.[58]

Thus entrenched, they can inhibit responsiveness to social changes.

From casuistic beginnings, categorising processes of generalisation and justification spawn rules and principles from which reasoning in a syllogistic

58 See the emboldened words in note 57.

mode is — or appears to be — possible. The concept of 'like cases' entails 'categories' of which the two cases can be said to be 'instances'.

An American Realist — or a social intuitionist, or David Hume — might say that a 'passion' to treat case B as case A was treated prompts the articulation of a single category into which both cases will fit. Once that has happened, the articulated category is part of the law-stuff and enables the category to be accommodated as a rule-like major premiss. However, the logicality of syllogistic reasoning is no more than apparent, because the non-mathematicality[59] or interpretivity of the category (or concept) is inherent, even if judges sometimes (mostly?) proceed — or purport to proceed — *as if* there is no interpretive scope.

Negligence: case-study

With only minor exceptions, the pre-1932 case law could be thought to evidence the major premiss of this syllogism:

1. Manufacturers' duties for the safety of their products sound (subject to limited exceptions) only in contract. (No contract: therefore, no duty — NCTND)

2. Ms Donoghue had no contract with Stevenson.

3. Therefore, Ms Donoghue could not recover damages for the harm allegedly caused by the decomposed snail in the bottle of Stevenson-made ginger beer.

That was Lord Buckmaster's position in *Donoghue* v. *Stevenson.*[60] But notice that Lords Buckmaster, Atkin and Macmillan were in accord that:

a. precedent cases can be grouped into categories; and

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59 Here I leave aside doubts and conundrums concerning the certainty of mathematics, on which see: Kurt Gödel's incompleteness theorem; https://www.abc.net.au/radionational/programs/philosopherszone/kurt-godel-and-the-limits-of-mathematics/2988874 (site includes a transcript).

'Gödel's … first incompleteness theorem states that in any consistent formal system FF within which a certain amount of arithmetic can be carried out, there are statements of the language of FF which can neither be proved nor disproved in FF. According to [his] second incompleteness theorem, such a formal system cannot prove that the system itself is consistent (assuming it is indeed consistent).' https://plato.stanford.edu/entries/goedel-incompleteness/#PhiImpAll

60 [1932] AC 562

Max Weaver
weaverm@lsbu.ac.uk

b. categories delimit the scope of the application of particular principles.

Nonetheless, Lord Buckmaster rejected the particular categorising that Lords Atkin and Macmillan accepted. Whilst not denying the notion of principle, he thought the NCTND principle should be subject only to very limited exceptions — for articles dangerous in themselves or whose defects are known to the manufacturer.[61] The practical outcomes of the strict NCTND principle appealed to him. He accepted its policy implications and therefore sought to disapprove suggestions in previous cases that seemed to support a more general principle of liability in tort for negligently caused reasonably foreseeable damage.

Whereas Lords Atkin and Macmillan were clearly uncomfortable with the effects of the NCTD policy and therefore sympathetic to:

(i) the development of a more widely-drawn category (Lord Atkin's famous 'neighbour principle'[62]); or

(ii) the accommodation of additional sub-categories. Here Lord Macmillan is the more explicit.

> 'The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed...Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken'.[63]

In the analysis of negligence, judges, legal advisers and scholars identify sub-categories — misrepresentations, omissions, liability for third parties, pure economic loss, psychiatric harm to observers uninvolved in the accidents they witness, etc. — that are so distinct from each other that any *general* concept of reasonable foreseeability has little relevance. Indeed, some of the sub-categories have rules that override reasonable foreseeability — if not 'reason' or 'reasonableness'.[64] One might well think some of them:

61 Ibid. p.569

62 Ibid. p.580.

63 Ibid 619.

64 *E.g*. in relation to eminently foreseeable pure economic loss, Lord Denning MR said, 'The risk should be borne by the whole community who suffer the losses rather than rest on one pair of shoulders, that is, on one contractor who may, or

(a) 'categories' *sui generis*, or

(b) exceptions from the main category's scope of application, or

(c) threats to the category's delimitation.

That last possibility underlines categories' mind-dependency and subjectivity.

Furthermore, there is mind-dependent situational specificity in setting the required standard of care. Thus, in *Marshall* v. *Osmond*, Lord Donaldson MR said that a police driver in hot pursuit of a suspect owes the suspect

> 'the same duty as that owed to anyone else, namely to exercise such care and skill as is reasonable in all the circumstances.

But he continued,

> 'The vital words in that proposition of law are "in all the circumstances"'[65]

Whilst a lay person driving as the police officer did in this case would have been negligent, the police officer was guilty only of 'an error of judgment.'[66] To say that the rules applied to lay persons and police officers are 'the same' ignores *the creation of a sub-category* of 'police officers in hot pursuit of suspects' in which *different standards* apply.

Roscoe Pound described 'the continual juristic struggle for a simpler system that will better order and better recognise the phenomena of the actual administration of justice' as 'no vain quest' even though it is — as 'a *juristic ultima Thule*'[67] — unattainable. He also argued that,

> 'Organization and system are *logical constructions of the expounder* rather than in the external world expounded. They are the means whereby we make our experience of the world intelligible and available.'[68]

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may not, be insured against the risk. *There is not much logic in this*, but still it is the law.' *SCM (United Kingdom) Ltd* v *WJ Whittall & Son Ltd,* [1971] 1 Q.B. 337, 344 (emphasis added). *Cf.* Weaver M., 'Honestly the Best Policy?' (1971) 34 Modern Law Review 323.

65 [1983] Q.B. 1034, p.1038.

66 Ibid.

67 A mythical island lying beyond the borders of the known world.

68 Pound R, *An Introduction to the Philosophy of Law* (London; Yale UP,1954) p.72 (emphasis added).

Max Weaver
weaverm@lsbu.ac.uk

Nonetheless — even if neither law nor morality can be reduced to algorithms or syllogisms that have quasi-mathematical precision entirely operable by computers — the spectre of the ultra-intelligent machine haunts us. In 1965, Jack Good wrote,

> 'Probably Man will construct the *deus ex machina* in his own image...Let an ultraintelligent machine be defined as a machine that can far surpass all the intellectual activities of any man however clever. Since the design of machines is one of these intellectual activities, an ultraintelligent machine could design even better machines; there would then unquestionably be an "intelligence explosion," and the intelligence of man would be left far behind....Thus the first ultraintelligent machine is the last invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control. It is curious that this point is made so seldom outside of science fiction. It is sometimes worthwhile to take science fiction seriously.'[69]

Pound also cited the ancient doctrine of *ratio legis*, which he describes as

> 'the principle of natural law behind the legal rule, which has been so fruitful both of practical good and of theoretical confusion in interpretation.' [70]

The legal rules have 'jural reality' insofar as 'they embodied or realized a principle of natural law' and justified 'the doctrine of reasoning from the analogy of all legal rules, whether traditional or legislative.'[71]

On that view, if successive judges have decided that negligent makers of defective articles are only liable to those to whom they have sold them if the articles are of an ultra-hazardous nature, Ms Donoghue's claim must fail because — ginger beer not being ultra-hazardous — it is not analogous to the previous instances. It seems undeniable that Lords Atkin and Macmillan had a policy view that chimed with the recognition of welfare as a counter to nineteenth century possessive individualism. By 1932, the Industrial Revolution had happened and would not be reversed by the imposition of

69 Good I.J., 'Speculations Concerning the First Ultraintelligent Machine' (1966) 6 Advances in Computer 32-33, purl.stanford.edu/gz727rg3869 (accessed 19 August 2021).

70 Note, p.10.

71 However, I take reasoning by analogy from statutes to be a relatively rare phenomenon (except perhaps where Human Rights Act 1998 is invoked) and leave it aside.

some burdens upon entrepreneurs.[72] The hedonistic calculus favoured some consumer protection, a realisation that gathered additional momentum in the second half of the twentieth century.

The fluidity of categories

Categories are bundles of items that are *deemed* to share characteristics that are *deemed* materially relevant to the *deemed* underlying purpose and are *deemed* sufficient in number and/or weight.

They are fluid because:

(a) taken over time, there is, in case law, no single mind doing the deeming. Sir Carleton Allen argued that the judge *in each case*

> 'has to decide whether the case cited to him is truly apposite to the circumstances in question and whether it accurately embodies the principle which he is seeking.'[73];

(b) saving rules like minimum voting age, the words used to delineate a category will be open-textured;

(c) in statute law, the canonical text is usually silent about the underlying purpose, which can be constructed and re-constructed in successive applications of the statute; and

(d) any words used to invoke an underlying purpose will be open-textured.

Categories are thus essentially contestable. Where the social consensus is strong, a particular conception will not be much contested. But as social *mores* change, the latent contestability of the formerly taken-for-granted can be is discovered and exploited.

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72 *McPherson* v. *Buick* 217 NY 382 (1916). 'Cardozo's ruling signaled a new standard of corporate responsibility although what that standard meant in practise depended on the specific context of the auto market.' Clarke, S., 'Unmanageable Risks: *MacPherson* v. *Buick* and the Emergence of a Mass Consumer Market' (2005) 23(1) Law and History Review 1-52, p.50.

73 Allen, C.K., *Law in the Making* (Oxford: OUP, 1961, 6th ed.) p.276, cited in Simpson, A.W.B., 'The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent' in Guest AG (ed), *Oxford Essays in Jurisprudence* (Oxford: OUP, 1961, 148-175) p.149.

Max Weaver
weaverm@lsbu.ac.uk

Brian Simpson[74] points to the distinction between (a) (judicial formulations) and (b) (statutory rules, 'where every word is sacred'). He argues that the formulations in cases are 'invariably embedded in the rest of the judgment', which might bear on the meaning of the formulation. Importantly, he notes that case-law rules are 'formulated and applied at the same time'.[75] Furthermore,

> 'a formulation of a rule in a judgment serves a justificatory purpose which is quite different from the purpose served by the formulation of a rule in a statute'[76]

Simpson argues that,

> 'it is sensible enough for the courts to retain a somewhat greater freedom in dealing with the rules enunciated in such circumstances than they enjoy in relation to statutory rules.'

However, he perhaps underestimates the potential for judicial creativity that cases like *Donoghue*[77] and *Hedley Byrne*[78] exemplify,

> '[T]he extent of this freedom is not very great, and judicial practice in general reflects little more than reluctance to be over impressed by short passages lifted out of judgments.'[79]

Exemptions, exclusions and exceptions

An exemption is an explicit and limited non-application of a rule. It might require some political or compassionate justification, but it leaves the rule and any justificatory conceptions of the rule's purpose untouched. Unlike exemptions, exclusions and exceptions delineate the rule itself.

Exclusion and exception are both tools of delineation. Any delineation of a rule — which is most rigorous when the rule is statutory and thus has a canonical form — entails *including* some matters and *excluding* others. Thus, although 'persons aged 18 or older may vote' uses *inclusory* language, it *excludes* under 18s: *expressio unius est exclusio alterius*.

The choice between that formulation and 'everyone, except those under 18, may vote' might appear to be a matter of drafting style. Although explicit

74 Note 73, pp.166-167.

75 Ibid. p.166.

76 Ibid. p.167.

77 Note 35

78 *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465.

79 Note 73, page167.

language of exception might be more likely to provoke interest in its justification, it is actually easy to ask, 'If 18s can vote, why are 17s excluded?'

And, when the equitable pull is strong enough, the need for 'exceptions' or amendment can be avoided by re-interpretation of the rule, whether judge-made or statutory.[80] J.L. Austin[81] points to: justifications (self-defence) that can justify exceptions; and excuses (accident) that might mitigate penalties and might justify the re-casting of a rule (by articulating a new requirement of intention or recklessness)

Where the original rule is in canonical form, there are sometimes stated defences. These simply narrow the scope of the rule and are, as the rest of the rule, subject to the mind-dependent interpretation of any open-textured terms. Beyond that to make an 'exception' requires strong reasons. In successive editions, Twining and Miers[82] have made extensive use of the unusual case of *Buckoke* v. *Greater London Council*, in which Lord Denning MR said,

> The law, if taken by the letter of it, says that they are not to shoot the lights when they are at red. But the public interest may demand that, when all is clear, they should follow the precedent set by Lord Nelson. If they should do so, no man should condemn them. Their chief officer says he will not punish them. Nor should the magistrates. Now that we in this court support what the chief officer has done, it means that, *in point of practice, we have grafted an exception on to the strictness of the law so as to mitigate the rigour of it*. It may now truly be said that firemen, ambulance men and police officers are to be excused if they shoot the lights when there is no risk of a collision and the urgency of the case so demands.[83]

Whilst *Buckoke* might be a limiting case, it illustrates an exception made for a consequentialist (or policy) reason. The categorisation made by the original rule — drivers are required to comply with road signs[84] — remains

80 *E.g. Yemshaw* v. *Hounslow LBC* [2011] UKSC 3, *Patel* v. *Mirza* [2016] UKSC 42.

81 Austin J.L., 'A Plea for Excuses', (1956-57) 57 Proc. Aristotelian Society (NS) 1-30.

82 Twining, W. & Miers D., *How to do Things with Rules* (1st edition, London: Weidenfeld & Nicholson, 1976 — (5th edition Cambridge: CUP, 2014).

83 *Buckoke* v *Greater London Council* [1971] Ch. 655, 669-670 (emphasis added).

84 Then Road Traffic Act 1960, section 14(1)(b).

Max Weaver
weaverm@lsbu.ac.uk

valid but emergency drivers who take care to avoid collisions are taken out of that category of 'drivers'. The category was re-defined.

In *DPP* v. *Ziegler*[85] the relevant offence was to, 'without lawful authority or excuse, in any way wilfully obstruct…the free passage along a highway'.[86] However, the concept of 'lawful excuse' was broadly construed to include intentional action by protesters to disrupt the activities of others, even with an effect that was more than *de minimis*.[87] The prosecution had failed to show that conviction under Highways Act was 'necessary in a democratic society' for the purposes of Articles 10.2 and 11.2 ECHR. This mind-dependent interpretation was influenced by broad moral views that ECtHR had endorsed.

> 'In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly…'[88]

Nevertheless, legal decisions, legal rules and legal principles are logically distinct from the processes by which they are made — a painting is not a painter, or a brush or brushstrokes.

No naked laws

Legal decisions, rules and principles stand embarrassingly naked without supporting justification.

Legal decisions just are. C wins, C loses, or *vice versa*. That does not entail any dealing with categories. However, their *justification* is normally by appeal to a rule or principle, which is logically (if not chronologically) prior, and which deals with a *category* of affairs. The simplest justificatory argument is from *regularity* (precedent, tradition, convention), which has

85 [2021] UKSC 23.

86 Highways Act 1980, section 137(1).

87 Ibid. [154].

88 Ibid. [41] citing *Kuznetsov* v. *Russia* [2008] ECHR 1170 [45], '[A]ny measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles — however shocking and unacceptable certain views or words used may appear to the authorities — do a disservice to democracy and often even endanger it.'

moral value in the fairness of predictability and of treating like cases alike. Regularity entails the mind-dependent notion of *sufficient similarity*.[89]

Regularity — and some degree of generality — are of the essence of rules. Again, the mind-dependent notion of sufficient similarity is entailed. Nevertheless, rules can 'just be': 'all shops must close before sunset'. If the legislator has, as a matter of social fact, sufficient authority, the rule will stand as part of the system of law.

Principles are norms and have the same logical structure as rules. However, the etymology of 'principle' evokes notions of first cause or foundations. Usage since the sixteenth century tells of 'fundamental tenets or doctrines of a system, a law or truth on which others are founded'. Being more 'fundamental', principles claim to guide whatever falls within their scope. They will often be used as justifications for rules and decisions, and so will tend to be cast at a higher level of abstraction than rules are and are typically more fluid. Whilst the categories of affairs to which they apply are not as explicit as rules are, the notion that principles have *scope* imports categorisation — albeit at a higher level of abstraction than is typical for rules. We would not say that it is a 'principle' that voting rights accrue on citizens' eighteenth birthdays, but instead, that, in principle in a democracy, all adults are entitled to influence the choice of government.

Principles can and do conflict (for example, privacy and freedom of expression). Conflict resolution usually involves identifying categories of affairs in which one or the other principle has priority. These are akin to *exceptions* to (rather than exemptions from) rules.

Principles are invoked — and sometimes re-cast — as justifications of rule applications and rule changes. Sometimes an invoked principle escapes the logical requirement that it, in its turn, be justified.

In *Lewis* v. *Averay,* D, a bona fide purchaser for value of a car was faced with a claim from the car's original owner, C, who had sold it to a rogue and wanted its return or value. C argued that he had been mistaken about the

89 A case of first impression raises no issues of regularity save in this wholly improbable sort of case: before any convictions (in the jurisdiction) for theft, identical twins X and Y jointly and simultaneously appropriate a sack of coal: if X is convicted of theft, regularity demands that Y too should be convicted. This example illustrate the logical possibility of identicality. Of course, for practical purposes, no two cases are identical.

Max Weaver
weaverm@lsbu.ac.uk

identity of the rogue who had purported to be a famous film actor and had thus persuaded the claimant to give him possession of the car and logbook in return for a rubber cheque. C's mistake as to identity, C claimed, rendered the purported contract void *ab initio* and thus incapable of passing title to the rogue. C's argument was grounded in nineteenth century principle that contract involves a 'meeting of minds'. In finding for D, Lord Denning MR held that there was a contract that was not void but voidable for fraud and thus, until avoided, capable of passing title. That was not just a rule change. Stepping outside the reference frame of *consensus ad idem*, Lord Denning explicitly — and hence overtly — weighed the rights of the bona fide purchaser for value against those of a vendor who could, and shold, have taken more care to check the rogue's claims of credit-worthiness. Thus the decision turned on a principle of *judicially-determined relative culpability* rather than on a principle of *parties' subjective intentions*. However, Lord Denning felt no need to justify this new principle. He simply asserted,

> '[t]hough I very much regret that either of these good and reliable gentlemen should suffer, in my judgment it is Mr. Lewis [C] who should do so.'[90]

Lord Denning was unusual in his willingness to innovate overtly, without gathering precedents as fig leaves.

Similarly, in *Donoghue*, Lord Atkin — although finding some comfort in precedent[91] — confidently asserted a principle (the neighbour principle) that was cast in very broad terms that almost transcended Lord Macmillan's categories.

Unsurprisingly, some well-established categories proved resistant, amongst them: that of harm caused through negligent (as distinct from fraudulent) words; and that of 'pure' economic loss (*i.e*. not consequential upon damage to person or property), which was regarded as a matter to be covered by the law of contract. The claim in *Hedley*[92] fell into both categories. Without D's

90 *Lewis* v. *Averay (No.1)*, [1972] 1 Q.B. 198, p.207.

91 At 580-581,immediately after the neighbour principle, he said.He c\limed that it was the doctrine 'the doctrine of *Heaven v. Pender* *11 Q. B. D. 503* , 509.... limited by the notion of proximity in *Le Lievre v. Gould.* *[1893] 1 Q. B. 491* , 497, 504. 1

92 Note 78.

words 'without responsibility',[93] the claim would have succeeded, but not by virtue of an application of the neighbour principle. Instead, the House of Lords used two forms of justification:

(i) an analogy with cases of fiduciary liability, citing *Nocton* v. *Lord Ashburton*[94] to provide precedential cover; and

(ii) a newly emphasised principle of reasonable reliance — a close relative of assumption of responsibility.

Lord Devlin said,

> 'In my opinion, the appellants in their argument tried to press *Donoghue v. Stevenson* too hard.... as it is only a general conception it does not get them very far....The real value of *Donoghue v. Stevenson* to the argument in this case is that it shows how the law can be developed to solve particular problems. Is the relationship between the parties in this case such that it can be brought within a *category* giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, *for new categories in the law do not spring into existence overnight.*[95]

Reasonable reliance now provides a *separate category* of liability for negligence. It is more limited than the neighbour principle, which reached its zenith in *Anns* v. *Merton LBC*[96] and has since been subject to a succession of limitations. The negligence tort is now more focused on setting standards in 'recognised duty situations' (or relationships) rather than sweeping expressions of abstract principle. In *Robinson* v. *Chief Constable of West Yorkshire Police* Lord Mance said,

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93 Heading the defendants' carelessly inaccurate statement about the credit-worthiness of Easipower Ltd. Ibid p.504.

94 [1914] AC 932, cited ibid by Lords Reid (pp.484-6,490), Morris (pp.500, 502), Hodson (pp.508, 510, 512), Devlin (pp.518-524, 529-350), and Pearce (pp.533, 535-536).

95 Note 78, p.525 (emphases added).

96 [1978] AC 728 pp.751-52 *per* Lord Wilberforce, 'Through the trilogy of cases in this House — *Donoghue*...(note 35), *Hedley Byrne*... (note 78), and *Dorset Yacht Co. Ltd. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist.'

Max Weaver
weaverm@lsbu.ac.uk

> 'The key to the application of [the neighbour principle and reasonable reliance] is to *ascertain whether or not a particular situation falls within an established category*.'[97]

Reasonable reliance as the applicable principle in the defective advice context was foreshadowed in Denning LJ's dissenting judgement in *Candler* v. *Crane Christmas.*[98] It also provides the rationale for one of the *Anns* case's offspring of, *Junior Books* v. *Veitchi*[99] in which a nominated sub-contractor was held liable in tort to the claimant, for whom a builder was managing a construction project. Although, ordinarily, liability would be contractual — sub-contractor to builder; builder to client — the House of Lords allowed the client's claim in negligence, justifying it on the neighbour principle even though the loss might probably be best classified as purely economic.[100] *Anns* having been abandoned, *Junior Books* needed a new justification, which the reliance principle provides. As a nominated sub-contractor, Veitchi must have known that the client was (reasonably) relying on their skill and competence. Why else would Veitchi have been nominated?[101]

This passage from Sir Henry Maine' *Ancient Law* (which Holmes read at Harvard[102]) is apposite.

> 'When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and

97 [2018] UKSC 4 [85] (emphasis added).

98 [1951] 2 KB 164, Denning LJ said at p.179, '[A] duty to use care in statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports *on which other people - other than their clients - rely* in the ordinary course of business.' (emphasis added).

99 [1983] 1 AC 520.

100 See note 64

101 *Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398. See Lord Keith at p.466.

102 White, note 40 p.131. At p.146, White asserts Maine's influence despite Holmes's disavowal of it.

> reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact they have been changed.'[103]

Grand-style categorisation

As a matter of social fact, decision-makers who lack charismatic or traditional authority,[104] feel some pressure to offer justifications for their decisions. 'Because I say so' is arbitrary and inadequate. *Impersonal* justifications — attended by categorising rules and principles — are needed.

Where there are no conveniently established general rules, decision-makers confront series of instances — disputes requiring authoritative resolution. They will look to *regularity*, applying Zipf's 'principle of least effort'.[105] Furthermore, in avoiding legitimacy-undermining inconsistency, they will find Max Weber's ideal-typical bureaucracy attractively convenient.

In Weberian terms, bureaucracy differs from charismatic and traditional ideal-types of authority and government. It 'replaces the belief in the holiness of what has always been…with submission to deliberately created rules'[106] and 'offer[s] the best chance of putting into practice the principle of division of labour in administration according to purely objective criteria [or] calculable rules.'[107] Furthermore, bureaucracy's '"rational" legal procedure [is] based on formalised legal concepts'.[108] Categorisation — with its potential for mind-disengagement — is of the essence of bureaucratic endeavours.

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103 Maine, H., *Ancient Law*, 1861, Chapter 2 ' Legal Fictions: http://public-library.uk/ebooks/07/2.pdf (accessed 12 July 2021).

104 See Runciman, W.G.(ed), *Weber: Selections in Translation* (Cambridge: CUP, 1978) pp.226-250.

105 Zipf, G. K., *Human Behavior and the Principle of Least Effort* (Cambridge MA: Addison-Wesley, 1949)

106 Runciman W.G., note 104, p.232. Weber goes on to say that these rules 'are not, in any sense, "sacred".' However, arguably, the priesthood of the common law holds some elements — for example the fault principle in tort law — of 'doctrine' sacred.

107 Ibid. p.351.

108 Ibid. p.352.

Max Weaver
weaverm@lsbu.ac.uk

Almost synchronously with the first revolutionary period in France, Bentham espoused the principle that no citizen should be subjected to laws of which they have no knowledge.

> 'The laws are a snare for those who are ignorant of them...Whatever is not in the code of laws ought not to be law.'[109]

> 'That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated...To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes.'[110]

The 1804 French Code was a symbol of the post-revolutionary order, replacing the old.

> '[T]he secular natural law ideal of one law applicable to all Frenchmen' [exemplified] 'the rampant rationalism of the time'[111]

By contrast, German codification in 1896 was, under Savigny's influence, more historically-driven. Principles were to be derived *scientifically* from the existing law and arranged *systematically*. Merryman shows how, in lawyers' attitudes to the Code, historicity gave way to legalism, with its downplaying of mind-dependence.

> 'Legal science is also highly systematic...as new principles are discovered they must be fully integrated into the system...*this emphasis on systematic values tends to produce a great deal of interest in definitions and classifications*...The assumption of legal science that it *scientifically derives concepts and classes* from the study of natural legal data on the one hand, and the generally authoritarian and uncritical nature of the process of legal education on the other, tend to produce the attitude that definitions of concepts and classes express scientific

109 Bowring J. (ed.), *The Works of Jeremy Bentham, published under the Superintendence of his Executor*, (Edinburgh: William Tait, 1838-1843) available at https://oll.libertyfund.org/title/bowring-the-works-of-jeremy-bentham-vol-1#lf0872-01_head_082. Vol. 2 p.207. Cited in DiFilippo T., 'Jeremy Bentham's Codification Proposals and Some Remarks on Their Place in History' (1972) 22 Buff. L. Rev. 239 https://digitalcommons.law.buffalo.edu/buffalolawreview/vol22/iss1/13 (accessed 12 July 2021)

110 Ibid. Vol. 1, p.157.

111 Merryman J.H., *The Civil Law Tradition* (Stanford; SUP, 1969) p.29. Merryman comments that, although some of the principles come for pre-revolutionary law, 'the fiction was stoutly maintained by a large group of French jurists that history was irrelevant to interpretation and application of the code.'

> truth.…The work of *legal science is carried on according to the methods of traditional formal logic*…[L]egal science attempts to be *pure*. Legal scientists deliberately focus their attention on *pure legal phenomena and values* such as the legal value of certainty in the law, and exclude all others. Hence the data, insights, and theories of the social sciences [and history], for example are *excluded as nonlegal*…The result is a highly artificial body of doctrine that is deliberately insulated from what is going on outside, in the rest of the culture.'[112]

This conception of legal science became part of the justification of US case method. The attitudes that Merryman describes can also be seen in the regard that UK law schools had for the textbooks that emerged in the nineteenth century.[113] Despite law-in-context and sociology of law, modern legal education and judicial justificatory reasoning is not free from appeal to Platonistic concepts. Geoffrey Samuel writes of the UK approach that, like Bentham,

> [Sir Henry Maine had suggested in 1861 that] '[w]hat English law needed was codification, and of course codification had been what might be regarded as the axiomatic stage of legal science. In fact what seemed to happen, as Hedley asserts, was that the new law faculties did for the common law that which codification did for the civil law with the result that the common law moved from being a mass of remedies largely categorised using the alphabet to a rationalised system of rights and duties classified according to the *Institutes* of Justinian. The new law faculties assumed that law was a science and of course "Maine inherited a traditional view of long standing that associated general legal theory with Roman law." Peter Birks certainly regarded this adoption of Roman law *categories* as progress since, for him, no "*science* can progress without *taxonomy* and *taxonomic debate*".'[114]

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112 Ibid. 67-69 (emphases added)

113 A 1888 review of the first edition (1887) of Pollock's *The Law of Torts* commented that Pollock, Holmes, Maine and Stephen, had made 'the elucidation of law…s*cientific*, because they have explained legal problems by aid of all the best knowledge of the age [and] have…sought to produce works treating of legal speculation in the same way in which authors of eminence have long been accustomed to deal with every other subject which can interest mankind.…[They have] applied to the elucidation of law the literary skill, the historical knowledge, the *scientific ideas of the day*.' Anon, 1888, p.19 (emphasis added).

114 Samuel, G., 'Is Legal Knowledge Cumulative?' (2012) 32:3 Legal Studies 448-479. p.458, citing: Hedley S., 'How has the common law survived the twentieth century?' (1999) 50 NILQ 283; Stein P., *Legal Evolution: The Story of an Idea* (Cambridge: CUP,1980) p.123; and Birks, P. (ed), *Classification of Obligations* (Oxford: OUP, 1997) v, 1-35.(emphasis added).

Max Weaver
weaverm@lsbu.ac.uk

In delayed and piecemeal responses to Benthamite arguments, the nineteenth century saw a series of topic specific codes, including: Bankruptcy Act 1842; Offences against the Person Act 1861; Sale of Goods Act 1893. But codification was something of a struggle.[115] Writing in 1908, Pound noted and criticised,

> 'the tendency to conceive of a statute as something exceptional and more or less foreign to the body of legal rules in which legislation has endeavoured to insert it'.[116]

However, that amounts to strong protective preference for the common law categories — influenced by Roman Law scholarship — rather than a rejection of categories.[117]

Group Agency[118]

We like to think our minds are our own — despite our developing understanding of evolution, neuroscience and the phenomena of social conditioning. But we recognise 'groupthink' as

> 'the mode of thinking that persons engaging when concurrence-seeking becomes so dominant in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action.[119]

115 See Cornish W R et al., *Law and Society in England 1750-1950* (Oxford: Hart, 2019, 2nd edn.) pp.579-583.

116 Pound R., 'Common Law and Legislation' (1908) Harvard Law Review 383-407, p.390.

117 Ibid. p.401.

118 The phrase comes from List, C. & Pettit, P., *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: OUP, 2011): https://hwcdn.libsyn.com/p/e/0/7/e07f1e139578573f/Philip_Pettit_on_Group_Agency.mp3?c_id=2904688&cs_id=2904688&expiration=1626259193&hwt=55842d6983b90039c21cad48d5042d7c (accessed 20 August 2021). *Cf* Chiao, V. (2014). 'List and Pettit on Group Agency and Group Responsibility' (2014) 64(5) University of Toronto Law Journal 753-770.

119 Janis, I. L. (November 1971). 'Groupthink' (1971) 5(6) *Psychology Today* 84-90 https://web.archive.org/web/20100401033524/http:/apps.olin.wustl.edu/faculty/macdonald/GroupThink.pdf (accessed 20 August 2021).https://web.archive.org/web/20100401033524/http:/apps.olin.wustl.edu/faculty/macdonald/GroupThink.pdf

Furthermore, we: attribute responsibility to the members of a 'conspiracy', and allow *corporate persons* to make contracts, to sue[120] and be sued in defamation and held liable for manslaughter.[121] The US Supreme Court has awarded corporations First Amendment rights to free speech in respect of corporate electioneering communications.[122]

Maximilian Koessler argues that,

> 'the term "person," originally the exclusive designation of man, came in addition to mean any rights and duties bearing unit. In the lawyer's vocabulary, the moral or juristic person was thus added to the natural person. It is clear that at this stage of the development, "person," even if used with regard to an entity different from a human individual, ceased to be a metaphor, but was a plain reference to something existing as it was referred to, without any figure of speech involved.'[123]

Rejecting John Austin's post-Enlightenment individualistic[124] insistence that,

> 'all rights reside in, and all duties are incumbent upon, physical or natural persons',[125]

Koessler concludes, almost Platonistically,[126] that,

120 *E.g. Jameel* v. *Wall Street Journal Europe* [2006] UKHL 44, 'the good name of a company, as that of an individual, is a thing of value' *per* Lord Bingham' [26].Defamation Act 2013 Section1 requires that bodies trading for profit show 'serious financial loss'.

121 Corporate Manslaughter and Corporate Homicide Act 2007 dispenses with the need to find an individual human 'controlling (and guilty) mind' and requires only *systemic* gross negligence: see Section 1(1) 'the way in which its activities are managed or organised'.

122 *Citizens United* v. *Federal Election Commission* 558 U.S. 310 (2010) https://www.fec.gov/legal-resources/court-cases/citizens-united-v-fec/

123 Koessler, M., 'The Person in Imagination or Persona Ficta of the Corporation', (1949) 9 Louisiana Law Review 435-449, pp.435-6. See also fnn 13, 16 and 17. https://digitalcommons.law.lsu.edu/lalrev/vol9/iss4/2 (accessed 14 July 2021)

124 Cf. note 25.

125 Austin J. (ed. Campbell), *Lectures on Jurisprudence or the Philosophy of Positive Law* (London: John Murray, 1911) 354

126 But, at p.447, Koessler (note 123) is more subtle. 'To the extent to which a given law rules that a certain thing *should be treated as* a separate legal entity, it is, *as a matter of law, just not possible to challenge its real existence as a separate rights and duties bearing unit*.' (emphases added). Perhaps his phrase 'dogmatic fiction' (pp.435 & 438) is apposite.

Max Weaver
weaverm@lsbu.ac.uk

> '[S]peculations about the reality or unreality of corporate personality which, nowadays, have no more sense than speculations about the reality or unreality of the conception of property or of other established institutions of a legal nature. All [these concepts] are, of course, based upon a given system of law, but within the thus ordered society they are as real as the morning sun or the evening star.'

He certainly opposes the dismissal of corporations as fictions, but that does not make him a naïve Platonist. Similarly, Andrew Simester[127] in his critique of *Jogee*[128] and support of a 'common unlawful purpose doctrine', asserts that '[j]oint criminal enterprises are a distinct moral phenomenon' as are crowds[129] and teams inspired by the Maori concept of Whakapapa.[130]

Conclusion

This paper offers no new principles. Rather it seeks to illuminate assumptions and analytical routines. The simple three-lettered word — *and* — leads to complex ideas of conjunction, disjunction, similarity, difference and combination. The resulting legal and moral concepts are legion and largely indispensable. But their mind-dependency is too often unrealised, forgotten, neglected, obscured or concealed.

[11998 words]

127 Simester, A., 'Accessory Liability and Common Unlawful Purposes' (2017) 133 Law Quarterly Review 73-90.

128 *R.* v *Jogee (Ameen Hassan)* [2016] UKSC 8.

129 Neville, F. et al, 'Shared social identity transforms social relations in imaginary crowds' (2020) Processes and Intergroup Relations https://doi.org/10.1177/1368430220936759 (accessed 21 August 2021)

130 https://teara.govt.nz/en/whakapapa-genealogy; Eastwood, O. *Belonging, the Ancient Code of Togetherness* (London: Quercus, 2021).