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### Axel Hägerström on Law-making

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## Realist Conceptions of Legislation

Eds. Pierre Brunet, Eric Millard, Patricia Mindus

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## INTRODUCTION

Pierre Brunet\*

What has legal realism to say about legislation? Does it really have anything to say about it? Indeed, the topic offers a real paradox and a great challenge. At a first glance, talk about appropriate legislation or decision-making in the legal realm does not seem to belong to the realist tradition. Its very approach to the topic builds on the inherently ambiguous notion of legislation.

First of all because “legislation” – as most words ending in “-tion” – indicates both a process and the result of the process: It stands both for the process of passing a statute and the very enacted statute. Moreover, as a process, legislation may refer to legislative authority as well as the activity of judges.

Add to this the fact that “realism” is not an univocal label even within legal theory and despite the fact that we all (think we) know who the realists were, it remains a controversial issue to establish how to best understand realism and which theories of law fit the label. Numerous scholarly works, published over the last twenty years, have contributed to putting an end to the “frankification of realism”<sup>1</sup> and legal realism is today no longer reducible to a debate on the idiosyncrasies of judges.

Yet, in avoiding any such reductionism, the papers collected in this special issue should not appear to go in too disparate directions. In fact, the contributions have a common starting point: like Hanoch Dagan argues, realism is “insisting on a view of law as a set of ongoing institutions distinguished by the difficult accommodation of three constitutive yet irresolvable tensions: between power and reason, science and craft, and tradition and progress.”

Embracing this general conception, the ten papers in this special issue are grouped in the following way. Section A deals with conceptions of legislation in the tradition of Scandinavian realism, and consists of four papers, each dedicated to an important Scandinavian realist: Patricia Mindus presents the view of Axel Hägerström, T.T. Arvind that of Vilhelm Lundstedt, Torben Spaak that of Karl Olivecrona and Eric Millard that of Alf Ross. Section B deals with conceptions of legislation in the tradition of American realism: Danni Hart discusses the contribution of Karl Llewellyn, Michael Green that of Felix Cohen and Frank B. Cross that of the movement known as new realism. Section C, entitled *questioning realism today*, groups three papers with more general theoretical claims about realist conceptions of legislation: Núñez Vaquero deals with the normative side of the issue, Pierluigi Chiassoni focuses on the premises of a theory of legislation in the realist tradition and Dagan develops his views on the idea of law-making that fits the realists.

Notwithstanding the many differences between American and Scandinavian legal realism, which legitimate this grouping, there are also a number of reasons why we have chosen to explore the topic from both perspectives:

M.S. Green emphasizes that American legal realists did need a prediction theory to criticize the idea according to which “rights” as well as other legal relations “exist” or have been “enforced.” From their point of view, legal relations do not exist as such: We are interpreting factual situations *as if* they were the causal effect of legal relations. Power thus tends to disappear in the mist of objectively valid law. This is so for the Scandinavian realists as well. It might be worth noticing that, according to Torben Spaak, Olivecrona also criticized the idea of “objective legal relations” whose “account of legislation follows a reliably realist pattern in that it is concerned not with the capacity of legislative products to establish legal relations, but with their capacity to cause people to behave in one way or another” (Spaak).

It is worthwhile emphasizing that interpretation, decision-making and morally relevant choices are pervasive, for judges adjudicating as in the process leading to the adoption of a statute. As applied by Cohen, prediction theory sheds light on the fact that adjudication is ultimately a moral decision that cannot be determined only by existing law. Green focuses on the tension between law and morals that is at the core of Cohen’s version of the prediction theory. But he also insists on Cohen’s originality since he was the one who “criticized other realists for exaggerating the extent to which the law is indeterminate” and writes that, “the prediction theory forces judges to face the fact that adjudication is always a moral decision that cannot be answered by determining existing law”. Green’s analysis echoes a relevant point first made by Rumble who wrote that “the thirst for justice which burned at the throat of every legal realist also afflicted him; but in him it was translated into a systematic analysis of the

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<sup>1</sup> See e.g. W.W. Fisher III, M. Horwitz, T.A. Reed, *American Legal Realism* (Oxford UP, NY, 1993), 167; B. Leiter, ‘American Legal Realism’, in M.P. Golding and W.A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publ., Oxford, 2005) 50-66.

ends of law”<sup>2</sup> so that Cohen in particular appears to be “the one genuine exception to the general tendency of most legal realists”<sup>3</sup>. Like all realists, he was very much concerned with justice but unlike most of realists, he was much more interested in the ends of law rather than in its means. This is why he was reluctant to focus on legal indeterminacy.

T.T. Arvind’s paper shows that the same could be said of Lundstedt whose theory is in contrast with many contemporary sceptical or critical theories. Lundstedt starts out with rejecting the traditional distinction between “interpretation” and “legislation” and recognizes that interpretation by judges in “hard” cases is actually better grasped as a form of legislation. Yet, Arvind explains, “unlike modern-day sceptical theorists, Lundstedt did not thereby imply that the adjudicative process is characterised by complete subjectivity, or an absence of groundedness.” This brings Arvind to conclude that “by linking parliamentary and judicial legislation, Lundstedt sought to make the point that both judicial and parliamentary legislation are grounded in the same thing – namely, conceptions as to its social usefulness and social functions – because legislation in its very nature is concerned with being, in some way, useful to society or with fulfilling definite social purposes and functions.”

From this point of view, the analysis of New Realism that Cross puts forward is very stimulating as he uses empirical research on judicial decision-making and its implications for legal realism concerning statutory interpretation. Much like the views of classical realists, “the research shows that attitudinalism and a degree of strategic behaviour characterizes judicial decisions.” But unlike the classical views, it also shows that “these extra-legal effects are not all powerful. Instead, it appears that traditional legal concerns are also quite important to judges.” Of course, such “formalistic” decision-making does not mean that judges are “bound” by the law as much as it shows the preference for a specific rhetoric surrounding decision-making.

We should always recall that, as Rumble emphasized, “the objective of the legal realists was not simply to describe and explain judicial behaviour as accurately as possible; rather, it was also to prescribe reforms for this behaviour. In other words, there is a positive, even idealistic, side to their teachings. Unfortunately, it is a side which has far too often been obscured by the militancy of their negations of traditional theories. Nonetheless, they did not wish solely to destroy; they also wished to build.”<sup>4</sup> This can be considered a point commonly made by the contributions to this special issue. Especially, this is the case of Dani Hart’s contribution which attempts to explain why Llewellyn’s efforts to reform contract law have had such serious long-term but unintended consequences for the modern contract law system. Hart’s essay makes this point in an unorthodox way by importing insights from two seemingly unrelated fields – civil rights law and social philosophy. Núñez Vaquero’s paper does also make this point: It attempts to provide a conceptual reconstruction of normative intuitions in the realist tradition, construed broadly as covering the most notable realists of course, but also their precursors and heirs, on the backdrop of ethical consequentialism.

In shedding light on the complex issue of realist views on legislation and decision-making more generally, this special issue reserves attention also to Alf Ross’ theory. According to Ross, legislation is just an element of the sources of the law and therefore, in his theory of law, there is no conceptual room for the specific study of legislation. As Eric Millard points out, Ross develops the concept of “legal politics” which is seen as a scientifically-based practical activity – it offers guidance to the legislator with the purpose of articulating the premises needed in order to influence social action and suggest formulations instructing legislative organs as they enact the law.

Here is another a core claim: realists have always been anxious about “social technology.” Thus, instead of opting for the misleading choice between clear-cut rules or vague standards, legal realists recommend using both precise rules and informative standards founded on the regulative principles of the doctrines at hand, enabling prediction of the consequences of future contingencies so as to enable individuals to plan and structure their lives accordingly (see Hanoch Dagan’s paper in this issue). This does not mean, as many critics have hastily concluded, that legal realism would be inconsistent because it does not exclude normative aspects and considerations, while at the same time claiming to provide a descriptive approach to law. Rather, a central point realism makes in relation to law-making is that approaching the law from a value-neutral and impartial point of view may be useful in our attempts to find solutions to our social problems. As Patricia Mindus notices about Hägerström, “law is a form of technology for regulating human behaviour. But like any technology, it only appears to be neutral while in reality it is a set of ‘constraining affordances’ since it enables some things while hindering

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<sup>2</sup> W.E. Rumble Jr., ‘The Paradox of American Legal Realism’, (1965) 75 *Ethics* 168.

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

<sup>4</sup> W.E. Rumble, ‘Rule-Skepticism and the Role of the Judge: A Study of American Legal Realism’, (1966) 15, *Journal of Public Law Emory Law School* 256.

others.” This implies that law-making here amounts to access and control of technical procedures grounded in a form of faith, or in Hägerström’s own terms “ideas governing men’s minds.” For sure, this is a way to stress the links between non-neutral technology or know-how and ideological power, a point that non-realist theories of law seldom make, yet a point that is bound to stimulate further debate as legal decision-making, especially policy-making by experts, becomes all the more pervasive as it becomes complex.

We are now back at the paradox: Does realism really have something to say about legislation? On the one hand, it is well known that American and Scandinavian legal realists were primarily concerned with judicial law-making. Some of them clearly recognized this, such as Julius Cohen who complained about legal realists not paying due attention to legislation, though it was “one of the prime sources of policy-making.”<sup>5</sup> Legislation here indicates the process of passing a statute, not its resulting normative text. We all know that statutory interpretation was one of the main topic of the realists yet it deals with the *result* of the legislative *process*. On the other hand, a common claim made by the legal realists is that judges do legislate. In point of fact, this idea was already expressed by Holmes in 1881: “the philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would have hardly tolerated a reference fifty years ago.”<sup>6</sup> Nevertheless, as Pierluigi Chiassoni suggests, it would be too hasty to conclude that legal realism does not have a theory of legislation in terms of process. In fact, it does: it results from realistic theory of law itself. Law is not in its “sources”, “statutes”, or “texts” but in the *use* of its sources, statutes and texts, the meaning of which is always indeterminate and will be determined only by a process.

*Ay there’s the rub*: legal realists did not all agree about indeterminacy. Of course, Frank might have enjoyed destroying lawyers’ illusions about certainty, but Llewellyn committed himself to his work with the commercial code because he felt that “the social practice of law implies stable expectations as to the content of the law at any given time and place” (See Dagan, and also Hart on Llewellyn). What this special issue has contributed in illustrating is that, within the realist tradition, law-making, both as a process and its result, needs to tackle an even deeper challenge linked to indeterminacy: “even when the law is fully determinate, it cannot on its own tell a judge how to decide a case, for it does not answer the question of whether the judge should decide in accordance with the law” (Green). Understanding this challenge makes a case for renewed interest in realism.

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<sup>5</sup> J. Cohen, ‘Towards Realism in Legisprudence’, (1950) 59, *The Yale Law Journal* 886-97 and see also, on the same topic: J. Cohen, ‘On the Teaching of ‘Legislation’’ (1947) 47, *Columbia Law Review* 1301-12.

<sup>6</sup> Justice Holmes, *The Path of the Law, in the Mind and Faith of Mr. Justice: His Speeches, Essays, Letters, And Judicial Opinions* (Lerner ed. 1943), 65 and see also Wilfrid E. Rumble Jr., ‘Rule-Skepticism and The Role of the Judge: A Study of American Legal Realism’ (1966) *supra* n. 4, 251.

## **A – Scandinavian Realism**

## HÄGERSTRÖM ON LAW-MAKING

Patricia Mindus\*

### Abstract

The relationship between law and politics is one of the most debated topics in legal theory. There is no consensus on the range and scope of the political and the legal element in law. Legislation or law-making is conceptually ambiguous because it indicates the law which has been promulgated, and therefore the primary *object* of many modern theories of law, but also the *process* of making it, that many theories of law usually locate outside the scope of jurisprudence and more specifically in the realm of politics. The first section sets the problem of legislation by distinguishing a number of different problems that often appear indistinctly under this label. Standpoints can be viewed according to a spectrum stretching from legal theories holding politics to essentially permeate the law to those claiming the opposite (Sect. B). The aim is to situate Hägerström's view on law-making along this spectrum. My claim is that Scandinavian realism holds middle ground in that ideological constructs structurally affect the law yet legal normativity cannot be reduced to the will of *de facto* holders of power: law cannot be reduced to any idea of will, including that of the majority or of the people. To substantiate this claim the article investigates Hägerström's view on the foundation of a new constitution pursuant to a political revolution (Sect. C), the ultimate touchstone for maintaining the (in)distinctiveness of law and politics. His bottom line is that the problem cannot be explained in terms of discovery of public interest (Sect. D), because of his non-cognitivist approach (Sect. E). But it cannot be explained in terms of decision-making either (Sect. F). Law-making here amounts to access and control of technical procedures grounded in a form of faith, or in his own terms "ideas governing men's minds" (Sect. H).

**Keywords:** Axel Hägerström – Law-making – Legislation – Statutory law – Non-cognitivism – Revolution – Constitution – Legal realism – Decisionism

### A. INTRODUCTION

Axel Hägerström (1868-1939) was the co-founder of the Uppsala School and is considered to be the inspirational source of Scandinavian legal realism. Over the years much has been said concerning his theoretical inquiries, from his early neo-Kantianism to his thorough refutation of metaphysics; his practical philosophy, especially his non-cognitivism, emotivism and moral psychology; his methodology, firmly grounded in ontological monism and with a strict upholding of Hume's thesis; and, of course, the importance of these insights for the development of the movement of Scandinavian legal realism, mainly represented by Hägerström's followers Vilhelm Lundstedt (1882-1955), Karl Olivecrona (1897-1980) and Alf Ross (1899-1979).<sup>7</sup> Generally speaking, the Scandinavian realists intended to give a "realistic" account of law, *i.e.* to treat the law as a social phenomenon understood in terms of causality. In contrast with American legal realists who focused on adjudication, the Scandinavian realists took a broader view on the legal system, thus of special interest to those interested in law-making.

At a first glance, it might seem a bit surprising that, notwithstanding a century of literature, a glaring void is to be found if one searches for accounts of Hägerström's theorizing on legislation. In fact, no attempt has been made to study Hägerström's realist approach to the topic. Yet many aspects of his work could be investigated in such a light: from his criticism of popular sovereignty to his polemic against statute-law in the systems of sources of law; from his analysis of the Roman *quaestor* and the common law judge, down to his sceptical interpretation theory; from his attack on the "will of the state" to his lectures on Rousseau's *volonté générale* and many more. I believe there a number of reasons why law-making in Hägerström has remained an untouched subject matter. They essentially depend on the conceptual overlappings that still poison much of the contemporary debate on legislation, to which

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<sup>7</sup> For a bibliography over the secondary literature, see P. Mindus, *A Real Mind. The Life and Work of Axel Hägerström* (Dordrecht: Springer 2009) appendix.

attention needs to be drawn. Legislation or law-making is conceptually ambiguous because it indicates the law which has been promulgated, and therefore the primary *object* of many modern theories of law, but also the *process* of making it, that many theories of law usually locate outside the scope of jurisprudence.

So to confer some order into the otherwise mesmerizing kaleidoscope of issues raised by the topic, this article will investigate Hägerström's view on law-making by focusing on his approach to one of the classical dilemmas of philosophy of law: the instauration of a new constitution pursuant to a political revolution. In particular, he discussed the case of the American Revolution and the Declaration of Independence. It is a great case because the founding fathers' represent the ideal-typical form of legislators; the type of object produced – the constitutional writ – characteristically defines the ultimate law-making power(s) in a legal system. The choice is also motivated by the fact that the process of making such constitutional politics has often been considered as the ultimate touchstone for making claims about the relationship between law and politics. In fact, revolutions are among the textbook examples of *fons extra ordinem*.

Therefore, the next section sets the problem of legislation by distinguishing a number of different problems that often appear indistinctly under this label. Standpoints can be viewed according to a spectrum stretching from legal theories holding politics to essentially permeate the law to those claiming the opposite (Sect. C). The aim is to situate Hägerström's view on law-making along this spectrum. My claim is that Scandinavian realism holds middle ground in that ideological constructs structurally affect the law yet legal normativity cannot be reduced to the will of *de facto* holders of power: law cannot be reduced to any idea of will, including that of the majority or of the people. To substantiate this claim the article investigates Hägerström's view on the foundation of a new constitution pursuant to a political revolution (Sect. D). His bottom line is that the problem cannot be explained in terms of discovery of public interest (Sect. E), because of his non-cognitivist approach (Sect. F). But it cannot be explained in terms of choice- or decision-making either (Sect. G). The conclusion is that law-making amounts to access and control of technical procedures grounded in a form of faith, or in his own terms "ideas governing men's minds."

## B. LEGAL DECISION-MAKING: WHAT IS THE MATTER?

If we take legislation to be synonymous with law-making or legal decision-making<sup>8</sup> – that is the procedures and institutions enabling the establishment of the law that impacts on the community, not being mere dead letter – a panoply of different types of problems arise. Let us stress four of these.

Firstly, there is the issue of 'science of legislation.' The phrase was coined by John Austin indicating Bentham's sphere of interest, "the portion of deontology or ethics, which is styled the science of legislation"<sup>9</sup> i.e. the business of which is to determine positive law as it ought to be, what we today would probably call policy counselling. As many later positivists, Austin classified legislation as being conceptually outside the scope of jurisprudence and essentially a matter for political morality. This is the realm of lobbyists and militants.

Secondly, the very subject matter of legal decision-making brings to mind a fundamental opposition within legal theory, namely that between legislation and adjudication. This opposition frequently appears as a form of modern instantiation of the medieval dualism between *gubernaculum* and *iurisdictio*,<sup>10</sup> i.e. between the seat of power and the sources of law. This distinction between the political realm of sovereign power – drawing on Justinian's *legibus solutus*, the prerogative of kings – and the rule-abiding, "limited" rule of judges, summoned to protect rights (both of which qualify to some extent as "law-making"), is not seldom blurred with the key-concept of rule of law. As known, Edward Coke, possibly the most influential common law judge ever, used the concept in early 17<sup>th</sup> century England to foreclose the participation of the King in deliberations of the common law courts.<sup>11</sup> "Rule of law" draws, as known, on the philosophical tradition of "empire of laws" (rule by law) as opposed to "empire of men" (rule under men). The English formula I use is from the 1771 edition of

<sup>8</sup> I take the phrase from F. Schauer, 'The Limited Domain of the Law' (2004) 90 *Virginia Law Review* 1909-1956. See also F. Schauer, 'Institutions and the Concept of Law: A Reply to Ronald Dworkin' in M. Del Mar, Z. Bankowski (eds) *Law As Institutional Normative Order* (Aldershot, Farnham 2009) 35-44, at 41-43; F. Schauer, 'Positivism before Hart' in M. Freeman, P. Mindus (eds.) *The Legacy of John Austin's Jurisprudence*, (Springer, Dordrecht 2013) 271-290.

<sup>9</sup> J. Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* (Murray, London 1873) 33.

<sup>10</sup> *Cfr.* Ch. H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1940).

<sup>11</sup> See *Prohibition del Roy* 1608 12 Coke Rep 63. For the early origins of the expression and evolution in common law, T.F.T. Plucknett, *A Concise History of the Common Law* (Little, Brown & CO, Boston 1956) 48.



*Encyclopedia Britannica*, but, more conventionally, the reference is to “a government of laws and not of men”, taken from *Marbury vs. Madison* (5 US 137, 163, 1803).<sup>12</sup> This classical opposition in Western thought was first developed in Plato’s *Statesman* through the myth of the inversion of the cosmos from the time where Chronos rules mankind like a shepherd to our time: *Xenos*, the Stranger, says “in a sense, however, it is clear that law-making (*hê nomothetikê*) belongs to the science of kingship; but the best thing is not that the laws be in power, but that the man who is wise and of kingly nature be ruler (*phronêseôs basilikon*)” (294a, Jowett’s translation).

Thirdly, within this tradition, law-making comes in the forms of both *gubernaculum per leges* and *sub lege*. The first describes the style of government by claiming that governance shall be exercised by issuing (abstract and general) laws, and not (particularistic) decrees, pursuant to Rousseau’s famous definition in *Contrat social* (II, 7): “ce qu’un homme (...) ordonne de son chef n’est point une loi (...) mais un décret, ni un acte de souveraineté mais de magistrature.” In English, this also goes under the appellative rule *by law*. Contrarily, the latter conception of rule *sub lege, non sub homine* systematically “ends up getting confused with constitutionalism”<sup>13</sup> as a specific doctrine about the content of legitimate law-making substantiated foremost through fundamental rights and separation of powers. The big issue here is the connection between the form – *per leges* – of law-making and its goal, to discipline society’s “savage powers” *sub lege*. Is there such a connection and how is it justified?

Fourthly, *legal decision-making encompasses more than one of the branches of Montesquieu’s powers organogram. In fact, it involves all three branches of government: the adjudication process or judicial power, in that verdicts are law; legislation in its proper sense or legislative power, in that statutes are law; and governmental and administrative decision-making or executive power, in that decrees, ordinances and administrative rulings are law. This poses the question of whether there is a specific and adequate province that ought to be reserved for law-making and to what extent this can be located in the overall design of existing constitutional arrangements. In other words, it regards the problem to whether and how separation of powers might guarantee the balance of powers.*

*If we focus, more specifically, on the legislative branch of government, the background of the early 20<sup>th</sup> century inquiries into the topic of legislation was set by one of the great debates on constitutional democratic law-making. It opposed those who, like Hans Kelsen, stressed the virtues of legislative, statute-focused, codified law-making in the procedural approach to liberal-democratic legitimacy with its insistence on limited popular sovereignty and, those who, like Carl Schmitt, emphasized the efficaciousness of monocratic decision-making, what later came to be called governability and the vices of parliamentary rule against which the principle of sovereignty needed to be reasserted.* This debate, which is generally located in the history of political thought is of interest for legal theoreticians as well: from the historical perspective, some have insisted that Hägerström’s philosophy of law – in particular, his criticism of both the historical school of jurisprudence and theories of natural rights – was inspired by the hope to “create more room for the expression of popular sovereignty through legislative law”<sup>14</sup> and therefore Hägerström ought to be located in the camp of advocates of rule by law. More generally, the Schmitt-Kelsen debate mimics the polarity present in most contemporary legal scholarship (see next section), that is the opposition between those who are inclined to depict the law either as being structurally affected by politics or as being ultimately shaped by its internal rationality.

Legal decision-making thus conflates different levels of abstraction, with different set of observables. Three of these levels of abstraction that are often blurred under the label “law-making” are the following: (1) how to understand and respectively regulate political vs. legal decision-making; (2) the disagreement concerning the nature, extent and quality of design vs. discovery of law (legislation and adjudication); (3) the controversy between the emphasis of legalists, such as Thibaut, on rule by codified statutes vs. less inflexible instruments, preferred by those who, like Savigny, stressed the historical process of emergence of law. In general terms, the issue hinges on the legitimacy attributed to governance through case-based legal reasoning and decree-making, traditionally the hallmarks of particular justice (*epeikeia*) but also of the (arbitrary) “justice of the cadiz.”

In other words, law-making is conceptually ambiguous because it indicates at the same time law which has been promulgated, and therefore the primary object of many modern theories of law, but also the process of making it, that many theories of law usually locate outside the scope of jurisprudence and more specifically in the realm of politics. In sum, the reason why legislation or law-making is

<sup>12</sup> See my ‘Global Harmony and Rule of Law: An Empirical-Analytic Approach’ in T. Bustamante, O. Onazi (eds.) *Global Harmony and the Rule of Law* (Steiner, Leipzig 2012) 33-48.

<sup>13</sup> P.P. Portinaro, ‘Beyond the Rule of Law: Judge’s Tyranny or Lawyers’ Anarchy?’ in P. Costa, D. Zolo (eds.) *The Rule of Law*, (Springer, Dordrecht 2007) 353.

<sup>14</sup> G.S. Alexander, ‘Comparing the Two Legal Realisms – American and Scandinavian’ (2002) winter 50: 1 *The American Journal of Comparative Law* 167.

evocative of so many different, yet often interrelated issues, is that it refers contemporarily to two different normative systems, law and politics.

### C. THE LAW AND ITS POLITICAL ENVIRONMENT

Undisputedly, the relationship between law and politics is still one of the most highly debated topics in contemporary legal philosophy. There is no consensus on the range and scope of the “political” and the “legal element” in law, to use Savigny’s phrase in *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, or even on how to engage in diverse kinds of inquiry, into different normative systems. All normative systems – such as ethics, the law, politics and other *habitus*-based social games – rely on a practical rule-following ability or behaviour. But this common feature does not indicate the *differentia specifica* that distinguishes one type of normative system from another.

The fact that politics and law do relate to one another in some fashion usually goes undisputed, in contrast to how the relationship between ethics and politics is conceived for instance in the tradition of political realism. As far as the latter relationship is concerned, strong dualists deny there being any relationship between the two systems because they rely on different forms of rationality.<sup>15</sup> In this regard, Machiavelli’s originality consists in the fact that he derived the distinction between the two normative systems of ethics and politics from the distinction between final and instrumental actions. No such strong dualism is found among legal theorists arguing about the relationship between law and politics, although legal theory admits that strong dualism is a possible way of casting the relationship between ethics and law (separation thesis).

Even if mainstream legal theorists thus recognize that there is a relationship between politics and law (contrarily to what some theorists claim about ethics and law), this relationship need not be one of mutual dependence and influence. Indeed, there are philosophers of law who retain a strict monist approach; e.g. Robert Alexy’s defence of the *Sonderfallsthese*, in *Theorie der juristischen Argumentation* (1978), according to which politics and law only constitute sub-systems of ethics. Prevalingly, however, the object of the debate among legal scholars is not whether there are relationships between law and politics but whether these are weak or strong. Therefore it is possible to say that opinions diverge according to a spectrum, based on the intensity of interaction between the two different normative systems. It stretches from those holding politics to essentially permeate the law (e.g. critical legal studies) to those who uphold the impermeability of the two normative systems (e.g. legal positivism, in different colouring). This article aims to situate Hägerström’s view on law-making within this spectrum.

The different levels of abstraction that conflate in the broad notion of law-making, highlighted in the previous section, can also be found in this spectrum. Consider e.g. how the aversion towards constructivist codification or the appeal to judge-made law can be situated in this scale of positions in jurisprudence, the poles or extremes of which constitute what Dyzenhaus calls the basic divide in legal theory, i.e. between those, on one hand, who focus on the distinction between the rule of law from the rule of men by stigmatizing the arbitrary character that law may assume when it no longer is answerable to the ideal of legality and those, on the other hand, who perceive the rule of law in continuity with the rule by law tradition where the nature of modern law raises questions of efficacious transposition into practice of choices made by policy- and lawmakers.<sup>16</sup>

Here we assume that ‘politics’ indicates a set of ‘values’ (of, say, an economic, social or moral nature) that are somehow chosen and that are implemented into the community by the public authoritative apparatus (most commonly the State) using “law-making.” By this definition, legal scholars are either inclined to depict the law as being structurally affected by politics or by its internal rationality (sometimes referred to as the ideal of legality). “The divisive question then becomes whether the law is flexible by nature, i.e. whether it tends to adapt its forms and nature according to the political substances it carries; or, alternatively, whether the law is rigid, i.e. whether it tends to keep the same forms and mechanisms regardless of the content. The central question is whether the law, as perceived by legal actors, changes its shape and manner of functioning in accordance to the values the political actors aim at implementing in the community.”<sup>17</sup>

<sup>15</sup> N. Bobbio, ‘Politica e morale’, in *Teoria generale della politica* (Einaudi, Torino 1999) 101-159.

<sup>16</sup> D. Dyzenhaus, ‘Austin, Hobbes, and Dicey’ in M. Freeman, P. Mindus (eds.) *The Legacy of John Austin’s Jurisprudence* (Springer, Dordrecht 2013) 215-236.

<sup>17</sup> M. Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer, Berlin 2008) 7. See also R. Cotterrell, *The Politics of Jurisprudence* (Butterworths, London 1989) 113-7; R. Cotterrell, *Law’s Community. Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995) 165-166, 277-278.

This ideal-typical approach of those who see law as permeated by politics consists of conflating values into the law. There are many ways in which this can be done. Natural legal thinkers do it by discovering ultimate “political” values, such as justice for instance, that ground the validity of the legal system. The law becomes part of the normative environment shaping values that are reproduced into the law. This can however be done in ways that are seemingly quite different from natural law: “Contemporary natural law theories, CLS, the School of Law and Economics, Public Choice Theory, Feministic jurisprudence, Critical Race Theory, Postmodernist approach, Legal Process, and the movement of Law and Society can be considered as endorsing a depiction of law as flexible towards politics.”<sup>18</sup> No matter if the castigation for not reproducing determinate societal values into the law is injustice or inefficacy, the relationship between the law and its political environment is cast similarly. This way of approaching the issue is also recurrent in theories of law based on forms of moral reasoning (e.g. Dworkin) or forms of normative positivism (e.g. Waldron), even though, in the latter case, the political values to secure are those characteristic of legal orders, and thus less clearly distinguishable from the second ideal-typical approach to the relationship between law and politics, of those, that is, who claim law to be essentially impermeable. A similar observation could also be made in relation to “legal ideals” such as those developed by Lon Fuller.

At the other end of the spectrum, we find the second approach to the relationship between politics and the law that insists on the fact that the internal rationality of the law constitutes its *differentia specifica* and guarantees the impermeability of the legal order to social climate changes. Positivist legal thinkers typically deny the need in a legal theoretical analysis for the presence of “political” elements. Legal science requires “purification” at an epistemological level. Hans Kelsen, as a legal theorist (but not as a theorist of democracy), embodied this idea as expressed in the incipit of *The Pure Theory of Law* where he distinguished the politics of law from legal science.<sup>19</sup>

Of course, when it comes to the ontology of law, as distinguished from the epistemological level, legal positivists seldom contest the fact that the law is actually influenced by politics. This idea is most commonly known as the social fact thesis that asserts that legal validity is a function of certain social facts. An example is Kelsen’s Gorgon of power lurking behind the sources of law. This implies that such positivist accounts of the relationship between politics and the law do not claim that the phenomenon the legal scholar is summoned to investigate lacks any connection whatsoever with other normative systems: neither Kelsen, nor Hart deny the fact that contemporary law is, to a great extent, produced by political actors, e.g. though parliamentary bills and statutes. For both Kelsen and Hart, the law certainly is open to receiving contributions to its content from the surrounding political environment in terms of values. However, the formal structures of the law are immune to inputs of this kind. Consider for instance the changing political environments that the principle of non-retroactivity in criminal law can be acclimatized to fit.

In the spectrum stretching from those holding politics to essentially permeate the law to those who uphold the impermeability of the two normative systems, Scandinavian realism holds middle ground. As Zamboni has pointed out, the Scandinavian realists offer a third alternative to these two ideal-typical positions, a partial rigidity of the law (*i.e.* proceduralistic account of the machinery of law) to the political and socio-economic ideas it conveys. For Hägerström, ideological constructs structurally affect the law yet legal normativity cannot be reduced to the will of *de facto* power-holders. More specifically, law cannot be reduced to any idea of will at all, not even the will of the majority or of the people.

One of law’s crucial aspects is its ability to shape our behaviour in ways of which we are often unaware. This is done through law’s “suggestive effect” that impacts on what we believe to be the right and wrongs ways to behave in society. To say it with Pierre Brunet, law is first and foremost “in the head.”<sup>20</sup> This also implies that there is more to Hägerström’s conception of politics and the normative environment in which law operates than brute force: *one of his central claims is that* “law is not simply a regime of constraint.”<sup>21</sup> Rather, law inscribes and constitutes as much as it prescribes. Think of the definitions of personhood and capacity for instance. In this specific meaning, for the father of Scandinavian realism, it is a form of technology for regulating human behaviour. But like any

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<sup>18</sup> M. Zamboni, *Law and Politics*, IVR encyclopedia, available at: <[http://ivr-enc.info/index.php?title=Law\\_and\\_Politics](http://ivr-enc.info/index.php?title=Law_and_Politics)> (last accessed 9/12/2012).

<sup>19</sup> H. Kelsen, *The Pure Theory of Law* (University of California Press, Berkeley 1970) 1. See L. Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy* (OUP, Oxford 2007).

<sup>20</sup> P. Brunet, *Le droit est-il dans la tête? A propos de Karl Olivecrona, De la loi et de l’État. Une contribution de l’école scandinave à la théorie réaliste du droit* (Daloz, Paris 2011), available at <<http://www.juspoliticum.com/Le-droit-est-il-dans-la-tete.html>> (last accessed 9/12/2012).

<sup>21</sup> A. Hägerström, *Rätten och staten. Tre föreläsningar om rätts- och statsfilosofi* (Natur & Kultur, Stockholm 1963) at 223 [hereinafter RoS]. All translations are mine.

technology, it only appears to be neutral while in reality it is a set of “constraining affordances” since it enables some things while hindering others.<sup>22</sup> Law cannot be, from this perspective, fully grasped in the traditional terms of a system of social control enforced through the determination of sanctions, nor as a set of procedures the form of which would be entirely distinct from its substance, that is the specific human behaviour involved.<sup>23</sup>

#### D. REVOLUTION: A PUZZELING SOURCE OF LAW

A concrete case of law-making that Hägerström discussed is that of a revolution that paves the way for a new constitution. The historical example he had in mind puzzled many great political and legal scholars in the 20<sup>th</sup> century, *i.e.*, the “American communities in rebellion against England.”<sup>24</sup>

As a text-book example of *fons extra ordinem*, the American revolution instituted a new order that had no legal ground in the previous constitutional arrangement. How can this best be explained from a legal point of view? The newly founded constitutional rules certainly did not derive their validity from precedent laws and ordinances, but nevertheless they cannot be reduced to what this or that official wants, requires or commands. Indeed, as a problematic source of law the new constitution cannot be credibly explained on the basis of formal legitimacy imputation. However, it still needs to find an explanation. In keeping with Hägerström’s theoretical philosophy and epistemology, an explanation may be given in causal or genealogical terms; the first method is usually used to describe the causes of a phenomenon while the second aims at dissolving a false problem. In his discussion of the revolution as a problematic source of law, he focused on causal explanation.

In *Inquiries*, Hägerström opened his treatment of law-making in relation to the American constitution in the following terms: “when, after a revolution, there is a question of establishing a constitutional authority in the state, whose decisions shall have actual application, the *first* thing to be done is to give force to certain constitutional rules. The same is true when it is a question of establishing a new constitutional state” (I 31).

In order to address the problem we need to start by explaining what he means by constitutional rules: “what does it mean to say that a constitution actually exists except that certain *rules* for the governance of a certain group of men are actually enforced? An essential part of this is of course that these rules are actually made the basis of legal theory, so that the judges in making their decisions actually base them on laws which are in force in accordance with constitutional rules” (I 31). In other words, had the rules no judicial enforcement they would not qualify as new legal rules, which in turn implies that the judges (and other legal operators) need to be persuaded of the validity of these very rules, and convinced to be doing what they think they are doing (applying the law), notwithstanding that they have been trained to apply a different set of rules, namely the previous constitution.

Do note that when Hägerström reflected on constitutional states, he did not only intend states that a contemporary political scholar would list under such a label. Constitutional states, in Hägerström’s sense, are all those forms of political organization in which some form of *sécurité juridique*<sup>25</sup> prevails and that can hence be opposed to “pure despotism and mob-rule” (I 35). This explains why one of the examples cited by Hägerström in connection with constitutional rule is *lex salica*: “Why should a rule of succession to the throne, which has been in force for generations, in an absolute monarchy, have any less legal significance, *e.g.*, than an electoral law which determines the way in which the highest authority in a parliamentary state is to be constituted?” (I 35).

In fact, what Hägerström suggested is an idea of the constitution held separate from constitutionalism: “we ignore here the power of the courts, recognized in some countries, to set laws aside as unconstitutional” (I 34). What he is looking for is not the content of the fundamental law, such as separation of powers or protection of rights, the configuration of which may vary with time and

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<sup>22</sup> L. Floridi, *The Philosophy of Information* (OUP, Oxford 2011); M. Durante, ‘Normativity, Constructionism, and Constraining Affordances’ (2011) XIII (2) *Etica & Politica/Ethics & Politics* 180-200; P. Mindus, ‘Updating Democracy Studies: An Outline of a Research Program’ J. Bishop, M.G. Solo (eds.) *Politics in the Information Age* (Springer, Dordrecht forthcoming 2013).

<sup>23</sup> This has recently been highlighted by some scholars who insist on Hägerström as a forerunner of the Foucaultian notion of regulation as understood prevalently in juridical terms: J.-E. Lane, ‘Filosofen som kulturkritiker: Axel Hägerströms politiska teori’ (2013, forthcoming) *Norsk Statsvitenskapelig Tidsskrift*.

<sup>24</sup> A. Hägerström, *Inquiries into the Nature of Law and Morals* (Almqvist & Wiksell, Uppsala 1953) 31 [hereinafter I].

<sup>25</sup> In *Inquiries* the formula is “with security for established rights” (p. 35). I prefer the French formula, used in parallel with *Rechtssicherheit*, since it expresses not only the “certainty of (the rule of) law” in the meaning of the established rights, but also “security” in the political meaning of an established state.

place, but its *function* in relation to society.

Unsurprisingly his discussion of the revolution runs in parallel with his discussion of unconstitutional practices, about which he stated: “the law-creating power of the customs (...) shows itself in the fact that regulations issued in accordance with them acquire actual application through the judges. If these rules conflict with the formal constitution, the latter has to that extent ceased to be in force, just as the old order ceases to be positive law in consequence of revolution” (I 33).

Even though it is not always clear which particular historical examples Hägerström would list under “constitutional states,” he does not seem to conceive the possibility for states to exist that do not fit the label ‘constitutional’: “we may set aside the special reference to constitutionally governed states, and raise the question: Is there any realm whatever (if one leaves out of account pure despotism and mob-rule) which can be called a “state”, in which the actual possessors of power are not subject to rules? (...) But, where pure despotism and mob-rule exists, one may question whether there really is any legal order” (I 34-35).

I take it that he is saying that modern states have a sufficiently complex set of rules of primary and secondary nature as to make it nonsensical to compare them with mayhem or lawlessness that would characterize “pure despotism and mob-rule.” This would be compatible with Olivecrona’s claim in the first edition of *Law as Fact* that there is no unique state power but only a set of more or less complexly related “situations of powers” within a state. My assumption would imply that “constitutional” in Hägerström’s phrasing carries no positive axiological meaning (such as the catch phrase “rule of law”), but does however indicate an order that permeates over time, which seems to be a *conditio sine qua non* for having a legal order in the first place. In other words, constitutional is not synonymous with legitimate but indicates a kind of order that is “the minimum purpose of any state.”<sup>26</sup> Moreover, from what he affirmed on other occasions, it seems clear that a constitution, in Hägerström’s sense, implies a developed system of sources of law.

These sources of law can also be said to be prevalently formalized in statute-law: “What is this organized system of rules? In a modern society it is, in principle at least, just what is called statute-law (*lagrätten*). What is implied, *e.g.*, by the fact that there is a special organ for legislation in a society? It consists in the following two facts: (i) That constitutional law, an ideal rule of action, assigns to certain persons or complexes of persons a certain activity in accordance with certain forms – legislation – and that this rule is now in fact put into operation. And (ii) that, through the above-mentioned activity, new rules (“laws”) are promulgated, also on the basis of the content of constitutional law, which themselves come into operation in virtue of that law” (I 44). This is *per se* a reason for concentrating on constitutional rules since the ordinary legislation depends on them.

Furthermore, Hägerström did not doubt whether we should consider the American revolution as a new foundation, *i.e.* breaking with the previous constitutional order. Contrarily to many revisionist historical accounts that insist on the continuity of the legal order notwithstanding the changes (*e.g.* in private contractual law or in international contractual obligations), Hägerström did not call into question the illegal nature of the phenomenon and thus its extra-legal nature: In fact he scorned Salmond for searching for the law in virtue of which the Americans declared the new constitution on popular consent,<sup>27</sup> expressed directly or indirectly through their representatives, because “the only existing law was English. But this was infringed by these very proceedings” (I 32). To ask for the legal basis – the ground of imputability, according to a conception that equals validity to formal entitlement – is “in this context (...) wholly meaningless. It is certain that when a constitution comes into being on the first formation of a state or through the transformation of the existing foundations of a state, no rules which are already in force need to be applied in the process” (I 32). So no rules need to be applied in the process of the revolution. But what kind of rules is he talking about? Let us assume that he referred to formally enacted and/or recognized legal rules, statutory law *in primis* and constitutional custom. Because clearly case-law did not dissolve over night and judges continued even after the Revolution to apply case-law to legal instruments such as deeds, bonds and contracts. Yet, when it comes to constitutional legitimacy principles for instance, “certainly English law had no longer force in this instance” (I 32).

However, Hägerström conceded that it is the kind of question that Salmond posed that is at the origin of the unsatisfactory answer: Salmond searched for the laws the Americans grounded themselves upon and these could not be the English Crown’s. Yet, Hägerström acknowledged that “the example is unfortunate for even the wrongly posed question must in this case be answered in a way that conflicts with Salmond’s intentions” (I 32). Why is that so?

Because there were no formal legal rules – no constitutional writ and no statute – at the source of

<sup>26</sup> Bobbio, *supra* n. 9, 165.

<sup>27</sup> J.W. Salmond, *The First Principles of Jurisprudence* (Stevens & Haynes, London 1893).

the American constitution but another kind of rules: what he dubbed ideal rules for action. “Now it is indubitable that what became the basis of the newly founded state (...) at the foundation of the American constitution, (...) was certain rules for exercising power within the region concerned, rules which derived their importance from being norms for the judges in carrying out the duties of their office (...). There were other rules for the exercise of power which there governed men’s minds and thereby had *de facto* effectiveness. It was considered that the English crown had lost its rights over the colonies in question through wronging them, and that power had been transferred to its natural basis, the people. There were rules (...) according to which the people itself had certain fundamental rights. These rules had actual power in the realm of ideas and it was only through the application of them in creating laws that the foundation of the constitution could be carried through. Since they functioned this way as the basis of the system of law, there is no reason why we should not regard them as positive rules of law which were logically prior to the particular constitutional enactments” (I 33).

In other words, for Hägerström, in order to grasp what kind of law is actually being made, we need to consider as positive law not merely the rules that have been enacted or that correspond to “formal” law (in this case, English law that was loosing ground; speaking more generally, statutory laws), or what American realists would have dubbed “substantive” law, *i.e.* the rules applied by judges (here, increasingly being the new constitutional norms of competence and case-law in general). What Hägerström understands as “substantive” is not to be found first and foremost in statutes or case-law, but in a different realm: what he calls “the realm of ideas.” But what would these be in more concrete terms? What do these stand for in the lawyer’s lingo?

The reference, in Hägerström’s philosophical jargon, goes to ideas or representations having a suggestive effect on our behaviour; that produce a conative impulse towards action. These ideas do not need to correspond to reality, nor have cognitive content. Yet, in order to perform their function and not risk loosing their suggestive abilities, they need to overlap with similar action enhancing ideas expressed by other authorities in society and maintain a type of psychological coactivity.

Criticism could easily be directed against the claim Hägerström made on the overlapping of authorities, both from a descriptive and a normative point of view. Indeed, he presupposed large overlaps among the commands of different authorities and this idea points to a conformist vision of society. Even though it was probably not descriptively awry in the times he wrote, this idea has to be considered a weak point in Hägerström’s theory since it rests on a fundamentally static view of society, hardly compatible with what usually goes under the name of globalisation or, *a fortiori*, any normative theory of multiculturalism. However, let us here set aside this claim and focus on the second point he made: the psychological coactivity.

The kind of normativity that characterizes these ideas is probably best explained with the concept of ideological power as developed by Max Weber in *Wirtschaft und Gesellschaft*, but an interesting way of making the same point is to say that this kind of normativity can be expressed in the classical terms of Gelasius I: the normativity thus depends on their expressing *vis directiva* as opposed to *vis coactiva*. To spell it out, Hägerström includes in positive law the implicit or not always clearly articulated principles of legitimacy grounding a particular legal order. Such principles of legitimacy, such as in the American case the principle of popular sovereignty and political representation, are the “other rules for the exercise of power” that he mentioned as “governing men’s minds and thereby had *de facto* effectiveness.”

Would this mean that Hägerström conceives the constitution’s fundamental principles as being appropriate or adequate in some sense, making the constitution essentially a question of declaring what is the right power-settlement for the community being regulated by the constitution at hand? If we assume that this is the case, would it entail that we can point to certain normative requirements in order to benchmark types of law-making? Would it entail, say, that popular sovereignty is a principle of legitimacy adequate for regulating law-making powers within the constitutional arrangement? Would the American constitution derive its (legal) validity from declaring a kind of (political) truth? No. Next, we explain why.

## E. CONSTITUTIONAL DESIGN AS DISCOVERY OF PUBLIC INTEREST

The Enlightenment conception of rule of law, the people’s consent, popular sovereignty and political representation were legion in the development of the climate of ideas leading up to the American Revolution. This is a matter of historical fact in Hägerström’s eyes and no discovery of any constitutional truth. More specifically, “it was the Lockean and not the Rousseauvian thoughts that won in the French revolution, having been taken over from the American Declaration of Rights” and the importance of this intellectual legacy becomes all the more clear as he specified that “the entire modern

democracy, including social-democracy, have its sources in these ideas” (RoS 164). The way Hägerström described the ideological authority of the ideas of political representation (to him, Locke’s primary legacy) may, at a first glance, look as if he believed these ideas to best accommodate the real interest of the people. Such an impression is strengthened by his comments on law-making in the 1921 lectures *The State and Its Forms* (*Stat och statsformer*) where he indulged in what seems to be his personal political opinion. While discussing the various theories on popular sovereignty and representative democracy, he stressed that “the English-French doctrine of representation as a delegation of the people, bound by mandate, is in itself scientifically implausible. But it should be preferred since this doctrine, with its fundamental ideas on the individual’s liberty and equality, was the basis from which the representation of the people by means of mass voting – *one man, one vote* – historically developed” (RoS 169). Such remarks led readers to conclude that “Hägerström probably also meant that the majority of people had an interest in unveiling conservative myths and substituting these with more rational ideas.”<sup>28</sup> How such rational standards would be established within Hägerström’s overall theory is a problem I shall leave to another scholar. Here what we need to understand is foremost why designing constitutional principles is not a question of unveiling public interest.

If the constitution would somehow “describe” the new societal values or interests then we should conclude that the rules of the constitution equal to what all want or at least what the majority requires. However, Hägerström dedicated much effort, in various writings, to explaining that law, and more specifically constitutional law, cannot be defined as the will of the people, or the will of the majority.

First of all, Hägerström repudiated all anthropomorphic readings of society as Agrippa’s *Magnus Homo*, because of his methodological individualism. So, law cannot be what the *Geimeinschaft* wants; there is no communal soul à la Ferdinand Tönnies: law is not what “society” requires because “society” cannot have any unitary willing. Hägerström was thus far from being “communitarist” in any contemporary meaning of the term, and he did not uphold holism or organicism that he considered to be only “fantasy” (RoS 169) and “poetry”<sup>29</sup> and he rejected the belief in “commonly shared values.”<sup>30</sup> As he stressed in *De socialistiska idéernas historia*, “for the modern man it is clear that we are not here for the sake of unity of society but, on the contrary, society exists for the individual” (p. 30). Secondly, law is not what everybody requires either. This position is, nonetheless, more plausible than the first. Because claiming that it equals to what all want amounts to giving a definition compatible with methodological individualism. However, to speak of law as what all want is blatantly counter-intuitive: the offender does certainly not crave enforcement of criminal law. Thirdly, law cannot be explained in terms of the will of the electorate in democratic regimes; this very electorate body came into being thanks to a determinate law, regardless of whether it is constitutional or ordinary. So “the will of the representative assembly (...) is merely legal fiction. Thus it cannot be defined as a real will directed towards the law” (RoS 265). In general, he was suspicious of the contemporary emphasis on popular sovereignty.<sup>31</sup> To him, constitutional principles cannot be equivalent to the will of the majority either. On many occasions he further insisted that the very idea of political representation is a mere fiction.<sup>32</sup> This includes political representation with imperative mandate. “If the law existed in this will [of the majority], it could not subsist. We should then fear, in all countries where a parliament partakes in sovereignty the whole social order could one day fall apart, because Mr Olofson from the town of Skuttung, or any other member of parliament who is not informed of the secrets of statesmanship, is not reasonable enough to direct his will towards the maintenance of the state. However, *mirabile dictu*, no one bothers to investigate Mr Olofson’s will in this sense” (RoS 143).

If we admit that the constitution corresponds neither to the normative requirements of society, nor to those of its members, it still does not follow that it is not conceived as a truthful shaping of fundamental interests in the public realm. To Hägerström, however, conceiving the fundamental law(s) as formed on the notion of *bonum commune* is illusionary: there is nothing like the “common good” and it is a fiction to speak of the interest of the people in analysing law. For instance, in *On the Relation between the State and the Law* from 1924, he emphasizes how “under modern conditions no [unitary will] normally exists. Whole strata of the population may desire a revolutionary alteration in the foundation of the law” (RoS 112). Law is being made regardless of whether it is in the interest of those held to obey it.

Setting aside the idea of a common good, he suggested that the ideological power that came to be

<sup>28</sup> G. Fredriksson, *20 filosofer* (Nordstedt, Stockholm 1994) 209.

<sup>29</sup> A. Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung*, vol. I (Almqvist & Wiksell, Uppsala-Leipzig 1927) 17.

<sup>30</sup> A. Hägerström, *Rätten och viljan. Två uppsatser av Axel Hägerström* (Gleerup, Lund 1961) 131-135.

<sup>31</sup> A. Hägerström, *Stat och rätt. En rättsfilosofisk undersökning* (Almqvist & Wiksell, Uppsala 1904) 12-13.

<sup>32</sup> See e.g. *Representationsidéens djupare grundvalar*.

expressed in Locke's conception of representative government is best grasped as a systematization of notions common in society. "The Anglo-French doctrine stemming from Locke about the representation of the people only models widespread ideas that are important to interests of people. Thus the political teachers do not betray people; they only seek, to as far as possible, to clarify the mysterious world of ideas that emerge spontaneously from people's needs, just like theological dogmatism tried to clear out the ideas generated by religious needs" (RoS 165). This means that lobbyists and ideologues do not impose their system or convictions; *vis coactiva* belongs to enforcement agencies, not to them. The *vis directiva* they control finds expression in directing or ruling the minds, interpreting the world so as to frame beliefs in determinate ways. Yet, their system or convictions represent their way of understanding what they believe social trends to be indicating, what they hold to be the needs of the people, what they assume is the unreflexive *habitus* emerging in the community.

The constitution's fundamental principles did not have "*de facto* effectiveness" because the founding fathers or law-makers at large had discovered the right form to give to constitutional writ; what they did was to give name to moods that pre-existed the constitutional rule and conveyed consensus upon them through a process of political identification, making people, including judges and lower level law-makers, identify themselves with the legitimacy principles expressed by the founding fathers.

#### F. RULING THE MIND

The fundamental constitutional principles were those that appeared to be "self-evident" in the eyes of those having the prerogative of setting the agenda of the public debate, *i.e.* the stronghold of ideological power. This is very different from conceiving these principles as the right form of law-making for the community at hand.

The fact that Hägerström was foremost interested in the ideological power exercised by (that which contemporary political science labels as) "agenda setters" is clear from his criticism of the idea of equal value of ballots cast in systems based on universal suffrage: "the power of each elector (...) is actually not equally important. The importance of the ballot depends on the capability on imposing one's ideas on the electorate in the general struggle for majority" (RoS 122). He even called into question the idea that the formal constitutional settlement can radically counteract the social force of opinion-making: "It is highly dubitable if the monarch in an absolute monarchy really needs to gain more power than the influential party leader in a democratic state." (RoS 122). It is clear from the examples he made that ideological power works like an extra-legal law-maker, in the sense of a social force able to impose normative inputs into the constitutional framework. Sometimes one is under the impression that he believed the agenda-setting power to trump other forms of social power, such as economic and political power, even though he did not explicitly discuss the problem.

One should also observe that this approach does not amount to any Schumpeterian *élite* theory of law-making where the *élite*'s interests take the form of law. Indeed, explaining law's authority requires a much more sophisticated theory of the ideological forces behind law-making. In *On the Relation between the State and the Law* from 1924, he specifies that "Russian law certainly does not depend *merely* (...) on the fact that a certain section of Russians desires that what the Tsar wills shall be carried into effect. It also depends to a large extent on such things as religious convictions about the person of the ruler, the indolence of the masses, army discipline and so on" (I 41). The reasons why the legal system is maintained in a society, as a legitimate form of *Herrschaft*, depends on "a medley of all kinds of heterogeneous factors" (I 39), such as "the habit of the people to obey decrees which present themselves with claims to authority... popular feeling of justice, class-interest, the general inclination to adapt oneself to circumstances, fear of anarchy, lack of organization among the discontent part of the people, and... the inherited custom of observing what is called the law of the land. [Hereby] law is maintained without any will intervening" (I 38-39). Behavioural compliance with the law or "habitual obedience", to use Austin's phrasing, constitute the default position before the legal order. Collective deviance, as opposed to individual deviance, is what is puzzling and, in order to coordinate action among individuals that is needed to produce phenomena of collective disobedience, such as a revolution, an element is required and this element pertains to ideological power with directing force.

Basically, convictions about how to run the public apparatus and how to promote public interest arise in society. Yet, these normative opinions are "mysterious" and inconsistent. Ideologues and



opinion-makers systematize these unarticulated notions, by performing the function of voice-giving.<sup>33</sup> However, voice is never given to all, or to society as a whole, and therefore the normative attitudes that opinion-makers do voice give rise to conflicts. In sum, there is no common good, there are only conflicting opinions about what public good *should* be. “Therefore it cannot be said that the ruling power in principle (...) satisfies the common good. What is being satisfied in this respect are only the particular interests that one actually have with regard to the public good” (RoS 116). But why is this distinction so important?

Because it derives from his non-cognitivism: the meta-ethical position that denies that norms can be said to be true or false. So, constitutional legitimacy principles – no matter the belief or faith people may have in them – are primarily *normative statements*. There can be no discovery of their truth; understanding them is not a question of pure cognitive pursuit; they do not pre-exist their institutional embodiment. Claiming the opposite would be at odds with one of the basic tenants of Hägerström’s view. In fact, claiming that constitutional rules are a matter of truth is a statement at the antipodes of the non-cognitivist approach that characterized Scandinavian realism.

As well known, Hägerström was the first to develop an articulated non-cognitivist program, starting already in his inaugural lecture from 1911, *On the Truth of Moral Propositions*: “Even if it is absolute, a reality can never include within itself a supreme value. The existence of a divine will or an inner demand can never imply, in and of itself, that we ought to follow it, that to follow it is of supreme value. Existence and value signify something entirely different.”<sup>34</sup> He emerged as a true adversary of all regressive confusion between is and ought, which he saw as the distinctive mark of the wishful thinking of natural law. His purpose was primarily to defend a ‘scientific’ and ‘value-free’ method, as opposed to the idealistic dogmatism then prevailing in the academia. It was part of the Scandinavian project to abandon scientific programs reducing social complexity and human emotion to the traditional frame of a metaphysical principle upholding a system of morals, aesthetics and so forth. This is why Hägerström stood out as a strong advocate for the radical separation between is and ought – ultimately grounded on his refutation of ontological dualism.<sup>35</sup> Contrarily to most positivist approaches, Hägerström did not only adopt the famous thesis on the separation of law from morality, but he also claimed that normative statements are not suitable for inquiries into their truth-value. This is of great importance for the realist approach to law-making since it prevents *a priori* any inquiry into the *goodness* of a specific policy or the *rightness* of a determinate set of constitutional principles. In sum, politics is not a question of truth. To phrase it with Hobbes: *autoritas non veritas facit legem*.

Do note that non-cognitivism does not imply that norms could not be issued or enacted through law-making, even though they certainly do not enjoy the same ontological status as natural objects. Yet it does imply that, in normative reasoning, the basic assumption – ‘value’ – is only posited as an axiom that cannot be justified as such. Hence, we reason and argue *from* a certain starting point (often implying a range of unarticulated non-normative assumptions), not *on* the value as such. If this were not so, non-cognitivism would imply a ban on principled reasoning as purely irrational. Hägerström never argued for abandoning normative discussions and he remained passionate about politics throughout his whole life. However, it should be clear from his position that normative discussions, in order to make sense, should not focus on the value as such, say, on the “existence” of the rights of man, inalienable liberties, immutable justice, original or social contract or any of the other cases of “jargon” criticised by Hägerström. To focus on the value is likely to lead to escalating conflicts: Hägerström pressed forward the admonition that all sorts of sinister interest will “cloak themselves in a shroud of righteousness”<sup>36</sup> and therefore peaceful compromise will become increasingly hard to obtain in such a poisoned atmosphere of public opinion making. It is a key understanding of his that whoever speaks in the name of the community promotes a specific vision of what lies in the community’s interest; to voice any such view is to “frame” it from a particular perspective. Framing may an effective heuristic, *i.e.* mental shortcut or cognitive bias, affecting the outcome of choice problems to the extent that several of the classic axioms of rational choice do not hold.<sup>37</sup> This dimension is to a large extent neglected, if not occulted, by traditional mainstream conceptions of law-making where transposing

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<sup>33</sup> A.O. Hirschmann, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, Cambridge, MA 1970).

<sup>34</sup> A. Hägerström, *Philosophy and Religion* (Allen & Unwin, London 1964) 87.

<sup>35</sup> P. Mindus, “À l’origine du non-cognitivism moderne: Axel Hägerström” in (2008) *Analisi & Diritto* 159-176; for a discussion of the connection between this outlook and forms of naturalism especially in Ross and Olivecrona, see T. Spaak ‘Naturalism in Scandinavian and American Realism: Similarities and Differences’ (2008) available at SSRN: <<http://ssrn.com/abstract=1354154>> (last accessed 9/12/2012).

<sup>36</sup> A. Hägerström, *Socialfilosofiska uppsatser* (Bonniers, Stockholm 1939) 215 [hereinafter SU].

<sup>37</sup> Cfr. S. Plous, *The Psychology of Judgment and Decision Making* (Columbus, McGraw-Hill 1993); A. Tversky, D. Kahneman, *The Framing of Decisions and the Psychology of Choice* (1981) 211 *Science* 453-458.

(political) conceptions of *bonum commune* into the law is often depicted as a question of technical knowledge or ability. This is so because framing an issue is not value-neutral. Hägerström believes that by shedding light on the interests of the “framers” conflicts may be avoided before they rhetorically spiral out of control.

What ultimately determines the modelling of constitutional rules of competence during a revolution or a similar shift in power? Of what kind are the ideas that govern men’s minds? “The political factors that are truly determinant for the constitution are the interests fighting against each other concerning what norm should rule over the genesis of positive law” (RoS 135). We are prevalently dealing with a fight about constitutional politics.

It would nonetheless be to catch a red herring to conclude from this that Hägerström would have given in to the other side of the law-politics spectrum we sketched in section B. Constitutional rules are being moulded by normative inputs deriving from actors with agenda-setting power. Thus they are neither true, nor false. No ideal of legality can be said to be “true.” Law’s inner workings will not change this. Would this imply that they merely amount to political rhetoric and the constitution essentially a question of decision-making?

### G. CONSTITUTIONAL DESIGN AS DECISION-MAKING

In order to grasp why the problem of “the first historical constitution”, as a verification test of normative inputs in law-making, cannot be resolved by annulling law’s internal rationality and motivating force, it is interesting to contrast Hägerström’s view with Carl Schmitt’s reading of *fons extra-ordinem*, related to the basic political distinction between friend and foe. Notwithstanding Hägerström overall historical thesis that is very similar to Schmitt’s,<sup>38</sup> his refutation of the particularistic stance Schmitt assumed in his general theoretical discussion of sovereignty in *Political Theology* locates them differently on the spectrum mentioned beforehand in section B.

Schmitt argued that “every legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic-norm and decision. Like every other order, the legal order rests on a decision and not on a norm.<sup>39</sup>” This strong particularistic stance was later developed in *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934) where Schmitt expounded the decisionism associated with his name. I call it particularistic because, to Schmitt, there is no single basic feature of actions in virtue of which they are always right or wrong; to determine whether they are compliant with a rule a particular decision from the decision-maker is required; a decision that confers to the action (or rather the interpretation thereof) the quality of complying or deviating from the norm. So, it is not the norm but the particular decision from the law-maker that grounds the rule. So, he claimed, law can never be applied, or put into practice by itself “as little as it cannot be interpreted and enforced by itself.” Now, revolutions represent exactly the kind of case in which Schmitt’s sovereign would have the possibility to manifest itself as the great legislator breaking the ordinary condition of social normality or “homogeneous medium” (PT 13). The sovereign would thus represent the institution at the height of which law-maker and decision-maker coincide. In Schmitt’s view, there can be no functioning legal order without a sovereign authority, conceived as an element as prior to the law (*pouvoir constituant*) needed to decide how to apply general legal norms to particular cases and deciding most importantly over the state of exception (PT 5–35).<sup>40</sup> Since what makes the sovereign is the ability to decide over the state of exception – the true mark of dictatorship – political decision-making trumps legal rationality in Schmitt, situating him on one end of the spectrum with many others who also hold politics to essentially permeate the law.

On the contrary, for Hägerström, revolutions, as well as the *consuetudo contra legem*, certainly do not derive their validity from precedent laws and ordinances (validity as formal basis of imputation), but nevertheless they cannot be reduced to what this or that official wants: in fact, validity is not, in his view, pursuant to mere decision-making. So there is no sovereign decision at the basis of the constitution, but the constitution, as the ultimate power-setting structure for law-making in a polity, must instead rest on something else. Let us bracket whether, as Schmitt denied, this basis can be a

<sup>38</sup> I develop the parallelism in *A Real Mind*, chapter 6.

<sup>39</sup> C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* [1922] (Chicago University Press, Chicago 2005) 10 [hereinafter PT].

<sup>40</sup> J.P. McCormick, *Carl Schmitt's Critique of Liberalism. Against Politics as Technology* (CUP, Cambridge 1997) 121-56; D. Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (OUP, Oxford 1997) 42-51; H. Hofmann, *Legitimität gegen Legalität. Der Weg der politischen Philosophie Carl Schmitts* (Duncker & Humblot, Berlin 2002) 49-64.

norm; it is unclear if such a set of norms could be generally speaking social norms and thus if, in absence of traditionally defined enacted laws, other kinds of norms would emerge to perform proto-legal functions. The key point Hägerström made was that the basis of the constitution cannot be a decision because then we end up losing our capacity to identify which decision counts.

So, the indistinctiveness of law and politics that Schmitt's sovereignty theory is grounded in leads to incongruous consequences. In fact, if the law equals to the sovereign's will, then, in the event of a sovereign disobeying the constitution, we would have to conclude that the constitution would no longer be in force which in turn would dissolve the existing identity between the will and the law. Such a theory of sovereignty like Schmitt's would then imply that "the constitution, insofar as it regulates the activities of those in supreme power ... is ... devoid of all meaning" (I 30). This happens because "if, in constitutional states, the supreme authority must base itself on the established constitution in all legislation, it follows that no constitutional rules as such can be described as a mere command or declaration of intention on the part of the possessors of power" (I 34).

The puzzle Hägerström presents can readily be reformulated: If the law amounts to the sovereign's will or command, and if the sovereign ceases to obey the constitution, then the constitution ceases to be valid, which in turn would dissolve the identity between the sovereign's will and the law, so that no criterion of identification of the law would subsist. From such a perspective, it would be pointless to talk about unconstitutionality. In other words, it means that in as much as the constitution is not applied, it is not; or, only in as much as it is applied, it is. If Schmitt's sovereign – regardless of whether it is a monocratic or collegial body – decides *not* to apply fundamental rules of the constitution, we do not face a mere phenomenon of desuetude, but rather a conceptual impossibility to break the fundamental rules since they can be only as long as they are applied. It is a *reductio ad absurdum* in which we lack a criterion for identifying what counts as law. Here Hägerström anticipated later criticisms of Schmitt concerning the conceptual incompatibility between sovereignty and legal systems.<sup>41</sup>

Furthermore, in any polity having a developed system of sources of law – a *conditio sine qua non* for any organisation to be labelled constitutional for Hägerström – material norms providing substantive grounds for legal decision-making appear alongside secondary norms such as norms of competence. Therefore claiming that legitimate political authority depends on legal authorization is not as indefensible as Schmitt suggests.<sup>42</sup> This point is clear to Hägerström who stressed the different levels of norms included in the system (RoS 212-13). The law can determine, for any material legal norm, which person or institution has the competence to interpret and apply it. But that a legal system, through its norms of competence, provides for the authoritative interpretation of its material legal norms hardly entails that it must contain a sovereign in the traditional understanding of that term. In fact, "the will of the Sovereign is considered (...) to be a rule of action, above all others, from a value standpoint. The will of the monarch, the highest law; that is the motto of the autocrat. Such a will is sacred and venerable. Hence, we are on the track of one of the deepest social superstitions there is" (SU 100). This line of argument derives from his 1913 essay on social superstition, where Hägerström had already elaborated this idea in connection with the concept of sovereignty. It stood clear to him that sovereignty cannot be "the highest *factual* power. Actually, both king and people appeal to sovereignty in order to keep their power" (SU 99). The social 'fact' (sovereignty) that would ground such theories by providing the closure of the system of sources is really a normative claim. Hägerström therefore insisted that this model of sovereignty is not grounded in constitutional states, but on despotism: "It is pure despotism which serves as a model for the theory under discussion. In particular it has been occasioned by the idea (which is not adequately supported by facts) of the Roman emperor as '*princeps legibus solutus*.' It has been assumed that all law must rest upon such a power not subject to any law" (1953: 35; 1916: 190). In a nutshell, he accused command theories of narrowing the focus on *rex facit legem*, forgetting the other side of the coin: *lex facit regem*. As he often pointed out, Napoleon gained his position within the revolutionary armies.

This means that the question of the priority – often cast confusingly in both logical and chronological terms – of "political authority" over fundamental norms, such as constitutional law, is for Hägerström a false problem: "Must not constitutional law have first gained authority, no matter in what way this may have happened, in constitutionally governed states, in order that a certain person shall have any authority from the legal point of view?" (I 31). He insisted on this point especially in *On Question of the Notion of Law* in the same passage where he quoted Schmitt: if the point of view

<sup>41</sup> P. Eleftheriadis, *Law and Sovereignty*, Oxford Legal Research Paper Series (2009) available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1486084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1486084)> (last accessed 9/12/2012).

<sup>42</sup> M. Kaufmann, *Recht ohne Regel? Die philosophischen Prinzipien in Carl Schmitt's Staats- und Rechtslehre* (Alber, Freiburg 1988) 337-45.

Schmitt defends would prevail in society, *i.e.* according to which the sovereign is the one who decides over the state of exception, this would in itself constitute the polity's fundamental structure in such a fashion that whom ever would occupy the office normally regarded as the sovereign would be obliged, for instance, to respect the forbearance of annulment of his own office, turning himself into a non-meaningful object of censorship. It seems that theories of indistinctiveness of law and politics, such as Schmitt's *reductio ad unum*, might perhaps not find their best institutional embodiment in the *princeps legibus solutus*, but rather in the impotence of the *Reichpräsident*-puppet: "The holder of political power will certainly find that it is not within the bounds of possibility to neglect to do what is expected of him as regards carrying out the laws, if he would retain his own legal position. But, in so far as his power depends on his legal position, which it certainly does in stable conditions of society, he simply cannot act as a political ruler without taking account of laws which stand above him" (I 73).

This is ultimately due to the fact that we are, in Hägerström's view, "not the master's of law but its slaves" (RoS 253). It depends on the fact that law and its making is a collective endeavour; it requires ability to coordinate action (our individual choices in hostile social environments are likely to produce little effect).

## H. CONCLUSION

Our dependence on such social gaming as law, also explains why what counts in the formation of new normative inputs, such as those that crystalize into constitutional principles of legitimacy in the course of revolutions and important shifts of power, is not mere physical force, *vis coactiva*, but the power of suggestion, *vis directiva*, that convince many to change the course of action. Hägerström realized that law-making is not ultimately a question of imposing decision-making. Our dependence on such social gaming as law also explains why the formation of new normative inputs does not occur out of the choice of individual actors, but of hubs in the network able to harness specific forms of social power. These need not be the heads of monocratic institutions as in traditional constitutional design, nor the elite of economic or political power. However, such hubs do need to be able to arouse a conative impulse towards action in a multitude of coordinated people and in Hägerström's view the seats of ideological power, including those of opinion-makers, play a crucial role in this. Yet coordinating and inspiring action is not a question of truth: law-making is not substantially a process of discovery of how to best promote public interest or common good. "The world of ideas that positive law is made up of is in reality a set of fictions that are determined to a great extent by hidden interests that maintain themselves by throwing this veil in front of them" (RoS 118). Rather, the politics of law-making is about controlling the access to the technology used in a polity for recognition of what counts as law, that is access to and control over the mechanisms determining which normative statements count as inputs into the legal machinery: "The pulling of the trigger *may* naturally be caused by the will of the shooter [...]. But this is totally irrelevant for the causal chain. [...] By pulling the trigger, the explosive is set off, and this in sequence ignites the gunpowder that sets the bullet in motion. This is exactly equivalent to the impact of a vote on the validity of a proposed bill" (RoS 133). The political battle concerns which procedures does the job best, but how law-making works, at least in constitutional states, obeys its own logic, irrespective of the will of politicians and officials.

The element that *makes* law seems to be, at its utmost, procedure. "It is so obvious that it needs no notice: A proposal for a new law gains validity through the votes of the majority according to parliamentary regulations, and not through the will of the members of Parliament" (RoS 132). To Hägerström, in other words, a vote in parliament is hence like pulling the trigger of law's powerful machinery, the ultimate explanation for the complicated web of factors enhancing validity of law. Independently of what the members of Parliament might wish in their hearts, the vote alone sets the "machine" in motion: "The consequence of the bill's passing is *that* they [who live in the state] are immediately and passively affected and feel committed to obedience; *that* those gaining benefices through the bill experience a particular sense of power [...]; *that* the judges feel bound to judge in accordance with it; *that* the State officials feel obliged to enforce it" (RoS 134).

For Hägerström, since we obey the law because it is prescribed according to its correct forms or procedures (*formenligt*), legislation amounts to a procedure that turns political statements into legal statements. This is not, like Kelsen famously claimed a "great mystery."<sup>43</sup> But it is a complexity-

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<sup>43</sup> H. Kelsen, *Hauptprobleme der Staatsrechtslehre* [1923] (Scientia Verlag, Aalen 1984) 411: "Es ist das große Mysterium von Recht und Staat, das sich in dem Gesetzgebungsakte vollzieht und darum mag es gerechtfertigt sein, daß nur in unzulänglichen Bildern das Wesen desselben veranschaulicht wird."

reduction mechanism that sets a standard of recognition so as to enable us to live in sufficiently ordered forms. Yet the political battle is over the control of the legal machinery's capacity to transform determinate normative statements into "habitual obedience."

As he stated at the end of *En straffrättslig principundersökning* from 1939, "nobody actually believes that the will of the driver *as such* has any influence over the car's motion. It is only specific movements of his, because of the mechanism, that sets it in motion. And the same outcome results whether the driver carries out those movements *with* or *without* will. However, out of the mechanical connection between his movements and the car's motion, the driver has the *possibility* to decide over the latter through his will. The same thing happens *mutatis mutandis* in the case of the lawmaker."

## VILHELM LUNDSTEDT AND THE SOCIAL FUNCTION OF LEGISLATION

TT Arvind\*

### Abstract

Axel Hägerström's axiological nihilism is often taken to render evaluative theories of law impossible: if normative statements are incapable of being true or false, there can be no objective basis on which a particular law can be judged to be desirable or undesirable, or good or bad. This paper challenges that understanding through a reassessment of the theory of legislation formulated by Vilhelm Lundstedt, Hägerström's leading disciple. The reading I present draws not only upon his core theoretical oeuvre, but also on his contributions to popular periodicals on questions that were the subject of public debate and his later contribution to the debate on the Swedish Law of Sales. When seen in the light of his contribution to these debates, his theory of the basis of legislation represents an ingenious attempt to overcome the problem of objectivity in law. I defend his approach, and argue that it has much to contribute not only to modern theoretical attempts to develop specifically legal theories of objectivity, but also to the debate about the role of legal, as distinct from political and moral, argument in the evaluation of existing and proposed legislation and the interpretation of contentious legislative texts.

### Keywords

Vilhelm Lundstedt – Legislation – Scandinavian Legal Realism – Legal Reasoning – Social Utility/usefulness of the law for society

### A. INTRODUCTION: A LEGAL THEORY FOR THE AGE OF STATUTES<sup>1</sup>

My aim in this article is to defend the theory of legislation put forward by Vilhelm Lundstedt, a leading member of the realist movement that blossomed in Scandinavia in the inter-war period. I seek to demonstrate that his theory not only remains relevant today, but provides a far better basis for making sense of the role legislation plays in modern legal systems than do the approaches that dominate contemporary legal theory. Despite the growing importance of legislation, law-making remains at the margins of legal theory, as a "particularist" intervention that is fundamentally "political" and hence not a proper subject for legal analysis.<sup>2</sup> This marginalisation is typically justified in terms of preserving the autonomy and coherence of legal analysis; but its result has been to leave us with an incomplete and distorted picture of the legal system.<sup>3</sup>

In Lundstedt's work, in contrast, legislation, the manner of its making, and its role in the legal process and legal system occupy a central place. Law cannot be understood without understanding how and why it is made, and Lundstedt argued that the conceptual apparatus that was and remains the basis on which legal theory is built – notions of rights, duties, culpability, responsibility, binding legal rules – is fundamentally incapable of contributing anything to our knowledge or understanding of the latter question. To understand what legislation is and what its effect is, we must set these to one side and focus instead on its social function. This function, he said, is to advance the general social interest by promoting what he called *samhällsnyttan*, loosely, the usefulness of the law to society, or the social benefit it provides. All of Lundstedt's work on legislation – whether critiquing proposed legislation or interpreting existing legislation – proceeded on the basis that legislation must be prepared and interpreted in the light of the specific social function or use to which it is directed.

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<sup>1</sup> See G. Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, Cambridge 1982).

<sup>2</sup> L. Wintgens, 'Legitimacy and Legitimation from the Legisprudential Perspective' in L. Wintgens and P. Thion (eds.), *Legislation in Context: Essays in Legisprudence* (Hart Publishing, Oxford 2007).

<sup>3</sup> See TT Arvind and J. Steele, 'Bringing Statute (Back) onto the Radar: Implications' in TT Arvind and J. Steele (eds.), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, Oxford 2012).

This aspect of Lundstedt's theory has been rejected almost universally, even by those otherwise favourably disposed to Scandinavian legal realism. The chief argument brought against it is that it is theoretically inconsistent. Under the received understanding of Scandinavian legal realism, Axel Hägerström's axiological nihilism renders evaluative theories of law impossible. Lundstedt was a leading legal exponent of Hägerström's philosophy; yet in arguing for basing the law on "the needs and interests of society," he seemed to be making an argument that is inextricably normative and evaluative. This was – and continues to be – taken as evidence of his theoretical weakness and political prejudices.

My argument is that this misses two fundamental points about Lundstedt's theory. I show, in the first instance, that his theory as to the social usefulness of legislation was, in essence, a theory about the nature of legal discretion, its exercise, and the relationship between interpretive and legislative activities. The nature of the discretion implicated in these activities is of central importance to any theory that seeks to understand the role and impact of legislation within the legal system. The fact that it rarely attracts the attention of legal theorists points to significant lacunae in the manner in which legal theory deals with the problem of judicial and legislative discretion in interpretation and legislation, which Lundstedt's theory overcomes.

Secondly, I show that Lundstedt's rejection of the traditional conceptual apparatus of legal thought is built on a complex theory of the nature of legal knowledge and, hence, of the reality of legal concepts. His claim that legislation must be approached from the perspective of its usefulness to society was not a normative claim in relation to how legislation ought to be interpreted, as his critics assumed, but a descriptive claim as to its nature. This claim has a sound theoretical basis, and has much to contribute to our understanding of the law-making process, and the much-contested, but ever increasing, role played by "policy" in the law.

## B. LEGISLATION AND LEGAL THEORY: THE NATURE OF THE PROBLEM

Legislation – whether parliamentary or judicial – is, in form, an intervention by a legal authority in the operation of an existing and functioning legal system, either through the creation of a new basis for adjudication or through the restatement, repeal or amendment of existing ones. The post-legislative task of judges and jurists is, accordingly, to integrate these newly framed texts into the framework of the functioning legal system.

Judges and jurists have plenty of tools for this task. Every legal system contains a wealth of "rules" or "canons" of interpretation, which cumulatively are capable of providing a conceptual framework for the transposition of legislative texts into the adjudicative process and thought-style that underlie the functioning of the legal system. The questions thrown up by the transposition of legislation are, nevertheless, extremely complex, and it is far from clear how these tools are to be brought to bear or with what sort of result.

A common problem, to which legal theory has no real answer, arises when courts are asked to consider the impact of a statute on situations to which it is relevant, but which it does not directly cover, as a few examples will illustrate:

(i) In *Marcic v Thames Water* ([2003] UKHL 66), a homeowner's property was repeatedly flooded by raw sewerage. He sued the water company responsible for the sewer, which argued that it was excused from liability, because its investment, maintenance and upgrade plan had been agreed with the regulator under a statutory scheme of regulation. The statute did not consider the relevance of an agreed scheme to the rights of private persons.

(ii) In *James Elliot Construction Ltd v Irish Asphalt Ltd* ([2011] IEHC 269), a construction product had complied with all relevant product standard regulations. It nevertheless caused serious problems when used to build houses. The suppliers of the product argued that the fact that they had complied with statutory standards meant they had no further liability. Again, the legislation under which the standards were prescribed did not consider the impact of compliance with the standards on liability if the product turned out to be defective.

(iii) In *Caparo Industries v Dickman* ([1990] 2 AC 605), the claimant purchased shares in a company relying on its audited accounts. The audit turned out to have been negligently carried out. The auditor's defence was that a company's annual accounts are, under the Companies Act, audited for the purpose of the Annual General Meeting only, as a result of which the auditor had no liability whatsoever if the accounts were used for any other purpose.

Problem also arise where a statute is clearly applicable to a case, but its scope and meaning are unclear, because its drafters did not, and could not have, conceived of the situation where it was invoked. Consider the following examples:

(i) In *Kiobel v. Royal Dutch Petroleum* (621 F.3d 111, 2<sup>nd</sup> Cir. 2010), the US judiciary had to consider the question of whether they had the jurisdiction to entertain suits for torts committed overseas by multinational corporations against foreign nationals. The basis of the claim of jurisdiction was a single, cryptic line in the Judiciary Act of 1789, which gives the courts jurisdiction over claims by an alien “for a tort only in violation of the law of nations or a treaty of the United States.”

(ii) In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* ([2008] UKHL 61), the UK judiciary were faced with the question of whether the British Executive by default has unlimited power to do as it pleases in relation to its colonies, by executive fiat and with no constitutional check. The basis of this claim – made in that case by the British government – was a provision in the Colonial Laws Validity Act 1865 to the effect that no law made in relation to a colony can be struck down “on the ground of repugnancy to the law of England” unless it was repugnant to an Act of Parliament. The statute’s main focus was the relatively narrow question of the extent to which the governments of British colonies could change principles of common law to suit local conditions but, due to its wording, it came to be the principal authority in a case involving a very different question.

Cases such as these are difficult, because they raise fundamental questions in relation to the effect of legislative participation in the process by which the legal system develops and the weight, meaning and significance of legislation for the legal system. They are not, however, exceptional – they represent a type of issue that modern legal systems face with growing frequency, as the requirements imposed by the regulatory state increasingly influence the ways in which parties behave or are expected to behave. Yet legal theory tells us curiously little about the actual mechanics by which courts deal with the problems of interpretation that such cases create. It is not that legal theory ignores the role played by interpretation – many legal theorists give the interpretive process a central place in their theories. The trouble, however, is that theorists rarely attempt to shed any light on the nature of the grammar or thought-style that underlies the interpretive process. Karl Llewellyn pointed out over half a century ago that it is far from clear how different rules on the interpretation of statutes fit together or what guides the choice of one rule over another.<sup>4</sup> Today, the question remains unanswered, and many theorists go to the extent of denying its relevance or importance.<sup>5</sup> Judges choose rules pragmatically, they argue, based on the relative weight of the various criteria they are called upon to apply, and there is no fundamental flaw in their doing so. Jurists need not, therefore, concern themselves unduly with attempting to describe the ways in which judges make these choices, or with attempting to discern or outline a single set of patterns or principles underlying them.

This lack of interest reflects a broader decline in the role of description in legal scholarship – a trend which stands in stark contrast to the fundamental premises of legal realism, and which Anne Orford has recently argued is linked to the growing emphasis on the use of philosophers as “authorities on justice or truth.”<sup>6</sup> Legislation presents the theorist not with ideas – as case law or open-textured provisions do – but with texts framed in the form of legal rules. This form, of its nature, detaches the text from the specific facts and imperatives of policy or principle that prompted it. As a result it is hard to impute to the text the justificatory bases that legal theory imputes to law derived from other sources, such as open-textured codes, case law, custom, or unwritten principles. Understanding legislation, its making, and its impact requires a level of descriptive analysis and research for which metaphysically oriented theories have little room.

This is not to say that legislation is ignored altogether, but its role is nevertheless marginal in virtually every area of legal theory. Ronald Dworkin famously denied that legislation could exert spreading effects – a “pull,” as he termed it – on surrounding areas of law, as case-law could, and statutes (apart from constitutional legislation) are conspicuously absent in the sources he uses to derive his account of political morality. This is part of a broader pattern. Idealist theories of law in general tend to focus on the open-textured provisions of codes, or on morally oriented strands of case law, rather than the nitty-gritties of more specifically-focused legislation. Similarly, despite the centrality of codes to the comparative project, the body of comparative scholarship on statutory interpretation is vanishingly small.<sup>7</sup> Yet to push legislation to the margins is to present a picture of the legal system that

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<sup>4</sup> K. Llewellyn, ‘Remarks on the theory of appellate decisions and the rules or canons about how statutes are to be construed’ (1950) 3 *Vanderbilt Law Review* 395, 400.

<sup>5</sup> Cf. the observations of S. Vogenauer in *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (Mohr Siebeck, Tübingen 2001) 1254 on the debate between subjective and objective approaches to the question of the goal of interpretation.

<sup>6</sup> A. Orford, ‘In praise of description’ (2012) 25 *Leiden Journal of International Law* 609, 621. It is pertinent to note that Orford (at 624) cites Hägerström’s views on the relationship between law and values as an important insight.

<sup>7</sup> S. Vogenauer, ‘Statutory Interpretation’ in J. Smits (ed.), *Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar Publishing, 2006).



is at best distorted and at worst wholly misleading. Even in an area of law as central to the legal system as private law, the impact of legislation – in addition to leading cases and open-textured provisions of codes – has been so significant and so sustained that the shape of the law cannot be understood without it.<sup>8</sup>

Lundstedt argued that these problems in legal theory are not incidental or minor, but reflect structural problems in jurisprudence and the analytical frameworks in which legal theory conventionally deals – and, in particular, point to the absence of an understanding in legal theory of the nature of the task of making and applying legislation. Much of modern legal theory draws a distinction between legislation and the judicial interpretation of law. “Faithful” interpretation, in these theories, is distinguished by its “groundedness” in the principles or concepts that these theories hold to be the constitutive essence of the law – whether that be “corrective justice,” “rights,” “political morality” and “fit,” or some other concept. Any form of judicial engagement with the law that is not so grounded is treated as being “judicial legislation,” beyond the pale of what a judge should properly do.

Lundstedt’s theory, in contrast, begins with a rejection of the traditional distinction between “interpretation” and “legislation”. Much like modern sceptical or critical theorists, Lundstedt argued that interpretation by judges in cases where written and unwritten law do not point to a clear and unequivocal result is a form of legislation, because a judge who articulates a new interpretation articulates something that did not previously form part of the practice of the courts or other authorities in the legal system.<sup>9</sup> Yet, unlike modern-day sceptical theorists, Lundstedt did not thereby imply that the adjudicative process is characterised by complete subjectivity, or an absence of groundedness. Instead, by linking parliamentary and judicial legislation, Lundstedt sought to make the point that both judicial and parliamentary legislation are grounded in the same thing – namely, conceptions as to its social usefulness and social functions – because legislation of its very nature is concerned with being, in some way, useful to society or with fulfilling definite social purposes and functions.<sup>10</sup>

In this, Lundstedt’s theory of legislation departs quite fundamentally from more conventional theories. Modern legal approaches to legislation for the most part do not seek to formulate general theories as to its nature. They focus, instead, on its form, and seek to devise ways of interpreting or giving content to legislation, or determining its relevance to a particular fact situation, purely from the words used in it, or from the context in which or purpose for which it was made. If they define legislation, they do so in procedural terms – as a document that has obtained the imprimatur of the legislative branch of government, after following a particular process that is seen as sufficient for the purpose of conferring that imprimatur.

A procedural definition of this sort, however, is incapable of shedding light on the character of the interaction between legislation and the legal system. Doing so requires a substantive understanding of the nature, character and weight of legislation, and of how it seeks to influence the legal system. The central claim of Lundstedt’s theory is that this requires theorists to take into account the social benefit a law provides, or the social usefulness its maintenance serves, because these are the factors upon which the activity of legislation is based. As we will see, examining how legislation implicates and is implicated in the exercise of discretion by legal actors lends considerable support to Lundstedt’s claim.

### C. LEGAL DISCRETION AND THE NATURE OF LEGISLATION

Legislation is, principally, directed to constraining or directing the discretion of legal actors. The terms in which statutes are phrased are conceptual and general, in the same way as the rules found in codes or in the “principles” of the common law: legislation, like law generally, is framed in conceptual terms – “reasonable,” “treasonous” – and in the form of rules. The concepts embedded in legislation affect those embedded in an existing legal system in three ways. Firstly, legislation may alter the intension – or “sense” – of a concept by changing the criteria that determine whether a particular situation falls within or outwith a concept. Secondly, it may alter the extension – or denotation – of a concept by directly specifying that certain situations will – or will no longer – be treated as falling within a concept.

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<sup>8</sup> See TT Arvind and J. Steele, ‘Legislation and the shape of tort law’ in Arvind and Steele, *Tort Law and the Legislature*, *supra* n. 3, 5-13; A. Burrows, ‘The Relationship Between Common Law and Statute in the Law of Obligations’ (2012) 128 *Law Quarterly Review* 232; J. Beatson, ‘The Role of Statute in Common Law Doctrine’ (2001) 117 *Law Quarterly Review* 247.

<sup>9</sup> See A.V. Lundstedt, *Legal Thinking Revised: My Views on Law* (Almqvist & Wiksell, Stockholm, 1956) 144 note 1, 158.

<sup>10</sup> See *e.g.* his second response to Alf Ross: A.V. Lundstedt, ‘Beaktandet av samhällsnyttan inom juridiken. Ett genmäle’ [1933] *Svensk Juristtidning* 121.

Finally, it may alter the effect or consequence that follows from a particular situation being classified as falling within a concept.

The UK's Compensation Act 2006 is a good example of a statute which, in successive provisions, does all three of these. s. 1 of the statute speaks to the intension of the concept of a duty of care, by specifying that the deterrent effect a duty might have should be one of the considerations that influence the answer to the question of whether or not a duty exists in a particular case. ss. 2 and 3 of the statute alter the extension of two concepts – the first, the concept of an “admission” of liability, by providing that certain types of offers will not be regarded as admissions, and the second the concept of “proportionate liability,” by providing that that concept will no longer apply to certain types of situations involving the causation of mesothelioma through negligent exposure to asbestos. The next sections of the statute alter the consequences of an entity's activities being classified as “claims management” by creating a new framework to regulate those activities.

In each of these cases, the principal goal and effect of so altering concepts is to impose constraints upon the discretion of judges or other legal actors. This is as true of judicial legislation as it is of legislation by a parliament. It is not difficult to find cases in which appellate judges, in their restatement of the law, expressly attempt to set out the factors that judges in lower courts should or should not take into account, particularly when overruling a line of authorities or when seeking to lay down the outlines of a new approach. The impact of legislation in either case is to alter the manner in which the legal system develops or functions, either by altering the manner in which it is interpreted or implemented or by freezing the development of the law by closing off certain paths which its development might otherwise have taken. This is also true of what is sometimes, misleadingly, called “symbolic” legislation. Symbolic legislation is rarely purely symbolic: by setting down in legislative form an aspect of the intension a court currently gives a legal concept, or the situations covered by the concept or the consequences of a situation so being covered, the lawmaker restricts the ability of judges to move these concepts along – as is the case more generally with any legislation that attempts to emulate the form and conceptual framework of judicial reasoning.

The fundamental question for an interpreter is, therefore, to assess how far-reaching or wide-ranging the effect of these constraints is to be taken to be. What, when seen from within the legal system, is the place, effect, weight and significance of legislative participation in the ongoing development of the legal system? How do the words in which the instrument that effects this participation is framed affect, alter, or reshape that process of the law's development?

The relationship between the answers to these questions and the nature of legislation can be seen with reference to the analogy of the chain novel, which has repeatedly featured in legal debates about interpretation. Ronald Dworkin, writing in the late 1980s, presented an analogy between interpretation and the writing of a chain novel. A person late in the chain, Dworkin argued, would be constrained by the work done by those who have gone before.<sup>11</sup> Yet this analogy is incomplete in an important respect. A subsequent entrant to the chain is not, in any coercive sense, bound to continue writing the chain novel in the spirit of the original – and, in point of fact, the actual writing of chain novels in internet-based projects to produce “crowdsourced” texts have shown that participants do not always feel themselves so bound. A particularly striking example is the result of the “A Million Penguins” project launched by Penguin Books in 2007, to produce a collaboratively written novel. The result showed a range of different types of participants, ranging from those who sought to use it to “showcase their talents,” to those who sought to nurture it for its own sake, and those who participated with a view to ruining it.<sup>12</sup>

This is not to adopt the sceptical position that judges are not under any real constraints in the manner in which they interpret texts. It is, rather, to point out that there is another dimension to discretion – which theorists of discretion refer to as its “internal” dimension<sup>13</sup> – which plays a significant role in augmenting the relatively weak constraints imposed by a text alone. One aspect of the internal dimension of discretion that has received some attention in the literature are the constraints placed on a judge by the existence of a multiplicity of actors in the legal arena, whose responses he or she will need to consider.<sup>14</sup> Lundstedt, however, points to a far more fundamental constraint. To return

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<sup>11</sup> R. Dworkin, ‘Law as Interpretation’ (1982) 9 *Critical Inquiry* 179.

<sup>12</sup> B. Mason and S. Thompson, ‘A Million Penguins Research Report’, 24 April 2008, <<http://www.ioct.dmu.ac.uk/documents/amillionpenguinsreport.pdf>> accessed 27 November 2012. Another project, with comparable results was the attempt to produce an online parody of *The Lord of the Rings*, which would seem sufficiently similar to the original to confuse individuals seeking pirated texts online. The results of this project are available at <<http://flyingmoose.org/tolksarc/book/book.htm>> accessed 27 November 2012.

<sup>13</sup> D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford 1990) 12.

<sup>14</sup> M. Troper, V. Champeil-Desplats, and C. Grzegorzczak, *Théorie des contraintes juridiques* (Bruylant LGDJ, Paris 2005); J. Knight and L. Epstein, *The Choices Justices Make* (CQ Press, Washington DC 1997).

to the analogy of the chain novel, subsequent entrants in the process of producing a chain novel or a crowdsourced novel have discretion in relation to whether or not to regard themselves as bound or constrained by what has gone before. The manner in which they exercise that discretion – whether they choose to continue the novel in the spirit in which it has been written until then, or introduce a radical twist that alters its essential character – depends on how they view the enterprise in which they are participating. Understanding how they view the enterprise must, therefore, be an essential part of any attempt to understand the process by which the chain novel is produced.

This was the basis of Lundstedt's critique of legal theory in his day, and it resonates even more strongly today. The making of legislation as well as its interpretation and application are purposive activities or enterprises, Lundstedt argued. No enterprise can proceed without some sense of what the enterprise is seeking to do, and no description of that enterprise intended to further it can proceed without engaging with the question of the nature of the enterprise. So it is with legislation.

Although Lundstedt did not phrase it in these terms, his argument was, in effect, that any judge faced with a legislative text has discretion in relation to how he chooses to engage with that text, much like any other interpreter faced with any type of text. The text itself is an external constraint on this discretion, but it is a rather weak one because of the room that rules of construction give to judges. Additionally, because legislation typically has a transformative aim, it is harder to understand it in terms of the pre-legislative content of those concepts – we must, necessarily, engage with the question of what legislation has done to those concepts, and we cannot rationally do that unless we look beyond them. The internal constraints on discretion – represented by the enterprise in which judges see themselves as being engaged when working with legislation, or, in other words, what they see the nature of legislation as being within the context of the functioning of the legal system – are in consequence of far more relevance.

What applies to judges as legislators applies equally to parliamentarians or administrators acting as legislators. One of the remarkable aspects of much of modern legal theory is the reluctance of theorists to treat the discretion of parliamentary legislators as being in any way constrained in relation to their activity – implicit in, for example, the absence of any serious theory within law of the nature of the discretion involved – whilst being at the same time reluctant to treat the discretion of judicial officials as being in any way unconstrained. It is hard to resist the conclusion that this is a reflection of the continued hold which the will theory of legislation – as a relic of Hobbesian and Austinian positivism<sup>15</sup> – continues to exercise over jurists. Even theorists quite far removed from positivism – such as Ronald Dworkin – tend to view legislation as being something different from, and exterior to, the “usual” sources of political morality: it can “introduce” principles of political morality into the law, seemingly without being constrained by them, in sharp contrast to cases, which “develop” and “refine” those principles while being constrained by them.

Yet this view of legislation is hard to sustain. It is true that most legal systems impose few external constraints on the ability of parliaments to legislate. The principal restrictions are constitutional “charters of rights” and procedural requirements (such as the requirement of a special majority for certain types of legislation or the procedural rules of the US Senate that give a minority of senators the ability to defeat legislation through a “filibuster”). Apart from these loose fetters, parliamentarians are not bound to legislate in a manner that “carries out the law”.<sup>16</sup> To confine oneself to these, however, is to ignore the internal element of constraints on discretion. Parliamentary legislators are not despots in modern legal systems nor are they any more likely to act capriciously than judges are; but to depict them as essentially untrammelled by any form of discretion is to posit precisely that. If we accept that parliamentarians are also guided by certain considerations in the exercise of their discretion – that, in other words, their discretion, too, is constrained by an internal dimension – then we must, necessarily, investigate what the contours of that dimension are if we seek to understand the phenomenon of legislation in the real world.

This, then, is the question to which Lundstedt's much-derided conception of “social usefulness” was the answer. “Social usefulness,” or *samhällsnyttan*, is in modern terms an aspect of the internal component of discretion, which affects both parliamentarians and judges because it represents the understanding of the nature of legislation (and, more broadly, of law) on which actors within legal system base their reception of and engagement with legislation. A legislator making a law is embedded within existing and functioning legal, social and economic systems, and is aware of this when

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<sup>15</sup> I am grateful to Richard Mullender for drawing my attention to the very significant role Thomas Hobbes played in shaping positivism.

<sup>16</sup> A. Hägerström, ‘Till frågan om begreppet gällande rätt’ (1931) 44 *Tidsskrift för Retsvidenskap* 48, 85-86. The article is a review of Alf Ross's *Theorie der Rechtsquellen*, but its discussion goes far beyond the scope of Ross's original work.

legislating. This awareness does not act as an external constraint on what a lawmaker may do – a sovereign Parliament such as the United Kingdom’s may under the British constitution validly make a law that ignores these constraints, much as a judge of the highest court may choose to ignore precedent. In practice, they do not do so, because the internal component of their discretion – which, in turn, represents an embodiment of a conception of social usefulness – emphasises its importance. The failure to take account of its existence and significance is responsible for the inability of legal theory to deal with the role of legislation within the legal system, and for the seeming randomness of judicial approaches to legislation.

#### D. SOCIAL BENEFIT AND THE MACHINERY OF LAW

We can, now, move to assessing the validity of Lundstedt’s theory. Can we, with any degree of confidence, say that this notion of social usefulness is, in fact, a fair description of the internal dimension of discretion, and, as such, of an important set of conditions that guides the manner in which legal actors make and otherwise engage with legislation?

Lundstedt’s insistence that legislation reflected social utility baffled many of his contemporaries and later theorists. On the one hand, Lundstedt – like Hägerström – criticised rights, duties and similar conceptions as being subjective, grounded in superstition, and having no basis in reality. How was “social usefulness” any different? Surely the notion of social usefulness was every bit as subjective and metaphysical as the notion of a right? And, given the sordid realities and limitations of the processes by which legislation emerges – regardless of whether the makers are parliamentarians<sup>17</sup> or judges<sup>18</sup> – how can a realist justifiably say that laws necessarily reflect and advance social goals, rather than the interests of whichever special interest group happened to have the most influence on the law-making process? Even granted that there is an internal component to a lawmaker’s discretion, why is “social usefulness” a valid description of the basis on which that discretion is exercised when “respect for rights” is not?

These points lay at the heart of Alf Ross’s attack on Lundstedt, which he launched through two articles in the *Svensk juristtidning* in 1932 and 1933.<sup>19</sup> “Social usefulness,” Ross argued, was every bit as metaphysical and “chimeral” (a phrase Lundstedt frequently used in relation to theories he opposed) as rights. This could well be the basis for constructing a pragmatic metaphysics, as Bentham and the utilitarians had tried to do. But it was a far cry from the rational jurisprudence Hägerström had sought to erect, and which Lundstedt claimed to espouse.

Lundstedt’s reply was complex. The idea of social usefulness he put forward, he said, was not a general principle nor did it represent an objective value. Instead, it represented the manner in which persons making the law were influenced by, and directed their actions towards, the conditions of the society to which their law-making activities relate, and the goals which persons forming part of that society strove to attain. Ideas such as rights, in contrast, were of their nature incapable of describing the nature or content of influences on law-making.

Let us take this argument in two parts, starting, first, with Lundstedt’s claim that legislation can objectively be said to be directed towards social usefulness, and then proceeding to his claim that rights cannot be objective. What is the nature of the claim Lundstedt was making when he stated that legislation was based on the idea of providing some form of social benefit, or social usefulness? As his critics then and now interpreted it, Lundstedt was in essence making a normative claim as to how lawmakers ought to make legislation, and how judges ought to decide cases. This claim, they argue, is no different from the claim that legislation should be approached from the perspective of “natural rights” or “the legislative will”. Lundstedt, in this reading, was so blinded by his social-democratic prejudices – and by the inadequacy of his own understanding – that, notwithstanding his espousal of Hägerström’s anti-metaphysical teachings, he was unable to see how his own work exhibited the very qualities Hägerström had criticised.<sup>20</sup>

<sup>17</sup> See e.g. B. Simpson ‘Trade Disputes and the Economic Torts’ in Arvind and Steele, *Tort Law and the Legislature*, *supra* n. 3; A. Morris ‘The “Compensation Culture” and the Politics of Tort’ in *ibid*.

<sup>18</sup> See e.g. J.A.G. Griffiths, *The Politics of the Judiciary* (Harper Collins, London 1997); R.B. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (Weidenfeld & Nicolson, London 1979).

<sup>19</sup> A. Ross, ‘Realismen i retsvidenskaben og samfundnyttekimæren’ [1932] *Svensk Juristtidning* 324; A. Ross, ‘Samfundsnytteprincippet – gensvar til professor Lundstedt’ [1933] *Svensk Juristtidning* 115.

<sup>20</sup> See, for example, I. Hedenius and A. Wedberg, ‘Professor Lundstedt och Uppsalafilosofien’ [1934] 5 *Fönstret* 3; Ross, ‘Realismen i retsvidenskaben’, *supra* n. 19; S. Källström, *En filosof i politiken: Vilhelm Lundstedt och äganderätten* (Stockholms Universitet, Stockholm 1991).

This reading has been persuasive, but it is based on a misunderstanding of Lundstedt's claims. Lundstedt himself insisted that his argument as to the centrality of an understanding of the usefulness of a law to society was descriptive, not normative. Social benefit in his theory was, he emphasised, not an abstract principle that could be assessed through a simple calculus, as it was in the theories of the utilitarians. Instead, it represented an evaluation of what might be useful to members of a given society, against the background of their way of life and their "aspirations and struggles" at a given point of time. This involved the encouragement of the things that members of that society actually strive for, not the things that a philosopher believed they ought to strive for. Laws favour social utility if their consistent operation furthers these goals. But whether something actually furthers these goals – and, hence is socially useful, in turn, cannot be determined save with reference to the actual conditions in a given society. A market-economy and a planned economy function in very different ways, and what is socially useful in one will not necessarily be so in another. The question of social usefulness must, therefore, be examined against the backdrop of the structure of a society, including its power-relations, and it is this determination that is, ultimately, the basis of all activity connected with legislation, including law-making and interpretation.<sup>21</sup>

Lundstedt's claim that his theory of social usefulness was founded on an empirical claim as to the nature of legislation, and not a metaphysical claim as to the law's content or justificatory basis does, prima facie, have substance. Lundstedt followed Hägerström in frequently describing the law as a machine. To say that a machine has a function is neither subjective nor metaphysical: the statement "a bicycle is a machine whose purpose (or function) is to transport its rider" is patently both descriptive and objective. And whilst the fact that the legal system can metaphorically be called a "machine" does not necessarily support the proposition that it has a "function," or that "social usefulness" is a valid description of that function, Lundstedt's proposition receives considerable support from modern institutional theory.

In Lundstedt's work the suggestion that law can be likened to a machine is not merely a convenient metaphor. When he sought to explain the differences between him and the American Realists in *Legal Thinking Revised* – his last book, in which he tried to present a final and complete account of his legal theory – he repeatedly returned to the fact that his theory incorporated an account of the functioning of "the legal machinery," and roughly half the book is devoted to setting out the role and functioning of the legal machinery. As Patricia Mindus has shown in a recent essay on Hägerström's use of the analogy, social changes since the two world wars of the twentieth century have radically altered the way we view machinery with the result that the point Hägerström (and Lundstedt) sought to make is generally missed.<sup>22</sup> Mindus argues that Hägerström's use of this figure has three dimensions, which taken together encapsulate his rejection of the transcendental idealism of natural law theories as well as the (equally transcendental) intentionalism of will-based theories of law – namely, that law is a human creation but at the same time not a reflection of any one individual's will in that the law that exists at any point of time is the result of an evolutionary process in which many individuals have participated; that law is a social system which incorporates and shapes the actions of legal officials and that consequently cannot simply be reduced to what legal actors such as judges do; and finally that law is a social technique, created to facilitate and shape social interaction.

The three dimensions identified by Mindus point to a far more substantive set of ideas lying behind the conceptualisation of the law as a machine than is traditionally assumed. These characteristics closely parallel what modern institutional theorists would call an "institution." Lundstedt himself seems, in his English writing, to have used these terms interchangeably, and the manner in which he (and Hägerström) use the image of legal machinery is much more intelligible today if we replace "machinery" with "institution". In institutional theory, an institution is a set of constraints – formal rules, informal norms, or conventions – which operate on a group of people and affect the manner in which they act or behave, and which are created in response to real or threatened conflicts between the social expectations of several people.<sup>23</sup> Institutions are, as institutional theory tells us, the products of deliberate human action, and are expressly created to shape social interaction, but change considerably over time as the social context in which they operate, the uses to which they are put, and the groups of actors affected by their operation change.<sup>24</sup> As institutional theorists have noted, this means that institutions have a function, which is a social function and is not reducible to any single will, much as Lundstedt claimed. Equally, concepts such as "rights" are at best what John Searle has called

<sup>21</sup> See Lundstedt, 'Beaktandet av samhällsnyttan', *supra* n. 10, 121ff.

<sup>22</sup> P. Mindus, 'Social Tools and Legal Gears: Hägerström on the Nature of Law' in S. Eliaeson *et al.* (ed.), *Axel Hägerström and Modern Social Thought*, Bardwell Press, Oxford (forthcoming 2013).

<sup>23</sup> J. Knight, *Institutions and Social Conflict* (Cambridge University Press, Cambridge 1992) 1-3.

<sup>24</sup> See generally D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge 1990).

“institutional facts,” which are the products of the operation of institutions, not their cause – again, precisely as Lundstedt claimed. And, finally, the creation and operation of institutions is always oriented towards meeting some need arising out of social interaction – a formulation that is remarkably similar to Lundstedt’s account of law as being a mechanism defined by its usefulness in pursuing social goals.

#### E. LEGAL IDEOLOGY, SOCIAL UTILITY, AND OBJECTIVE LEGAL KNOWLEDGE

Lundstedt did not stop at saying that social usefulness was a way of understanding legislation. He went further, arguing that legislation and law could only be understood in terms of social usefulness. He opposed, in particular, the proposition that legislation sometimes protected rights. Rights were, as a concept, so fundamentally flawed that they were incapable of constituting the basis of legislation. It was, even as a descriptive matter, wrong to say that, for example, legislation concerning misappropriation of trust funds is aimed at protecting the beneficiary’s “right” to the funds.

The best place to begin considering what distinguishes “rights” from “social usefulness” is the debate between Lundstedt and Ingemar Hedenius, a philosopher who was also broadly associated with the realist movement in Scandinavia and who had a deep influence on Swedish jurisprudence. In 1941, Hedenius published a book called *Om rätt och moral* (“Of law and morals”), around a third of which was taken up by a section titled “Det Hägerström-Lundstedtska misstaget” (“The Hägerström-Lundstedt error”), which presented an extended critique of Hägerström and Lundstedt’s views on law.

Hedenius began by taking an example deliberately chosen to resemble Hägerström’s assertion that the idea of a “right” was grounded in Graeco-Roman superstition. Consider, Hedenius said, rain. The Classical Greek word for “It is raining” was “*hyei*.” A Greek who said “*hyei*” meant the same thing as a Swede who said “*det regnar*” or an Englishman who said “*it is raining*.” Now, Hedenius said, the ancient Greeks believed that rain was the result of Zeus strewing water over the Earth. This was clearly wrong. However, when a Greek said “*hyei*” he still meant that waterdrops were falling from the heavens onto the Earth, and his words therefore described a real phenomenon, even if his conception of rain was wholly fantastic and even if he believed that he was talking about a different and much more complex process.

The same principle, Hedenius argued, applied to “rights” and other core concepts in jurisprudence. Hägerström may well have been correct in his assertion that the concept of a “right” in origin was clouded in superstition. It might even be that people’s personal conceptions of rights were riddled with superstitious beliefs. This, however, did not alter the fact that when people spoke of legal rights, whatever the philosophical problems with the underlying concept itself might be, they were referring to something real – namely, that if certain factual criteria were satisfied, the state machinery would react in a particular way. To say, as Hägerström and Lundstedt did, that rights could not have any real existence because the notion of rights had its roots in superstition ignored the fact that the term “rights” as a legal term described real facts and real relations. The right to property, for example, was an aggregation of a number of hypothetical facts, whose components included restitution, compensation, punishment, and so on. The alleged problems pointed to by Lundstedt and Hägerström were no different from the conceptual problems created by a statement such as “My, how the time has flown,” and were just as capable of referring to factual realities.<sup>25</sup>

In framing the problem in these terms, Hedenius was taking his cue from Adolph Phalén, who is generally taken to have been, with Hägerström, the joint founder of the so-called Uppsala school of philosophy. All theoretical and philosophical concepts, Phalén said, ultimately derive their meanings from the manner in which the relevant term is used in common, everyday usage. As time passes, however, these concepts come to be riddled with contradictions. The task of philosophy is to identify and resolve these, and through so doing to contribute to the concept’s development.<sup>26</sup> This, in essence, is what Hedenius sought to do in relation to law.

In Hägerström’s theory, however this basic insight received a new form. Well before he and Phalén founded the Uppsala school of philosophy, Hägerström had begun to investigate a basic epistemological question which was the foundation of his critique of moral reasoning: how can we acquire knowledge, and of what can we acquire knowledge? Legal theorists such as Dworkin have tended to assume that theories which reject the reality of moral statements are built on a

<sup>25</sup> I. Hedenius, *Om rätt och moral* (2<sup>nd</sup> edition, Wahlström & Widstrand, Stockholm 1963) 63-75, 92.

<sup>26</sup> See e.g. A. Phalén, ‘Ur erfarenhetsbegreppets historia’ in *Festskrift tillägnad prof. Vitalis Norström på 60-årsdagen den 29 januari 1916* (Elanders Boktryckeri, Göteborg 1916) 52-96; G. Oxenstierna, *Vad är Uppsafilosofien?* (Bonniers, Stockholm 1938) 8-15, 32-43.

correspondence theory of reality. The foundation of Hägerström's theory is however in the idea of contradiction.<sup>27</sup> The acquisition of factual knowledge, Hägerström argued, entails gathering empirical data as well as making a judgment on the data through rational thought. An important aspect of the way in which we identify conceptions as being true or false, over and above their internal consistency, is their consistency with other conceptions which we know to be true. We can, thus, assess the conception "men who breathe through gills" to be incompatible with the conception "men who breathe through lungs," in that they cannot exist in the same world.<sup>28</sup> We know that the latter is a conception grounded in the real world, which implies, necessarily, that the former is false. A conception where such a comparison is not possible is, therefore, incapable of being true or false, because it has no real-world referents we can use to judge its truth or falsity – it is, to put it differently, not representational. It is the absence of a representational character that makes statements incapable of being true or false in Hägerström's theory, not the fact that they have an axiological or normative element – and, indeed, both Hägerström and Lundstedt admitted quite freely that law had a normative element, and was connected with the enterprise of prescribing how people ought to behave.<sup>29</sup> Equally, because it is only conceptions grounded in the spatio-temporal world that can form the basis of any such comparison, it is only such conceptions that can ground the possibility of any form of knowledge.<sup>30</sup>

The same insight, Hägerström said, applies equally to legal knowledge in all its forms.<sup>31</sup> Consider the statement:

"The sky is blue"

Here the adjectival predicate following the copula is the conception "blue". Following Frege's method, this can be replaced with its real world referent, thus yielding the formulation in relation to a person with normal vision:

"The sky is perceived as having a visual appearance corresponding to a segment of the electromagnetic spectrum having a wavelength between 474–476 nm"

Given the veracity of this statement with reference to the spatio-temporal world, we can assess the validity of the following conception:

"The sky is mustard yellow"

and reject its truth on the basis of its incompatibility with the first.<sup>32</sup>

Crucially, however, this exercise involves two dimensions of fit, the first relating to *internal* fit – the self-consistency of the complex of conceptions represented by the statement itself, which it passes – and the second to the fit of the statement with things *external* to itself – i.e., the consistency of the complex of conceptions represented by this statement with the external, spatio-temporal world, which it fails. It is the latter that is absent in legal theory that is based on rights, positivism, or the other concepts that have traditionally formed its basis. In relation to law, the element of external fit can only come from an understanding of the actual nature of legislation – the act that is the origin of the law – and of the evaluative judgments that go into its making, not from fictional constructs that by virtue of being fictions do not exist in the spatio-temporal world.<sup>33</sup> Consider the following statement (an example cited by Dworkin):

"Slavery is unjust"

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<sup>27</sup> See "Axel Hägerström" in *Die Philosophie der Gegenwart in Selbstdarstellungen*, Bd. 7, Leipzig 1929, 111-159. Cf the discussion in P. Mindus, *A Real Mind: The Life and Work of Axel Hägerström* (Springer, Dordrecht 2009) 59-60, 63-70.

<sup>28</sup> A. Hägerström, *Filosofi och vetenskap* (Ehlin, Stockholm 1957) 126-128.

<sup>29</sup> See Hägerström, 'Till frågan om begreppet gällande rätt', *supra* n. 16, 84-85, 88-91.

<sup>30</sup> On this point, see E. Pattaro, 'I Will Tell You about Axel Hägerström: His Ontology and Theory of Judgment' (2010) 23 *Ratio Juris* 123-156, and esp. at 150.

<sup>31</sup> See Hägerström, *Filosofi och vetenskap*, *supra* n. 28, 177-179.

<sup>32</sup> Or, in the case of a person who suffers from tritanomaly, affirm its truth. See A.V. Lundstedt, *Det Hägerström-Lundstedtska misstaget: Sju föreläsningar samt efterskrift* (Almqvist & Wiksells, Uppsala 1942) 21.

<sup>33</sup> This is the basis on which Hägerström rejects the will theory (and theories of natural law). See A. Hägerström, *Till frågan om den objektiva rättens begrepp I: Viljeteorien* (Almqvist & Wiksells, Uppsala 1917); A. Hägerström, 'Är gällande rätt uttryck av vilja?' in *Festskrift tillägnad prof. Vitalis Norström på 60-årsdagen den 29 januari 1916* (Elanders Boktryckeri, Göteborg 1916) 171-210.

Here, the predicate following the copula – “unjust” – can neither be reduced to a real-world phenomenon, nor can it be compared to one. Taken by itself, therefore, it is incapable of being true or false, and the mere fact that the individual making it is absolutely convinced that it is true does not change its essential character. It can, potentially, be given content and truth-validity if we define “unjust” to mean “contrary to settled law” – as Hedenius suggested we could<sup>34</sup> – but doing so makes the concept a result of the operation of the legal system, which is unhelpful if our task is to deal with cases to which existing law does not speak. As such, the concept “unjust” cannot in and of itself provide an interpretive principle.

Hägerström’s theory thus implies that internal fit – a concept that lies at the heart of much of modern legal theory – cannot by itself be of any assistance in dealing with legislation, because internal fit is epistemologically insufficient without the added dimension of external fit. In an early course of lectures, Hägerström presented a critique of Hegel’s subjective naturalism. This, he said, permitted the construction of elaborate worlds based on concepts that were entirely false because they did not reflect reality.<sup>35</sup> Much the same can be said of theories of law that rely solely on internal fit.

Paradoxically, therefore, the failure of legal theorists to deal with the spatio-temporal considerations that constitute the internal dimension of discretion leads to their being unable to deal with the external dimension of fit. The result is to leave their theories crippled when it comes to dealing with the questions thrown up by legislation. Take, by way of example, the question with which section B began. On what basis can we say that a particular reading of legislation is right or wrong, or better or worse? Thus, for example, in *Marcic v Thames Water* – discussed in section B – the House of Lords accepted a form of pre-emption of the law of tort by regulation, holding in effect that a regulatory framework of the type implicated in that case implicitly excluded remedies in tort even if it purports not to.<sup>36</sup> On what basis can we decide whether this can be said to be a wrong reading, or a worse reading, of the relevant legislation? Bare, ungrounded conceptualism cannot give us the answer, nor can variants of “fit” that are purely internally determined, because neither is grounded in the spatio-temporal world.

Lundstedt’s critique also implies that the result of basing engagement with legislation on things that are not real in the spatio-temporal sense is to give free rein to legal ideology, with consequences that are fundamentally undesirable for the legal system as a whole.<sup>37</sup> Consider again Dworkin’s example of the statement “Slavery is unjust.” In an emotivist reading, such as the one Hägerström and Lundstedt adopted, it might be capable of being seen as giving expression to the sentiment:

“The failure of the State to act against slavery produces in me emotions of anger and dissatisfaction.”

which may well be true if it is an accurate description of the internal emotions of the speaker. As a referent to external reality, however, it is incapable of being either true or false. Lundstedt’s theory goes further. In legal discourse, Lundstedt pointed out, a person making a claim that an action or situation is “unjust,” or that it is “unlawful,” or that it “breaches a right” is making a claim in relation to the outcomes that the operation of the legal system produces. In consequence, they can and do refer to some form of reality, and are in essence an ideological layer superimposed over these realities, which they disguise.<sup>38</sup> What, then, are these realities? The real-world phenomenon in each case is an evaluative decision in relation to the outcomes that the operation of the legal system produces – which, by definition, relates to the goals the legal system pursues and how it pursues those goals. Regardless of what legal ideology might say, it is therefore ultimately the law’s social function that motivates the making of legislation by judges and parliamentarians.<sup>39</sup> Because, to use his metaphor, “the demands of

<sup>34</sup> Hedenius, *Om rätt och moral*, *supra* n. 25, 53-59, 75-96.

<sup>35</sup> A Hägerström, *Moralfilosofins grundläggning* (Almqvist & Wiksells, Uppsala 1987) 111.

<sup>36</sup> M. Lee, ‘Occupying the field: Tort and the pre-emptive statute’ in Arvind and Steele, *Tort Law and the Legislature*, *supra* n. 3.

<sup>37</sup> Lundstedt, *Det Hägerström-Lundstedtska misstaget*, *supra* n. 32, 127-129.

<sup>38</sup> A.V. Lundstedt *Obligationsbegreppet I: Fakta och fiktioner* (A.B.L. Norblads Bokhandel, Uppsala 1929) 107 – 127; A.V. Lundstedt, ‘Har rättsvetenskap behov av rättsideologi?’ in *Festskrift tillägnad Thore Engströmer* (Uppsala, Almqvist & Wiksells, 1943) 107-142. The first half of the latter piece, interspersed with other material, can be found translated in Lundstedt, *Legal Thinking Revised*, *supra* n. 9, 91-118. See also Lundstedt, *Det Hägerström-Lundstedtska misstaget*, *supra* n. 32, 31-41.

<sup>39</sup> A.V. Lundstedt, *Obligationsbegreppet II: första häftet* (ABL Norblads Bokhandel, Uppsala 1930), 187-273, and esp. 211-231.



[the law's] social uses are too strong to be refused," these burst through the constructs erected by legal ideology.<sup>40</sup>

Lundstedt gave the example of the law of property. A property "right," he said, is the result of the operation of the legal system, and not its cause. The reason a person can assert that he has a property "right" is because the law systematically defines his legal position vis-à-vis others in a manner that lets him maintain actions against them under the laws of trespass, conversion, trust, nuisance, alienation and so on, but also through the rules of criminal law concerned with theft, embezzlement and similar matters.<sup>41</sup> His "right," therefore, cannot form the basis of the law. The same is true of ideas such as general feelings of justice in society – these, too, are the products of the existence of a legal system, and of social conceptions as to what the legal system does. They serve the ends of the legal system once they come into existence, but they are nevertheless its effects rather than its causes.<sup>42</sup>

At one level, this view of legislation assumes a certain element of uncorrupted civic virtue in the political process through the participation of what Lundstedt called 'enlightened lawmakers.' Lundstedt has been criticised as being "naïve" for having made this assumption, but as his work shows, he did not, in fact, assume that that civic virtue would always animate legislators and adjudicators. Part of the jurist's role in his theory is to highlight situations where legislation and adjudication did not in fact work to the benefit of society, and much of Lundstedt's work was devoted to excoriating legislators and jurists for failing to take broader social interests into account.<sup>43</sup> More fundamentally, the fact that law-making can and does function in the interests of a particular section of society does not affect the validity of his thesis. Returning to the analogy with a machine, whilst machines can break down, we can still describe how a well-functioning machine would work, and indeed, doing so is an essential scholarly activity. It is hardly metaphysical to say "greasing a bicycle's chain with treacle is bad for the bicycle." Equally, there is much in this aspect of Lundstedt's work that is corroborated by recent anthropological research on "legal consciousness," and in particular on the manner in which constructions of legality and expectations as to how the law will react influence social interaction.<sup>44</sup>

#### F. THE METHOD OF SOCIAL USEFULNESS

How, then, can we actually use the concept of social usefulness to interpret or describe the law? Contrary to the view one frequently sees in Anglo-American sources, Lundstedt did not reject all conceptual thinking. He admitted it would be difficult to discuss the content of the law without drawing upon rights, duties and similar conceptions as descriptive categories<sup>45</sup> – a point that, regrettably, has been systematically missed by English-language commentators on Lundstedt, who have in consequence accused him of failing to appreciate the difference between naming and meaning and of ignoring the "functional use" of words.

Nevertheless, these concepts are not – and cannot be – the basis of legislation, because they are, inherently, the result of the operation of legislation. Construing the basis of the law involves setting these descriptive categories to one side, and instead examining the results of the operation of the law against the backdrop of the society in which it operates and the power relations reflected in that society. The starting point is to ask the counterfactual question: what would this society look like were it not for this particular complex of laws?

Lundstedt used this method to analyse the law of property. Its base lies in the fact that it is "particularly desirable" for people in Western societies to "command things, have them at one's disposal, use and thus to exploit them," and in the consequent role the "prospect of acquiring possession of things" that are sought after plays in encouraging productive work.<sup>46</sup> The question of what the law of property actually protects must, therefore, be answered by examining the consequences of the operation of property law against the background of these goals. Looking at the Swedish law of sales, Lundstedt argued that its true base was the (social) need of giving individuals the ability to

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<sup>40</sup> Ibid. 241-273. See also Lundstedt, 'Kan härskande tolkning av 24 § Köplagen anses riktig?' (1921) 7 *Svensk Juristtidning* 325, 340.

<sup>41</sup> Lundstedt, *Legal Thinking Revised*, *supra* n. 9, 103-104.

<sup>42</sup> The fullest account is in Lundstedt, *Obligationsbegreppet II*, *supra* n. 39, 74-91. A partial is given in Lundstedt, *Legal Thinking Revised*, *supra* n. 9, 159-170.

<sup>43</sup> See his discussion of the roles of judges, jurists and legislators in Lundstedt, *Principinledning I. Kritik av straffrättens grundåskådningar* (Appelbergs Boktryckeri, Uppsala 1920) 6.

<sup>44</sup> P. Ewick and S.S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, Chicago 1998).

<sup>45</sup> Lundstedt, *Det Hägerström-Lundstedtska misstaget*, *supra* n. 32, 29-34.

<sup>46</sup> Lundstedt, *Legal Thinking Revised*, *supra* n. 9, 103, 124-127.

engage in risk-free transactions in property – without, in other words, the risk of a legal intervention to disrupt the transaction, or the risk of the other side unilaterally engaging in loss-causing conduct – and to protect the security of holdings, both of which cumulatively furthered the goals he had identified.<sup>47</sup>

It is notable that Lundstedt here uses the notion “desirable” – which, on its face, would seem to be metaphysical. Lundstedt was not unaware of this, but he argued that this did not render his theories metaphysical in the same way that rights-based theories were. The fact that value-judgments cannot be true or false does not mean that they are all equal. Returning to the distinction Hägerström drew between conceptions that are representational (and hence capable of being true or false) and those that are not (and hence neither true nor false), Lundstedt argued that whereas the conception “a property right” cannot refer to anything outside the legal system – and hence cannot be representational of anything that can constitute the base of the legal system – the conception “the things Swedes strive to gain” can and does refer to something that has objective existence external to the conception. That thing may well be a feeling or the product of an emotion-based evaluation, but the existence of that feeling amongst the general public is, nevertheless, an objective fact.<sup>48</sup> There are challenges associated with ascertaining this objective fact, with overcoming the cognitive biases that can lead a legislator to mistake his or her feelings for the feelings of the general public, and with determining how these goals are best served. But resolving these, Lundstedt argued, was the task of jurists. His aim was not to eliminate jurisprudence with a simple test (an “Open Sesame,” as he put it), but to more clearly define what its tasks for succeeding generations were.<sup>49</sup>

The language of ideology obfuscates this, making the task of interpretation and legislation far more complex than it needs to be. Lundstedt took the example of a single section in the Swedish Law of Sales of 1905 (Köplagen 1905:38, since replaced by Köplagen 1990:931), dealing with liability in relation to events beyond the control of a party. The traditional interpretation, Lundstedt said, treated this as dealing with situations of “objective impossibility,” but this left the section too broad, with the consequence that jurists had to invent new doctrines – such as the doctrine of implied guarantee – in order to turn what, objectively, was an objective impossibility into a subjective impossibility. Not only was this immensely complex, Lundstedt pointed out, but it was hard to see how this flowed from the wording of the relevant provision, which made no mention of subjectivity or objectivity, let alone of implied guarantees.<sup>50</sup> This pattern, Lundstedt argued, was typical of the constructions that were produced by legal ideology. Thus rights were defined as being absolute by legal ideology, which meant that notions of the “abuse of rights” had to be invented to deal with the fact that the rights so defined were too broad. Similarly, the liability to pay compensation was treated by legal ideology as being grounded in the notion of “fault,” so that notions of “objective” duty and “objective” responsibility had to be invented to deal with the narrowness of a true conception of fault.<sup>51</sup> The result was to turn legal theory into a seething mass of contradictory principles, which were hard to reconcile.<sup>52</sup>

More fundamentally, however, Lundstedt also appears to have believed that legal ideology represents a form of special pleading. Ideology, Lundstedt argued, can serve the interest of specific sections of society rather than society itself. This is because, in the ultimate analysis, it is the underlying realities that are dispositive, not the ideological layer superimposed on them. Rights are only real to the extent that they reflect the outcomes produced by the operation of the legal system; detached from that context, they are claims or arguments as to what that system should look like.

This explains why rights-based arguments can conceal pragmatic approaches beneath the surface of the formalist and philosophical language in which they are typically couched.<sup>53</sup> Claims couched in the language of “rights,” “duties,” “responsibility” or the other concepts that are the basic currency of legal theory represent what modern institutional theory might refer to as “institutional strategies” – that is, attempts to define certain practices as representing the “normal” or “correct” process by which an institution (in this case, the judiciary) functions, thus claiming for those practices a value that goes beyond their basic technical utility.<sup>54</sup> The aim of institutional strategies is to manage the structure of rules and standards governing conduct so as to create more favourable grounds for achieving ends in

<sup>47</sup> Lundstedt, ‘Har rättsvetenskap behov av rättsideologi?’, *supra* n. 38, 109-115.

<sup>48</sup> *Ibid.* 200ff.

<sup>49</sup> *Legal Thinking Revised*, *supra* n. 9, 192 – 195.

<sup>50</sup> Lundstedt, ‘Kan härskande tolkning av 24 § Köplagen anses riktig?’, *supra* n. 40, 325-357.

<sup>51</sup> Lundstedt, ‘Kritik av nordiska skadeståndsläror’ [1923] *Tidskrift for Rettsvitenskap* 55.

<sup>52</sup> See Lundstedt, *Det Hägerström-Lundstedtska misstaget*, *supra* n. 32, 124-126. Compare Llewellyn’s critique of the canons of statutory interpretation in Llewellyn, ‘Theory of appellate decisions’, *supra* n. 4, discussed above.

<sup>53</sup> I discuss this more fully in TT Arvind, “‘Though it shocks one very much’: Formalism and Pragmatism in the *Zong and Bancoult*” (2012) 32 *Oxford Journal of Legal Studies* 113.

<sup>54</sup> T.B. Lawrence, ‘Institutional Strategy’ (1999) 25 *Journal of Management* 161; TT Arvind, *The Law of Obligations: A New Realist Approach* (Cambridge University Press, Cambridge 2013) (forthcoming), chapter 3.

relation to governance the actor sees as desirable. If a strategy is successfully entrenched, it simply becomes part of the institutional environment, so that the outcomes it produces are now seen as being ‘normal’, thus drawing attention away from its genealogy and the interests it actually advances.

Arguments as to “rights” and “duties” are, in these terms, clear examples of attempts to entrench certain institutional strategies. Lundstedt’s point, therefore, in essence amounts to the claim that uncritically accepting rights-based arguments, without asking whose interests they entrench, will over time erode the law’s ability to function, as its commands lose their legitimacy. Looking beyond the terms of the arguments by examining the institutional outcomes they produce, in contrast, shows them for what they are – practices whose origins lie in special pleading by interest groups, whose effect is to subvert the proper operation of the institution – and enable the creation of a more constructive jurisprudence.<sup>55</sup> Depicting the reality of the legal system requires jurists to look beyond these artificial constructs to the social realities that lie behind them, and the social benefits the law is created to promote.

## G. CONCLUSION: POLICY, PRINCIPLE AND LEGISLATION

There is much in Lundstedt’s approach that distinguishes it from modern projects to frame an objective basis for law and which should thus be of general interest. However, his theory has two specific – and closely related – features that should make it of particular substantive interest to modern theorists.

Firstly, Lundstedt’s acceptance of both ontological and methodological naturalism gives particular relevance to his approach, in as much as it suggests that insights from other disciplines can be used to shed light upon complex questions of interpretation in a manner that is more objective and grounded than those which legal theory customarily uses, without sacrificing the disciplinary autonomy or distinctiveness of law, something that has been a recurrent theme in anti-realist writing. Of particular relevance here is Lundstedt’s analysis of the law’s “social function,” his defence of its objectivity and his exploration of its link to social values, political programs, and what he called the “common sense of justice,” all of which he placed within a mutually reinforcing feedback loop.

This represents a fundamental break with conventional legal theory, challenging the methodological individualism on which it is based. Not surprisingly, the sharpest critics of Lundstedt repeatedly ended up arguing for the inclusion of concepts such as rights that are strongly associated with methodological individualism. This is a striking feature of Ingemar Hedenius’s critique, discussed above, but arguably is most strongly seen in the debate between Lundstedt and Björling, which was provoked by Lundstedt’s critique of the interpretation of the Swedish Law of Sales. Lundstedt might well be right about the desirability of the law taking account of social needs, Björling said, but how were the limits of the law to be determined? This, he argued, would require engagement with rights and their proper place.<sup>56</sup> Yet this fails to engage with the heart of Lundstedt’s critique, which is that rights cannot answer the question of where the limits of the law lie, because rights are not self-limiting, so that an argument based on rights will necessarily fall to special pleading. Only an approach that looks beyond internal fit – and, thus, which considers the institutional character and social function of law – can make sense of the nature of law and legal knowledge.

Secondly, and more importantly, Lundstedt argued that any question of interpretation can be objectively approached with reference to the social function of the provision in question. Similarly, the aims of existing or proposed legislation can be objectively questioned by analysing whether its provisions actually effectively discharge the social function of that aspect of the legal system. These aspects of his theory must be seen as being targeted not only at lawmakers but also at jurists, and as representing a way for jurists to maintain scholarly objectivity while avoiding being entangled in the charged political terms in which contentious questions on the interpretation and critical evaluation of legislation, whether existing and proposed, are typically debated.

The importance of these insights is far-reaching. One of the more strident debates in recent years has been over the place of “policy” in adjudication. Is it permissible for judges to decide cases on policy grounds? What are the limits of “policy”? A major factor behind the discomfort with the idea of judges deciding cases on the basis of “policy” is the identification of policy with political ideology. Yet, as Lundstedt’s work demonstrates, questions are not in and of themselves any more or less political or ideological. It is the manner in which we choose to conceive of them or answer them that

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<sup>55</sup> See Lundstedt, *Obligationsbegreppet II*, *supra* n. 39, 211-241, and esp. 232-241.

<sup>56</sup> See C.G. Björling, ‘Har gängse tolkning av 24 § Köplagen visats vara oriktig?’ (1923) 8 *Svensk Juristtidning* 281; C.G. Björling, ‘Rättsvetenskaplig forskning – eller enbart sanningsförkunnelse?’ (1924) 4 *Svensk Juristtidning* 425.

makes them so. Or, to put it in Hägerströmian terms, the properties that we term “political” or “ideological” are not properties of – and do not affect – the thing itself. They are properties of – and merely affect – our conception of the thing. What makes certain legal questions seem political is the fact that they are phrased in terms of legal ideology. This of its nature emphasises the conflicting interests involved, and conceals the operative ideas that underlie them, namely, the social outcomes that each possible outcome would promote, and the manner and extent to which each contributes to the social usefulness of the law.

This was the position Lundstedt attacked. The problem, he argued, lies in the concepts in which legal theorists reason, and the manner in which they attribute content to those concepts. As long as legal ideology continues to dominate jurisprudence, and as long as the institutional strategies that flow from legal ideology continue to dominate the structures of judicial decision-making, we will continue to see political decisions. The point of Lundstedt’s critique was to try and move the legal system beyond this. This is something that can only be achieved by a proper, open-minded study of the nature and function of the process that creates the law and the process and thought-style by which these newly created laws are integrated into a legal system. The Hägerström-Lundstedt variant of Scandinavian realism thus offers a far more promising starting point for the analysis of modern legal systems than does American realism, because it explains what, precisely, is missing in current theories that leaves them unable to deal with these questions, and supplies the tools we need to incorporate these into our theories of legislation.

## KARL OLIVECRONA ON LEGISLATION

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### Abstract

The multidisciplinary study of legislation, or *Gesetzgebungslehre*, as the Germans call it, has yet to fully penetrate the defense wall of legal philosophers, who have so far focused mainly on the more or less finished product of legislation, namely the legal system (in their inquiries into the nature of law), or on the activities of judges and other law-appliers (in their study of legal reasoning), or, in some cases, on normative or evaluative questions, such as whether there is an obligation to obey the law. But the interest among legal philosophers in questions concerning legislation seems to be on the increase. Against this background, it is of some interest to note that the Scandinavian realist, Karl Olivecrona, touches on questions concerning legislation in his otherwise traditionally oriented writings on jurisprudence. As one might expect, his account of legislation follows a reliably realist pattern in that it is concerned not with the capacity of legislative products to establish legal relations, but with their capacity to cause people to behave in one way or another. More specifically, Olivecrona rejects the view that legal rules have binding force and can confer rights and impose duties, arguing instead that they are independent imperatives possessing (what he calls) a suggestive character by virtue of which they influence the citizens (and the legal officials) on the psychological level. This suggestive character depends in turn ultimately on the reverence (or respect) for the constitution on the part of the citizens (and the legal officials): They are disposed to obey the independent imperatives because they revere the constitution. On the basis of this account of legislation, Olivecrona identifies important similarities (and some differences) between ordinary and revolutionary legislation. Olivecrona's account is not without its problems, however. One may, for example, wonder precisely what it means to say that independent imperatives have a suggestive character, and that the citizens (and the legal officials) revere the constitution. These questions will be addressed in the lecture.

**Keywords:** *Gesetzgebungslehre* – Realism – Olivecrona – Legislation – Nature of Law – Independent Imperatives – Revolution – Constitution

### A. INTRODUCTION

The multidisciplinary study of legislation, or *Gesetzgebungslehre*, as the Germans call it, has yet to fully penetrate the defense wall of legal philosophers, who have so far focused mainly on the more or less finished product of legislation, namely the legal system (in their inquiries into the nature of law), or on the activities of judges and other law-appliers (in their study of legal reasoning), or, in some cases, on normative or evaluative questions, such as whether there is an obligation to obey the law. As Luc Wintgens notes, perhaps exaggerating somewhat, “[t]he way law is created through the process of legislation does not appear on the screen of the legal theorist.”<sup>1</sup> But the times appear to be changing, thanks in part to Wintgens himself, who was the driving force behind this journal. The interest among legal philosophers in questions concerning legislation seems also to be on the increase, now that there is an international journal devoted to philosophical, or at least theoretical, reflection on the topic of legislation.

The general idea behind the study of legislation is that legal scholars should focus on the legislative process rather than the finished products of legislation.<sup>2</sup> As I implied above, this can be done in a number of ways. One might view the process of legislation at least from a historical, a sociological, a philosophical, an economic, or a legal-doctrinal point of view. Adopting a philosophical perspective, then, I would say that the study of legislation may include, *inter alia*, studies concerning technical

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<sup>1</sup> L. J. Wintgens, ‘Legisprudence as a New Theory of Legislation’ (2006) 19 *Ratio Juris* 1-25, 1.

<sup>2</sup> L. J. Wintgens, J. Hage, ‘Editor’s Preface’ (2007) 1 *Legisprudence* iii-iv.

aspects of legislation, such as the construction of norm typologies and studies of the role certain types of norm, such as, e.g., goal norms, play in legislation,<sup>3</sup> studies of the consequences – such as lack of intelligibility – of the ever-increasing quantity of legislation, especially in times of globalization, studies of the correlation between the intended and the actual effects of a given piece of legislation, studies of whether rational legislation is at all possible,<sup>4</sup> and a number of other questions.<sup>5</sup>

But there is also room for the development of normative theories of legislation, that is, theories about the general aim of legislation, about the proper limits of legislation, etc. For example, in a fairly recent article on the study of legislation, or legisprudence, as he calls it, Wintgens issues a call for a “rational theory of legislation,”<sup>6</sup> arguing that such a theory should consist in “an elaboration of the idea of freedom as *principium*” (at 10). Crudely put, his idea is that legislation infringes the freedom of the citizens and that it must therefore be justified (at 10). To this end he proposes four guiding principles, namely (i) the principle of alternativity, (ii) the principle of normative density, (iii) the principle of temporality, and (iv) the principle of coherence, arguing that if a proposed piece of legislation meets these requirements, we may treat it as being justified (at 10-24).

Against this background, it is of some interest to note that the Scandinavian realist, Karl Olivecrona, touches on questions concerning legislation in his otherwise traditionally oriented writings on jurisprudence. As one might expect, his account of legislation follows a reliably realist pattern in that it is concerned not with the capacity of legislative products to establish legal relations, but with their capacity to cause people to behave in one way or another. That is to say, his account presents legislation as part of the “chain of cause and effect”,<sup>7</sup> not as something that creates legal entities and properties. On this analysis, there are (and can be) no legal (or moral) rights or duties, but only legal (and moral) claims, including legislative claims, which function on the psychological level. And this means that his contribution to the study of legislation can in no way contribute to, but is rather designed to undermine, the development of normative theories of legislation.

As we shall see, Olivecrona’s view on legislation depends on a realist account of the nature of law. Olivecrona rejects the view that legal rules have binding force and can confer rights and impose duties, arguing instead that they are independent imperatives possessing (what he calls) a suggestive character by virtue of which they influence the citizens (and the legal officials) on the psychological level. This suggestive character depends in turn ultimately on the reverence (or respect) for the constitution on the part of the citizens (and the legal officials): They are disposed to obey the independent imperatives because they revere the constitution. On such a realist understanding of law, one important task for anyone who wants to understand legislation and its role in the world of the law is to explain how legal rules in the shape of independent imperatives become incorporated into the legal machinery. Although such incorporation is of course mainly done nowadays through the process of legislation, Olivecrona points out that custom and judge-made law also play a role. In this article, I shall therefore present Olivecrona’s account of how legal rules become incorporated into the legal machinery by means of legislation, and to some extent by means of custom and judge-made law, and add a few critical remarks on this account.

I begin with a brief account of Olivecrona’s rejection of the view that law has binding force and the attendant account of legal rules as independent imperatives (Section B). I then turn to consider Olivecrona’s view on legislation, as it was presented in the first edition of *Law as Fact* (Section C), in a later article on realism and idealism in legal philosophy (Section D), and, finally, in the second edition of *Law as Fact* (Section E), adding a few words about Olivecrona’s thoughts on customary law and judge-made law (Section F). Having done that, I consider briefly Olivecrona’s discussion of the problem of revolution (Section G) and the search for an ultimate explanation of law (Section H), and point to a couple of difficulties in the account of legislation (Section I). The article concludes with a few words about the place of studies on legislation in the discipline of jurisprudence (or legal philosophy) (Section J).

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<sup>3</sup> See, e.g., P. Westerman, ‘Governing by Goals: Governance as a Legal Style’ (2007) 1 *Legisprudence* 51-72.

<sup>4</sup> F. A. Hayek, *Law, Legislation, and Liberty*. Vol. 1 (Chicago, The University of Chicago Press, 1973); F. A. Hayek, *Law, Legislation, and Liberty*. Vol. 2 (Chicago, The University of Chicago Press, 1976); F. A. Hayek, *Law, Legislation, and Liberty*. Vol. 3 (Chicago, The University of Chicago Press, 1979).

<sup>5</sup> J. Hellner, *Lagstiftning inom förmögenhetsrättens område* [*Legislation in the Field of Property Law*] (Stockholm, Juristförlaget, 1990); Arthur Kaufmann, *Rechtsphilosophie* [Legal Philosophy] (2<sup>nd</sup> ed., Munich, C. H. Beck, 1997) 18.

<sup>6</sup> L. Wintgens, ‘Legisprudence as a New Theory of Legislation’ (2006) 19 *Ratio Juris* 1-2.

<sup>7</sup> K. Olivecrona, *Law as Fact* (1<sup>st</sup> ed., Copenhagen, Einar Munksgaard & London, Humphrey Milford, 1939) 21-2.

## B. LEGAL RULES AS INDEPENDENT IMPERATIVES<sup>8</sup>

Olivecrona rejects the view that law necessarily has binding force.<sup>9</sup> The problem, he explains, is that the (alleged) binding force is such a peculiar property that one rationally must locate binding legal rules in some sort of supernatural realm, where this property can make sense, and that there can be no connection between such a world and the world of time and space.<sup>10</sup> He also reasons that since legal rules do not and cannot have binding force, they cannot confer rights and impose duties, or, more generally, establish legal relations.<sup>11</sup> This critique is at the foundation of Olivecrona's substantive legal philosophy. As Olivecrona puts it (at 77), the rejection of this view entails "the demolishing of all metaphysical conceptions in the law, or... that these conceptions appear in their true light." And since he maintains that legal rules do not and cannot have binding force and cannot establish legal relations, he cannot reasonably maintain that their function is to guide human behavior by establishing legal relations. Instead, he argues that the function of legal rules is to cause human behavior, and that legal rules can fulfill this function because they have (what he calls) a suggestive character. He writes:

The sole basis for the nebulous words about the supernatural relation of the "ought" is a verbal expression in conjunction with certain emotions. The word "ought" and the like are imperative expressions which are used in order to impress a certain behaviour on people. It is sheer nonsense to say that they signify a reality. Their sole function is to work on the minds of people, directing them to do this or that or to refrain from something else – not to communicate knowledge about the state of things (at 48).

Having argued that the form of legal rules is *imperative*, Olivecrona points out that the *command* is the prototype of the imperative, that it works directly on the will of the recipient of the command, and that this means that it must have a suggestive character: "A command is an act through which one person seeks to influence the will of another. / . . . / The command as such does not contain any reference to values. It works directly on the will. In order to do this the act must have a suggestive character. Whether words or other means are used, the purpose is obviously suggestion" (at 33-34).

Olivecrona proceeds to explain that legal rules are *not* commands (at 35-40), but *independent imperatives* (at 42-9). On his analysis, there are three important differences between commands and independent imperatives. First, whereas a command is always issued by a certain person, an independent imperative is not issued by anyone in particular (at 43). Secondly, whereas a command is always addressed to a certain person or persons and concerns a particular action or actions, an independent imperative concerns a kind of action and is not addressed to anyone in particular (at 44-45). And thirdly, whereas a command is in no way equivalent to a judgment, an independent imperative can sometimes be replaced by a judgment (at 45-46).

At the end of his discussion of legal rules, Olivecrona points out that our notion of the existence of law – of legal rules – will undergo a considerable change, if we adopt a realist understanding of law and legal phenomena (at 47). He notes that we think rather vaguely of legal rules as if they had a permanent existence as some kind of real entities. But, he explains (at 47-48), realists see that a "rule exists only as the content of a notion in a human being", and that no "notion of this kind is permanently present in the mind of anyone." He therefore concludes that the law of the land

...consists of an immense mass of ideas concerning human behaviour, accumulated during centuries through the contributions of innumerable collaborators. These ideas have been expressed in the imperative form by their originators, especially through formal legislation, and are being preserved in the same form in books of law. The ideas are again and again revived in human minds, accompanied by the imperative expression: "This line of conduct *shall* be taken" or something to the same effect (at 48)

Olivecrona's central claim about legal rules, then, is that they can influence human beings because they have a suggestive character, and that this in turn means that they can cause human behavior. This claim is, of course, very important to Olivecrona's analysis – if legal rules were not psychologically

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<sup>8</sup> This section draws rather heavily on the account of these topics given in T. Spaak, 'Karl Olivecrona's Legal Philosophy: a Critical Appraisal' (2010) 24 *Ratio Juris* 155-192, 165-174.

<sup>9</sup> K. Olivecrona, *Law as Fact*, *supra* n. 7, chap. 1.

<sup>10</sup> I discuss this objection in more detail in T. Spaak, 'Naturalism and Non-Naturalism in Legal Philosophy: Hägerström on Kelsen' 15-16, in S. Eliaeson, P. Mindus, and S. Turner (eds), *Axel Hägerström and Modern Social Thought* (Oxford, the Bardwell Press. Forthcoming).

<sup>11</sup> K. Olivecrona, *Law as Fact* (1<sup>st</sup> ed.) *supra* n. 7, 21-22.

effective in this way, the analysis would be incomplete, since on Olivecrona's analysis, there are no legal relations the knowledge of which could motivate the citizens to act accordingly.

### C. LEGISLATION IN *LAW AS FACT I*

As we shall see, Olivecrona's focus is on one part of the general topic of legislation, namely the incorporation of rules in the shape of independent imperatives into the machinery of law. While this account leaves out much that is of interest, it is nevertheless a considerable achievement. Not only is the account combined with, and dependent on, a highly original account of the nature of legal rules, it also bears a distinctive realist mark and differs in this way from much else that has been written on legislation.

Olivecrona begins his discussion by pointing out that accounting for the effects and significance of legislation will be problematic only if one (mistakenly) assumes that legal rules have binding force: "From the traditional standpoint the act of legislating implies something inexplicable, though this is not always clearly realized. It is, however, inexplicable how the draft, or bill, can be lifted into another sphere of reality through being promulgated as law."<sup>12</sup> But on a realist understanding of law, he explains, one will see that the task of the legal scholar is to explain how rules in the shape of independent imperatives are actually incorporated into the legal machinery. And he points out that this task amounts to describing relations of cause and effect in the world of time and space.<sup>13</sup> He means, more specifically, that the lawmakers "are able to influence the conduct of state officials and of the public in general" by means of 'ought' and other imperative expressions; and he points out that "[t]his effect of the act of law-giving is in no way of a mystical character. It is only a question here of cause and effect in the natural world, on the *psychological* level" (at 52).

Focusing on legislation, then, as distinguished from judge-made law or customary law, Olivecrona points out that the way the individual mind works is a matter for the science of psychology, and that for the purposes of his investigation into the nature of law, he need only point to the general conditions that must be satisfied for legal rules to be effective in society. He explains that the efficacy of legislation depends primarily on an attitude of *reverence for the constitution* on the part of the citizens:

Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as "binding" and implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains. The general attitude towards the constitution places them in key-positions, enabling them to put pressure on their fellow-citizens and generally to direct their actions in some respects (at 52-53).

This attitude of reverence, he continues, has a double significance (at 54). First, it causes the citizens to accept as binding the rules that are issued by the legislature. Secondly, it closes off such acceptance in other directions, making it impossible for other groups than the members of the legislature to issue binding rules. Thus the attitude of reverence for the constitution makes it possible for some, and impossible for others, to legislate.

Under normal circumstances, Olivecrona explains, we take this attitude for granted, and as a result we treat the efficacy of legislation as a given, as part of the order of the universe: "...we do not reflect on the simple fact that the effect of legislation is conditioned by the psychological attitude which we ourselves and the millions of other people maintain. Because of this attitude the law-givers can play on our minds as on a musical instrument" (at 55).

This attitude is not self-supporting, however, he explains, but must be sustained by means of an incessant psychological pressure on the citizens (at 53-54). Hence a second condition for the efficacy of legislation in society must be satisfied, namely that there be an *organization* – the state – that handles the application and enforcement of the law:

The organization that wields force, the state organization, is largely composed of persons who are trained automatically to execute the laws which are promulgated in the

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<sup>12</sup> Ibid. 51. The accounts of legislation in the first edition of *Law as Fact* and the Swedish version of this book, entitled *Om lagen och staten* [*On Law and the State*], are more or less identical. The full reference to the Swedish version is as follows: K. Olivecrona, *Om lagen och staten* (Copenhagen, Einar Munksgaard & Lund, Gleerup, 1940).

<sup>13</sup> K. Olivecrona, *Law as Fact* (1<sup>st</sup> ed.) *supra* n. 7, 21-22.



constitutional form, irrespective of their own opinion of their advisability. The organization is therefore like a vast machinery, so regularly and certainly does it function. The law-givers sit in the centre of the machinery as before a switchboard, from where they direct the different wheels (at 55-56).

Olivecrona concludes that the real significance of the act of legislating is to be found in the *formalities* that are attached to it, because these formalities confer on the legal rules a special nimbus that makes people take them as a pattern of conduct: “What takes place is that the formalities prescribed in the constitution when applied to the ‘independent imperatives’ in the draft, give to these imperatives a special social importance for social life by shrouding them in a nimbus or labeling them in a certain way, thereby making people take them as patterns of conduct” (at 56).

He also points out that even though we think of the state as the lawmaker, it is always individual persons who act on behalf of the state when we say that the latter is creating law. From the standpoint of such individuals, what is important is to have access to the *mechanism* with the help of which one can create law. This mechanism, he explains,

[i]s always ready for use for anyone who has been born into a key-position or has the courage and skill and tenacity required to make a way to one. The ways are different in a monarchy and in a republic, in a democracy and a dictatorship. But the significance of the key-positions is on principle the same everywhere. The important thing is to be able to use those formalities, which, considering the psychological situation, in the country, are required in order to give practical effect to independent imperatives (at 57).

Olivecrona is, however, careful to point out that although the constitution is a source of power for the act of legislation, it does not follow that the continued efficacy of the law is dependent upon the continued efficacy of the very constitution on the basis of which the law was created (at 48-59). He notes that we have seen many times that the law of the land remains efficacious even though the constitution under which it was created has been overthrown or has otherwise come to be ignored. As he explains, “[t]he respect for the law may survive the causes that have, originally, brought it into being. Other causes come into play and maintain the respect. When a law has become a part of the structure of the community, many interests grow up around it. It cannot, therefore, be put aside without causing a disturbance” (at 59).

#### D. REALISM AND IDEALISM

As I have said, Olivecrona’s main discussions of legislation are to be found in the first and the second edition of *Law as Fact*. But in an article from the early 1950’s on idealism and realism in legal philosophy, Olivecrona does touch, albeit briefly, on questions concerning legislation in his discussion of the idea of an objective ‘ought,’ which he considered to be embraced by traditional legal scholars, such as Hans Kelsen.<sup>14</sup> He argued, more specifically, that any credible analysis of norms and value judgments has to be non-cognitivist,<sup>15</sup> and that such an analysis makes it clear that there is no such thing as an objective ‘ought’ that dwells in a non-natural realm of norms and values, but only the efforts of the legislature (and other issuers of norms) in the world of time and space to influence human beings on the psychological level by means of imperatives:

The sentences representing legal rules are obviously factual, and so are the ideas which they express. The belief in the objective ought includes the idea that the sentences are held really to *engender* the relations which they enunciate; they are held to establish, for instance between crime and punishment, a relation of a wholly different kind from that of causality. We are misled by our own feelings of being bound into believing in these metaphysical relations. What the legislator can do is merely to *cause* officials to act in a certain way and to impress, with more or less success, certain patterns of behaviour on the public. Nothing else is required for this purpose (at 130-131).

The idea is thus the same as before, namely that imperatives – commands as well as independent

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<sup>14</sup> K. Olivecrona, ‘Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy’ (1951) 26 *New York University Law Review* 120-131.

<sup>15</sup> *Ibid.* 129-30. Olivecrona does not use the term ‘non-cognitivism,’ however.

imperatives – are very well suited to bring about human behavior. The reason, as we have seen, is that they possess a suggestive character that influences the subjects of the imperatives, a suggestive character that in the case of the independent imperatives depends on the above-mentioned reverence for the constitution.

#### E. LEGISLATION IN *LAW AS FACT II*

Olivecrona returns to the topic of legislation in the second edition of *Law as Fact*.<sup>16</sup> His discussion takes place against roughly the same background as did his discussion in the first edition of *Law as Fact*, though he does not emphasize here his rejection of the view that legal rules have binding force as strongly as he did in the first edition.

Having discussed technical details of the procedure of legislation in Sweden, he repeats the view he put forward in the first edition of *Law as Fact*, that the efficacy of legislation is a psychological matter, which depends essentially on the reverence (or respect) for the constitution on the part of the citizens:

What makes legislative acts by King and Diet effective is, in the first place, the engrained respect for the constitution. In the constitution the right of making laws is conferred on King and Diet; the formalities to be observed are described. The respect for these rules is so universal and so powerful that a text promulgated as law after due procedure is automatically accepted by everybody as being a law; and this implies the idea of duty to follow its prescriptions.<sup>17</sup>

Having pointed out that the adherents of the will theory of law, according to which law is the content of a sovereign will, emphasize the will of the sovereign over the formalities in the procedure of legislation, he objects that this is to turn “the realities upside down.” What is important, he insists, is not the will of the lawmaker, which in any case does not exist, but the *formalities* that must be respected in the procedure of legislation: “The formalities may seem trifling when they are regarded in isolation. They are nevertheless essential. They may consist of this or that according to the historical circumstances in the country; the important thing is that the forms of the existing constitution are observed” (at 92).

#### F. TRADITIONAL LAW

In addition to legislation, Olivecrona considers in both the first and the second edition of *Law as Fact* (what he calls) informal methods of establishing legal rules, namely custom and judge-made law. He points out in the first edition that on a realist understanding, customary rules are incorporated into the legal machinery in pretty much the same way as rules enacted by the legislature: “In both cases what takes place is the introduction of new imperatives into a system of imperatives that is regarded as binding and has practical effect. In both cases there is nothing but a chain of cause and effect on the psychological level.”<sup>18</sup> He also observes that “[t]he forces which give practical effect to the judge-made rules are similar to those which support the law-giving machinery. The reverence in which the constitution is held is the dominating factor” (at 63). He concludes that the important thing in both the case of legislation and the case of customary and judge-made law, is that it is a matter of making independent imperatives efficacious in a system of rules, and he notes that it is only to be expected that this can be done in different ways, such as by legislation, on the one hand, and by custom or judicial decision-making, on the other hand (at 65).

In the second edition of *Law as Fact*, Olivecrona discusses briefly custom and judge-made law as examples of more informal ways to incorporate rules into the machinery of law. A custom, he explains, is “a certain manner of acting, regularly observed within a community.”<sup>19</sup> But, he continues, it is not a question simply of behavior that actually takes place, but of behavior that actually takes place *because*

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<sup>16</sup> K. Olivecrona, *Law as Fact* (2<sup>nd</sup> ed. London, Stevens & Sons, 1971). The accounts of legislation in the second edition of *Law as Fact* and the Swedish version of this book, entitled *Rättsordningen [The Legal Order]* (1976) differ slightly. The full reference to the Swedish version is as follows: K. Olivecrona, *Rättsordningen [The Legal Order]* (2<sup>nd</sup> ed. Stockholm, Liber, 1976) (1<sup>st</sup> ed. 1966).

<sup>17</sup> *Ibid.* 90. Olivecrona means by ‘the Diet’ a legislative body, such as the English Parliament or the US Congress.

<sup>18</sup> K. Olivecrona, *Law as Fact* (1<sup>st</sup> ed.), *supra* n. 7, 62.

<sup>19</sup> K. Olivecrona, *Law as Fact* (2<sup>nd</sup> ed.), *supra* n. 16, 105.

the members of the community believe that this is what they ought to do (at 106). With time, he notes, custom will become less and legislation more important when it comes to incorporating rules into the legal machinery (at 106). He adds that today (1971) there is no customary law that is independent of legislation and judge-made law (at 106-7). It is, however, worth noting that while this was (and is) largely true about state law, the significance of customary law seems to be increasing in step with the process of globalization. Just consider the case of so-called transnational law.<sup>20</sup>

#### G. THE PROBLEM OF REVOLUTION

Observing that it is difficult to understand how a revolution can give rise to a binding constitution, since the revolutionaries will necessarily be enacting laws in violation of the old constitution, Olivecrona points out that this problem – which he refers to as the problem of revolution – disappears completely, if we adopt a realist understanding of law and legal phenomena.<sup>21</sup> If we do, we see that in both cases a person or a group of persons is laying down a set of independent imperatives, claiming that they must be obeyed. The interesting difference, he explains, is to be found in the reasons why the imperatives become efficacious:

While ordinary legislation is made effective through the general reverence for the constitution, working as a *permanent* source of power, a revolutionary constitution is pressed on the people by other means. There must be a temporary assemblance of forces strong enough to effect that change in attitude of the citizens which is implied in the acceptance of a new constitution as binding. For the ordinary law-givers no special effort is required to make their laws effective, because they have at their disposal a ready-made machinery. The revolutionaries have got to create the machinery themselves, *i.e.* to turn the minds of people into new channels through which psychological pressure can be brought to bear on them (at 67-68).

Olivecrona identifies two important factors that must be present if the revolutionaries are to be able to create a revolutionary situation, namely force and propaganda (at 69). Observing that the immediate obstacle to any attempt at a revolution is the loyalty of the citizens to the existing constitution, he concludes that, generally speaking, “[t]he principal source of strength to the constitution is the social habits and instincts of the people. This is so *during* the reign of a constitution as well as when a new constitution is established. The revolutionaries can gain power only by utilising this force in the proper way” (at 70-71).

He concludes his discussion of revolutionary lawmaking by pointing out that, on his analysis, no sharp line can be drawn between ordinary and revolutionary legislation (at 72). Not only do the constitutional legislators often have the power to deviate from the requirements of the constitution, it is also widely known that a constitution may be interpreted in a way that does not correspond to the intentions of the framers. Constitutions, he observes, “are far more exposed to varying and arbitrary interpretations than ordinary laws, because their application is not in general done by impartial judges but by politicians. The only control on these people is often public opinion, which may be manipulated by them to a considerable extent” (at 72). It is, however, worth noting that Olivecrona does not mention the possibility of judicial review in this context. While there was no such provision in the Swedish constitution of 1809 (which was in force at the time Olivecrona wrote his book), there is one in the constitution of 1974 (introduced in 1979). Moreover, as Olivecrona surely knew, judicial review was (and is) an important legal institution in some jurisdictions, such as those of the USA and Germany.

This claim about revolutionary legislation, although perhaps somewhat surprising at first, is very much in keeping with Olivecrona’s realism about law and legal phenomena. If we do away with the idea that law is binding and confers rights and imposes duties, this may be what we find. Olivecrona is not, of course, saying that the picture he paints of law and legal phenomena is attractive, only that it is realistic. Nor is he saying that one cannot subject revolutionary as well as ordinary legislation to moral criticism, though one may perhaps wonder what will be left of morality if we conceive of moral discourse as nothing more than a matter of expressing attitudes and feelings in order to *persuade* – not

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<sup>20</sup> On transnational law, see, *e.g.*, H. J. Berman, C. Kaufman, ‘The Law of International Commercial Transactions (*Lex Mercatoria*)’ (1978) 19 *Harvard Journal of International Law* 2221-2277; M. Frischkorn, ‘Definitions of the *Lex Mercatoria* and the Effects of Codifications on the *Lex Mercatoria*’s Flexibility’ (2005) 7 *European Journal of Law Reform* 331-351; H.H. Koh, ‘Why Transnational Law Matters’ (2005-2006) 24 *Penn State International Law Review* 745-761.

<sup>21</sup> K. Olivecrona, *Law as Fact* (1<sup>st</sup> ed.), *supra* n. 7, 66.

convince – people to behave in a certain way. But this is a deep question about the implications of the non-cognitivist analysis that I shall not pursue here.<sup>22</sup>

#### H. THE SEARCH FOR AN ULTIMATE EXPLANATION OF LAW

Olivecrona notes at the end of his discussions of the problem of establishing legal rules in both the first and the second editions of *Law as Fact*, that although he has discussed the problem of revolution, he has by no means provided an ultimate, or final, explanation of the law, that is, he has not explained how the legal system came into existence. The reason, he points out, is simply that it is more or less impossible to provide such an explanation. He also points out that since this is so, a failure to provide such an explanation cannot reasonably be an objection to his account of legislation. Here is how he puts it in the first edition:

The historical explanation always refers to a stage in the evolution of the law starting at a point where a system of law has been practised for a long time. At most some conclusions concerning an earlier stage may be drawn from known facts. But this does not lead to a “final” explanation. It is futile to ask how the system as a whole has been established from the beginning. The objection that our exposition has not furnished an answer to that question is therefore of no weight.<sup>23</sup>

What we can do, he says in the second edition of *Law as Fact*, is to identify some common features in the process: “Even where we find working constitutions, as for instance in the Greek states and in Rome, their origin is not known and can presumably never be known to us. It is only possible to study the facts as they appear from the sources and draw some conclusions from them.”<sup>24</sup> He points out in this context that there was one important element that made the establishment of a constitution possible, namely the prevalence of *religious* beliefs. As he explains, “[i]n ancient times religion and law were not separated into different spheres. They formed an entity. If social rules evolved in connection with religious rites and beliefs, we can understand how they could obtain enduring respect” (at 98).

#### I. TWO DIFFICULTIES

We have seen that Olivecrona maintains that legal rules are independent imperatives that influence people on the psychological level because they possess a suggestive character, that this suggestive character depends ultimately on the reverence for the constitution on the part of the citizens, and that such independent imperatives are incorporated into the legal machinery mainly by means of legislation, but also by means of custom and judicial activity. But, one wonders, what does it mean to say that independent imperatives have a suggestive character? And what does it mean to say that the citizens (and the legal officials) revere the constitution?

Although Olivecrona does not have much to say about the idea of reverence for the constitution, he does consider and reject a couple of possible objections to his account, namely (i) that the general public “has very hazy notions regarding the constitution”, and (ii) that even if they do know something about the constitution, they “can hardly know that the text has gone through the requisite formalities” (at 90). His answer to the first objection is simply that having rather hazy notions of the constitution is sufficient: “[I]t is enough that people have the idea that the power of issuing laws belongs to certain authorities in the capital, known as the King and Diet” (at 90). His answer to the second objection is that although it is quite true that only a few people will have direct access to the procedure of legislation, there are a number of “technical links” between the legislature and the general public that make it reasonable for the general public to trust that the legislative procedure has been carried out according to plan:

Officials take care that the text signed by the King is the same as that which has been passed by the Diet. They then see to it that the same text is published without alteration in the official collection of the laws. The texts in this collection are read by few people outside the bureaucracy. But for the use of the public private editions are printed with

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<sup>22</sup> On this, see R. Schafer-Landau, *Moral Realism. A Defence* (Oxford, Clarendon Press, 2003) 27-30.

<sup>23</sup> K. Olivecrona, *Law as Fact* (1<sup>st</sup> ed.), *supra* n. 7, 74.

<sup>24</sup> K. Olivecrona, *Law as Fact* (2<sup>nd</sup> ed.), *supra* n. 16, 97.

commentaries, and these have to be reliable if they are to be sold at all. The press, the radio, and the TV help in spreading knowledge of new laws; organizations of different kinds distribute information to their members, and so on. This activity refers only to texts that have really gone through the constitutional formalities (at 90-91).

I am not convinced that the citizens revere the constitution, however, and Olivecrona does not offer any evidence to support the claim that they do. He maintains, as we have seen, that although many people have rather hazy notions regarding the constitution, they know that the legislature (together with the King) has the legal power (or competence) to make laws, and that this is enough. But can we really infer from Olivecrona's description that the citizens *revere* (or respect) the constitution? I do not think so. True, the great majority of the citizens in most democratic countries accept that a collective body called the legislature has the legal power to make laws. But this attitude on the part of the citizens can in many cases hardly be described as one of reverence or even respect for the constitution, but rather as one of acceptance, perhaps indifference, and in a few cases even as one of fear. Since Olivecrona does not discuss the attitude in question in any detail, it is difficult to say whether, and if so how, his account of legislation would be affected, if it turned out that the attitude was not one of reverence or respect, but rather one of acceptance, indifference, or fear. I am, however, inclined to think that such a finding would not be damaging to Olivecrona's account. For the account concerns the psychological efficacy of the independent imperatives only, not their normative force, and the distinction between reverence (or respect), on the one hand, and acceptance or indifference or even fear, on the other, is of little or no importance in this regard – if Olivecrona had been concerned instead to establish an *obligation* to obey the law, the situation would have been very different.

But even if one were to accept the claim that the citizens revere the constitution, and the implication that the citizens are disposed to obey the law, one must surely wonder whether it is illuminating to describe this state of affairs in terms of a suggestive character possessed by the independent imperatives. It seems to me that one might as well assert that snakes have a peculiar "recoil property" just because most people recoil when they see a snake. As I see it, Olivecrona should have adopted instead the line of reasoning employed by Charles Stevenson in his analysis of the emotive meaning of moral words.<sup>25</sup> Just as Stevenson finds the emotive meaning of moral words *in* the affective responses in people, so that there will be no emotive meaning over and above those responses, Olivecrona might have found the suggestive character of imperatives *in* the disposition of people to obey imperatives, so that there would be no suggestive character over and above that disposition. As I see it, an account along Stevensonian lines would be more realistic than Olivecrona's account, in that it does not posit entities or properties that play no real role in the purported explanation. On this type of analysis, the interesting empirical question would be whether people are in fact disposed to obey the imperatives.

Moreover, there seems to be a problem of circularity in Olivecrona's discussion. As we have seen, Olivecrona maintains that the suggestive character of legal rules depends ultimately on the consistent application and enforcement of the relevant legal rules by the members of an organization whose task it is to apply and enforce those legal rules. One may, however, wonder how this organization, *A*, can become fully functional and give rise to the suggestive character of the rules in question, given that the rules that influence the officials in *A* could not have the requisite suggestive character, unless there was another organization, *B*, whose officials applied and enforced those rules. And, of course, the rules that influence the officials in *B* could not have the requisite suggestive character, unless there was another organization, *C*, whose officials applied and enforced those rules. And so on, and so forth. But Olivecrona might perhaps reply that the members of the organization are likely to be properly motivated by virtue of being hired to do this particular job. The problem with this idea, however, is that such motivation would depend very much on the individual official – there would be nothing necessary or systematic about it.

#### J. LEGAL PHILOSOPHY AND THE STUDY OF LEGISLATION

I said in Section A that the study of legislation has yet to fully penetrate the defense wall of legal philosophers, and I would like to conclude this article with a few more words on this topic. Although German legal scholars, in particular, including legal philosophers, have discussed the general topic of legislation since after World War II,<sup>26</sup> legal philosophers in most other countries have not expended

<sup>25</sup> Ch. L. Stevenson, 'The Emotive Meaning of Ethical Terms' (1937) 46 *Mind*, New Series 14-31.

<sup>26</sup> Kaufmann, *supra* n. 5, 16.

much energy on the study of legislation. Consider, for example, the following important legal-philosophical publications: Jerome Frank,<sup>27</sup> Alf Ross,<sup>28</sup> Hans Kelsen,<sup>29</sup> Giorgio Del Vecchio,<sup>30</sup> Roscoe Pound,<sup>31</sup> Leon Petrazycki,<sup>32</sup> Gustav Radbruch,<sup>33</sup> Karl Llewellyn,<sup>34</sup> H. L. A. Hart,<sup>35</sup> Joseph Raz,<sup>36</sup> John Finnis,<sup>37</sup> Neil MacCormick,<sup>38</sup> Robert Alexy,<sup>39</sup> Aleksander Peczenik,<sup>40</sup> Stig Strömholm,<sup>41</sup> Michael Moore,<sup>42</sup> Jules Coleman,<sup>43</sup> Michael Freeman,<sup>44</sup> and Åke Frändberg.<sup>45,46</sup> One cannot find much on legislation in these writings, even though authors such as Ross and Strömholm do touch on questions concerning legislation under the heading of ‘sources of law.’<sup>47</sup> For while discussions of legislation under the heading “sources of law” are not without interest to the study of legislation, their focus is on how judges and other law-appliers do and should use legislative materials, including preparatory works, and this has usually rather little to do with the process of legislation, which is what the study of legislation is supposed to be about.<sup>48</sup>

I believe the main reason why the topic of legislation has so far not interested most legal philosophers is to be found in the old, still dominating view, that the task of legal philosophers is to analyze fundamental legal concepts or else study legal reasoning, especially judicial reasoning.<sup>49</sup> Wintgens and Hage suggest, as I understand them, that a deeper reason why legal philosophers have avoided the topic of legislation may be that they have assumed that one cannot study a non-rational process like legislation in a scientific manner.<sup>50</sup> If Wintgens and Hage are right about this, it is high time that legal philosophers abandoned this view. At the most, it might turn out to be impossible to

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<sup>27</sup> J. Frank, *Law and the Modern Mind* (6<sup>th</sup> printing. Gloucester, Mass., Peter Smith, 1970) (Originally published 1930 by Brentano’s Inc).

<sup>28</sup> A. Ross, *Towards a Realistic Jurisprudence* (Trans. Annie I. Fausbøll Aalen, Scientia Verlag, 1989) (Originally published by Munksgaard, Copenhagen, 1946); A. Ross, *On Law and Justice* (Berkeley & Los Angeles, University of California Press, 1959).

<sup>29</sup> H. Kelsen, *General Theory of Law and State* (Trans. Anders Wedberg. Union, New Jersey, The Lawbook Exchange, 1999) (Originally published 1945 by the Harvard University Press, Cambridge, Mass.); Hans Kelsen, *Reine Rechtslehre [The Pure Theory of Law]* (2<sup>nd</sup> ed. Vienna, Österreichische Staatsdruckerei, 1960).

<sup>30</sup> G. Del Vecchio, *Philosophy of Law* (8th ed. Transl. Thomas Owen Martin. Washington 17, D.C., The Catholic University of America Press, 1953).

<sup>31</sup> R. Pound, *An Introduction to the Philosophy of Law* (Revised edition. New Haven, Yale University Press, 1954) (1<sup>st</sup> ed., 1922).

<sup>32</sup> L. Petrazycki, *Law and Morality* (Transl. H. W. Babb, with an Introduction by N. S. Timasheff. Cambridge, Mass., Harvard University Press, 1955).

<sup>33</sup> G. Radbruch, *Rechtsphilosophie [Legal Philosophy]* (5th ed. Ed. Erik Wolf. Stuttgart, Koehler Verlag, 1956).

<sup>34</sup> K. Llewellyn, *Jurisprudence. Realism in Theory and Practice. With a New Introduction by James J. Chriss* (New Brunswick, USA, Transaction Publishers, 2008) (Originally published 1962 by the University of Chicago Press).

<sup>35</sup> H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983); H. L. A. Hart, *Essays on Bentham* (Oxford, Clarendon Press, 1982); H. L. A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961).

<sup>36</sup> Joseph Raz, *Between Authority and Interpretation* (Oxford, Oxford University Press, 2009). Joseph Raz, *The Concept of a Legal System* (2<sup>nd</sup> ed. Oxford, Clarendon Press, 1980); Joseph Raz, *The Authority of Law* (1<sup>st</sup> ed. Oxford, Clarendon Press, 1979).

<sup>37</sup> J. Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980).

<sup>38</sup> N. MacCormick, *Institutions of Law. An Essay in Legal Theory* (Oxford, Oxford University Press, 2007); N. MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 1999); N. MacCormick, *Legal Theory and Legal Reasoning* (2<sup>nd</sup> ed. Oxford, Oxford University Press, 1994).

<sup>39</sup> R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism*. Oxford, Oxford University Press, 2002); R. Alexy, *Theorie der juristischen Argumentation [Theory of Legal Argumentation]* (2<sup>nd</sup> ed. Frankfurt am Main, Suhrkamp, 1991) (1<sup>st</sup> ed. 1978).

<sup>40</sup> A. Peczenik, *Vad är rätt? [What is Law?]*. (Stockholm, Norstedts, 1995).

<sup>41</sup> S. Strömholm, *Rätt, rättskällor och rättslämning [Law, Sources of Law, and Law-Application]* (5th ed. Stockholm, Norstedts, 1996).

<sup>42</sup> M. S. Moore, *Educating Oneself in Public* (Oxford, Oxford University Press, 2000).

<sup>43</sup> J. L. Coleman, *The Practice of Principle* (Oxford, Oxford University Press, 2001).

<sup>44</sup> M. Freeman, *Lloyd’s Introduction to Jurisprudence* (7<sup>th</sup> ed. London, Sweet & Maxwell, 2001).

<sup>45</sup> Å. Frändberg, *Rättsordningens idé [The Idea of the Legal Order]* (Uppsala, Iustus, 1985).

<sup>46</sup> I freely admit that the selection of legal philosophers is skewed toward legal philosophers who write in a language I understand, namely English, German, or the Scandinavian languages.

<sup>47</sup> A. Ross, *On Law and Justice*, *supra* n. 28, 78-84; Strömholm, *Law, Sources of Law, and Law-Application*, *supra* n. 41, 334-357.

<sup>48</sup> See L. Wintgens, J. Hage, ‘Editor’s Preface’, *supra* n. 2.

<sup>49</sup> See, e.g., H.L.A. Hart, ‘Problems of the Philosophy of Law’, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) 88-119.

<sup>50</sup> L. Wintgens, J. Hage, ‘Editor’s Preface’, *supra* n. 2; Kaufmann, *Rechtsphilosophie*, *supra* n. 5, 18.

develop a rational normative theory of legislation. But even if this were so, it would not follow that one cannot study conceptual and empirical questions, or questions about the best means to an end, in a rational manner. Moreover, if we find normative ethics a meaningful, if not a fully rational, discipline, as I and many others do, we have no reason to reject out of hand attempts to develop normative theories of legislation.

Let me conclude this article by mentioning the work of Friedrich Hayek,<sup>51</sup> who may actually have been one of very few major social thinkers who have thought seriously about questions of legislation. Although he was not primarily a legal philosopher, but rather a social and a political philosopher, and, of course, an economist, his writings on legislation should be of considerable interest to those who study legislation. Like Olivecrona, Hayek did not believe in the possibility of rational legislation, except on a small scale, a view that is clearly incompatible with Wintgens's call for a rational theory of legislation. More specifically, Hayek maintained (i) that the legislature cannot possess the knowledge necessary for rational legislation, and (ii) that legislation that is nevertheless enacted on the basis of insufficient knowledge (as it must be) will actually lower the welfare level in the society in question by ruining the existing free market that is based on so-called rules of just conduct. I conclude that Wintgens and others who aim to construct a rational normative theory of legislation have reason to engage not only with Olivecrona's, but also with Hayek's writings on the subject.

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<sup>51</sup> F. Hayek, *Law, Legislation, and Liberty. Volumes. 1-3*, *supra* n. 4.

## ALF ROSS ON LEGISLATION

Eric Millard\*

### Abstract

Alf Ross was certainly the best-known and consistent theoretician within the movement known as Scandinavian realism. In his main work, *On Law and Justice*, Ross constructs an empiricist theory of law on the basis of a positivist methodology and non-cognitivist meta-ethics. In this constellation, legislation does not occupy the same place as in formalist theories like normativism. Legislation instead is an element of the sources of the law, and for that reason, considered a part of the normative ideology of judges. Despite this, according to Ross there is no call from a scientific point of view for a specific study of legislation, and in particular of law-making. One of the most surprising aspects of the theory proposed by Ross in *On Law and Justice* is found in its final chapters, where Ross develops his concept of legal politics. Legal politics is not a scientific activity, but a scientifically-based practical activity: Guidance for the legislator for the purpose of articulating premises for influencing social action and proposing formulations instructing legislative organs when they enact the law. There is no inconsistency in the way Ross deals with this issue, and the entirety remains coherent to his non-cognitivist premises. On the other hand, his theory of legal politics appears unrealistic as the preconditions for its efficacy are scarcely tenable. In a sense, this theory appears more to be a self-justification for the practical activities of certain Scandinavian lawyers rather than a true realist theory.

**Keywords:** Alf Ross – Legal Politics – Legal Realism – Legal Science - Legislation – Non-cognitivism – Sources of Law – Validity.

### A. INTRODUCTION

Alf Ross (1899-1979), Jur. D. Copenhagen, Ph. D. Uppsala, Professor of Law at the University of Copenhagen, was a Danish legal philosopher and probably one of the most influential philosophers in the school of Scandinavian realism, along with Axel Hägerström, Karl Olivecrona and Vilhelm Lundstedt. However, Ross cannot be seen as a “pure” Scandinavian realist. On many occasions, Ross extends the framework structuring his theory beyond that of Scandinavian realism. Ross initially studied with Kelsen, who inspired his first important work, a theory of legal sources,<sup>1</sup> and incorporated some parts of Kelsen’s normativist theory in his own version of legal empiricism. Ross then gave attention to the Vienna Circle movement and its positivism as can be seen in two senses: A positivist methodology but also a legal illustration of the logical positivism orientating Ross’ two classical books: *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law*<sup>2</sup> and *On Law and Justice*.<sup>3</sup> Ross proposes as a result an empiricist theory of law that rests upon a strong non-cognitivist approach in meta-ethics and an empirical reductionism as scientific methods.

An individual seeking a theory of legislation in Ross’ works would probably be disappointed. Naturally, concepts such as legisprudence cannot be found in his various and numerous works, despite a consistent and permanent interrogation of what the law is. But even the very idea of legislation is not appropriate for Ross’ conception of law. This paper aims to explain the reasons why legislation can be seen as a marginal problem for Ross. Two reasons are advanced for such a minimization. First, it is obvious that the necessity of providing a concept of valid law adequate for a scientific analysis of what the law is obliges Ross to deconstruct the juristic ideology and to reconstruct “enacted” law as a main element of a descriptive theory of the sources of law. Second, when taking legislation into account, Ross does so mainly through legal politics, a controversial and rather obscure part of his theory.

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<sup>1</sup> A. Ross, *Theorie der Rechtsquellen, Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* (Franz Deuticke, Leipzig-Vienne, 1929).

<sup>2</sup> A. Ross, *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law* (Munksgaard, Copenhagen, 1946).

<sup>3</sup> A. Ross, *On Law and Justice* (University of California Press, Berkeley, 1959): hereinafter “OLJ”.



Consequently, the next section (sect. B) deals first with Ross' conception of validity; after this his theory of legal sources is examined (sect. C) and accordingly, his analysis of legislation as an element of legal sources is illuminated (sect. D). Going to the second part of his analysis of legislation, his idea of legal politics is presented (sect. E) as well as its epistemological status (sect. F). In conclusion, the task of legal politics, to provide the legislator with guidance, is addressed (sect. G) before providing a short conclusion given in order to better appreciate Ross' theory on legislation (sect. H).

## B. WHAT IS VALID LAW?

A realist approach to law is generally defined as an attempt to give an account of law as a part of reality, that is seen as a complex of facts existing in our world. It is a kind of sociology, but one for which a sociological explanation is not sufficient. On the other hand, it refers to the causal connection as a method of explanation. The concept of validity fitting such an approach cannot be the same, for instance, as for a normative science, or a science of law based on norms as ideal entities.

In a well-known lecture given in Buenos Aires,<sup>4</sup> Ross established that the word "validity" is used in legal philosophy with three different meanings designating three different functions respectively. The first is a non-theoretical but technical use: to say that a legal act produces legal effects. It has an internal function, and stating that an act is valid is a legal statement according to a system of rules. The second is a scientific use corresponding to a theoretical concept: to say that a norm or a system of norms exists, that it is real. It has an external function, and saying that a norm exists is to refer to a set of social facts. This assertion is not according to a rule, but about a rule. The third one is an ethical use, to indicate that a system of norms has an *a priori* property, a "binding force", *i.e.*, that there is a moral obligation to obey those rules constituting the system, or this system of rules itself. Obviously, the second sense is the only one that is adequate for a realist program, and this is the sense that Ross recommends using. Further precision must then be given.

First, Ross refuses any ontological approach of law, and this is consistent with his non-cognitivist meta-ethical position. In *On Law and Justice*, he writes: "The function of the doctrinal study of law is to give an account of a certain individual national system of norms... All these systems are facts whether we like them or not. In any case we need a term to describe these facts and it is purely a matter of terminology without any moral implications whether for this purpose the term 'law' or any other term is chosen" (OLJ, 31). He later insists that "a descriptive terminology has nothing to do with moral approval or condemnation" (OLJ, 32).

Second, Ross refuses to identify, as do American realists for instance, law and judicial decisions. For Ross, we can say that a system of norms is valid "if it is able to serve as a scheme of interpretation for a corresponding set of social actions in such a way that it becomes possible for us to comprehend this set of actions as a coherent whole of meaning and motivation... This is based on the fact that the norms are effectively complied with, because they are felt to be socially binding" (OLJ, 34). The effectiveness is the validity of the law, that is its existence, and the counterpart of the norms must be the decisions of the courts. Far from any behaviouristic realism, or psychological reductionism, his concept of validity implies two dimensions: an external-factual one (effectiveness) and an internal psychological one (a judge's feeling that there is a socially binding force). These two elements are often seen as giving birth to a set of antinomies, and Ross' project is to allow the dissolution of these antinomies through a reconstruction of legal concepts, such as the concept of validity: a reconstruction in the legal practice of the normative idea that a valid norm contends. This does not mean that the norm is accepted by the popular legal consciousness, as is the case for psychological realists. Neither does this entail that the reality of law simply means that law is applied. A synthesis is needed: "[C]onsistency and predictability are found in the externally observed verbal behaviour of the judge [but] the consistency referred to is a coherent whole of meaning and motivation, only possible on the hypothesis that in his spiritual life the judge is governed and motivated by a normative ideology of a known content" (OLJ, 74). The decisions of judges are not law. They are the factual counterparts of this normative ideology that is law. In other words, legal science does not describe adjudication as law, but describes law through the knowledge of adjudication.

Third, asserting that a norm is valid is "a prediction to the effect that this norm will be taken as the basis for decisions in future legal disputes" (OLJ, 75). Much has been written on this aspect of Ross' theory: a prognostic, a prognosis. According to his logical positivist framework, this mainly means that an assertion that norm D is valid could be verified through its future application (reproduction), in such

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<sup>4</sup> A. Ross, 'Validity and the Conflict between Legal Positivism and Natural Law', *Revista Juridica de Buenos Aires*, (1961) IV, 46-93.

a way that the logical meaning of the assertion is a prediction. The idea is that the normative ideology cannot be observed elsewhere than in the courts' behaviour, and that to state it is an actual ideology, *i.e.*, that the norms referred to in the assertion that a norm is valid/exists implies that this ideology produces effects beyond an individual case under the same conditions. One can discuss this criterion for a scientific assertion, and mainly the question of verifiability instead of the one of falsification. But it implies that for Ross, this actual ideology is an ideology of the sources of law.

### C. A DESCRIPTIVE THEORY OF THE SOURCES OF LAW

The same antinomies we have seen with validity are present in the field of theories as to the sources of law. Jurists and legal philosophers typically refer to a prescriptive, normative theory. The aim of this kind of theory is not to describe what the sources of law are, but to establish what they ought to be. In other words, what are the legitimate sources (according to a certain point of view, ethical or technical, for instance)? In a sense, this is the significance of the Kelsenian Pure Theory of Law that assigns to the legal science the description of the ideal, objective meanings of certain facts seen as the legitimate sources of law (constitution, enacted law, and so on). But this Kelsenian normativism differs only in consistency from any formal approach to the law. In that sense, such an approach is certainly the necessary precondition for any practical or prescriptive Legisprudence. On the other hand, certain theories of the sources of law rely on a sociological-descriptive point of view. But the sceptical-rules starting point they adopt oblige them to invoke psychological inquiries that they can hardly achieve, and condemn them to abandon any idea of a normative ideology. The "Breakfast Theory" can be seen as an extreme variation of a broader category of theories even less caricaturist.

On the contrary, the subject of a descriptive theory of the sources of law is a "common normative ideology, present and active in the mind of judges when they act in their capacity as judges" (OLJ, 75). If prediction is possible, according to Ross it must be "because the mental process by which the judge decides to base his decision is not a capricious and arbitrary matter, varying from one judge to another, but a process determined by attitudes and concepts" (OLJ, 75). This ideology is "the foundation of the law system and consists of directives which do not directly concern the manner in which a legal dispute is to be settled but indicate the way in which a judge shall proceed in order to discover the directive or directives decisive for the question at issue" (OLJ, 76). It is clear from this that the traditional criticisms that Hart directs at realism in general, *i.e.*, both American and Scandinavian, fail, at least for Ross.<sup>5</sup> According to Ross, it is inconsistent to adopt an attitude of scepticism about rules, and at the same time assert that the law is what judges make: how can we identify judges without pre-existent rules? If the sources of law have a normative function, as well as a directive function, that is if there are elements of an ideological nature in the sources of law, we do not need rules to identify (legally) authorities, but an efficacious ideology supporting actual behaviours. Sources of law must be then understood as "the aggregate of factors which exercise influence on the judges' formulation of the rule on which he bases his decisions" (OLJ, 77), including the rules concerning his competence.

A descriptive theory of the sources of law must permit "the establishment and identification of general types of sources of law which according to experience are found in all mature legal systems" (OLJ, 77). This implies that "not all law is positive in the sense of formally established" (OLJ, 101) and is a call for a reconstruction of the concept of positive law on a realistic basis. Among such sources of law, Ross indicates legislation, precedent, custom and the tradition of culture ("reason").

### D. ENACTED LAW AS A SOURCE OF LAW

This concept of sources of law is "not intended to imply a procedure for the production of rules of law. This characteristic only belongs to legislation" (OLJ, 77). Ross recognizes that "the most important source of law in the Continental law [of his time] is legislation" (OLJ, 78). He defines legislation as enacted law, which is "created by a resolution made by certain human beings." This "supposes norms of competence which indicate the conditions under which this may take place" (OLJ, 79). His approach of legislation is broad, comprising "not only the constitution (if written) and Acts of Parliament, but also kinds of subordinate and autonomic enactments, by whatever name they may be called: orders in council, statutory rules and orders, by-laws by local authorities, autonomic corporations, churches, etc." (OLJ, 78). It must be clear that questions, such as to the specificity of the "Parliamentary sovereignty" according to a political doctrine of the separation of powers, are not relevant for a descriptive theory of

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<sup>5</sup> H.L.A. Hart, 'Scandinavian Realism', *Cambridge Law Journal* (1959), 233-240.

the sources of law. That which is important is the original form of enactment as a way to identify a type of source.

In this sense, “any enactment acquires its authority from the norms of competence defining the conditions under which the enactment shall have force of law” (OLJ, 79). There are two kinds of conditions: formal and material. The formal defines the procedure, including the identification of the qualified authorities; the material conditions define the matter of the content that can be enacted. As for any positivist theory dealing with such questions, this leads Ross to the traditional question of the constitutional (if written) enactment and amendment: If the Constitution is (actually) the superior source of law, there is no superior rule indicating the conditions of its enactment: “Every system of enacted law is necessarily based on an initial hypothesis which constitutes the supreme authority, but which is not itself created by any authority.” This hypothesis is not of the kind as found in Kelsen’s basic norm: A theoretical fiction necessarily presupposed by legal theoreticians for the ends of describing a legal system as a set of (valid) prescriptive meanings. It is closer to Hart’s rule of recognition in the sense that “it exists only in the form of a political ideology which forms the presupposition for the system” (OLJ, 83). On the other hand, there is no need to suppose that this ideology is valid in the sense that Hart uses the concept and the criterion of validity (by a statement of validity). Ross later on develops this very question from a logical point of view in one of his most discussed papers: *On Self-Reference and a Puzzle in Constitutional Law*.<sup>6</sup>

The relation of legislation to valid law must be analysed according to both elements: Ross’ conceptions of validity and sources of law. Usually, the juristic thought sees this relation as follows: “[T]o what extent does the law exist already created in the source itself” (legislation, for instance) and “to what extent is it the judge who first creates it?” (OLJ, 101). According to Ross, this concerns “the degree of probability with which the motivating influence of a source on the judge can be predicted” (OLJ, 102). Here, Ross separates himself from legal American realists such as Gray, who denied that statutes as such are law.<sup>7</sup> For Ross, “to regard the statute in itself as law signifies that we can generally and with a degree of probability bordering on certainty predict that it will be accepted by the judge” (OLJ, 102). In other words, it is law according to the actual ideology of judges. But this is no difference in nature but only (generally) one of degree between enacted law and other sources of law. Even a statute can be disregarded by a judge, and even custom or rules derived from “reason” can be considered as laws in themselves by judges. And of course, to say that statutes in themselves are valid law does not answer the subsequent question: How are the directives contained therein pragmatically interpreted by judges (how are norms created), which is a factual question as far as method (and discretion) are concerned.

## E. THE IDEA OF LEGAL POLITICS

The concept of legal politics is a very obscure one. Its content and epistemological status depend narrowly on the kind of theory of law adopted. The next section deals with the latter, even if Ross begins there. I want to first clarify what kind of activity Ross designates under the term “legal politics”, which is the second occasion for him to deal with legislation.

For Ross, legal politics is easy to define if one adopts an idealistic theory of law. This is because for such a conception, law has its objective in itself (to perfect the idea of justice). Legal politics is a “specific branch of cultural politics, that branch which belongs under the specific cultural idea of law” (OLJ, 327). It is the doctrine of how the perfection of the idea of justice is to be attained. It is distinct from other branches of cultural politics, such as welfare politics or power politics. On the contrary, for a theory that rejects the “idea of a specific idea of law that gives the law an absolute value of its own,” that is for a theory like a non-cognitivist theory of law that “looks upon positive law as a social technique or as an instrument for social objectives of any kind”, legal politics should not be “determined according to a specific objective, but according to a specific technique” (OLJ, 327). In other words, legal politics “embrace all problems of action that arise from the use, for the attainment of social objectives, of the technique of the law” (OLJ, 327).

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<sup>6</sup> A. Ross, ‘On Self-Reference and a Puzzle in Constitutional Law’ *Mind* (1969) 78, 1-24.

<sup>7</sup> J.C. Gray, *The Nature and Sources of Law* (Columbia University Press, New York, 1909); See also J. Frank, *Law and the Modern Mind* (Brentano, 1930).

## F. LEGAL POLITICS AS A NON-SCIENTIFIC ACTIVITY

As Ross himself admits, “defined like this, legal politics would acquire a scope far beyond what is in general considered as the legitimate field of action of the jurist” (OLJ, 327). And it seems obvious that this scope is even further beyond the legitimate field of action of the legal scientist according to Ross’ theory of legal science. Indeed, it would be surprising to find a quite long development of this topic in a non-cognitivist main work in legal philosophy.

The answer has to be found in the relationship Ross establishes between science and politics. Ross clearly separates cognition and action. For him, the only cognition is empirical and thus a question arises: “How is it possible on this basis to arrive at legal politics – at any guidance for the legislator?” (OLJ, 298). This question is not peculiar to legal politics. It “exists correspondingly for all sciences which pretend to give directions as to how we shall behave.” (OLJ, 298). Therefore, Ross must give two types of answers: the first analyses the relation between science and politics, the second the peculiarity of legal politics.

For Ross, “cognition can never *motivate* an action; but assuming a given motive, it can *direct* the activity released.” (OLJ, 298, italics in the original). There is no possible practical cognition in the ethical sense, which Ross has constantly assumed.<sup>8</sup> On the contrary, our actions are conditioned by two factors: beliefs and attitudes. Attitudes are “those volitive and emotional phenomena of consciousness which are the source of all conscious activity” (OLJ, 301). Our preferences constitute the practical form of consciousness; while our beliefs are the theoretical form. Our attitudes, which have no possible truth value but are facts, are under the influence of our beliefs; but not as a possible logical derivation from them. Conversely, the same can be said, just because our beliefs and our attitudes are in interaction, and does not render it possible to know whether our beliefs influence our attitudes or if our attitudes influence our beliefs. Consequently, “the task of science consists solely in serving rational argumentation by providing it with scientifically tenable assertions and by picking out with critical discrimination those that cannot stand up to a scientific test” (OLJ, 315). Science does not persuade, convince or impose; neither does it justify.

Referring to Max Weber, Hans Kelsen and a number of young Swedish jurists as well as prominent American sociologists, Ross repeats the motto: “Science is one thing, politics another” (OLJ, 318). Of course, a scientific consciousness supported by a theoretical approach and an appropriate methodology, has effects on our beliefs, and therefore on our (political) attitudes: “The role of theory is not only purely technical. It is also its task to give guidance concerning the objective itself; to clarify and give precision to the political attitudes by correction and supplementation of the conditioning beliefs; or to indicate the objectives which those in power would set themselves if they had a more adequate conception of reality than they actually have” (OLJ, 322). This is what Ross calls applied social science, and Ross notes that this activity is frequent. On the other hand, this applied science can never be rationally conclusive as natural sciences must be. Ross concludes that “it is plain that this activity is not of a scientific kind. We cannot however draw the conclusion from the idea of the purity of science that such activity should not be undertaken by a scientist” (OLJ, 323). Furthermore, Ross is of the opinion that “it is compatible with the idea of the purity of science, and expedient besides, for the theoretician himself to undertake the irrational jump and proffer the result in the forms of instructions to the practician” (OLJ, 324). But of course, the limits are explicit: Those instructions are neither true nor false. It is then the responsibility of the practitioner to decide. Those instructions are designed to clarify problems, not to provide answers. Hence, “the idea of purity of science suffers no injury provided only that the boundaries between science and politics are clearly marked” (OLJ, 338). In other words, “no violence is done to the idea if the profession pursues science and politics together, provided that the ideal boundary between them is kept clear”. Legal science is not legal politics, but a lawyer can clearly and legitimately act as a legal scientist and as a legal-politics expert if he keeps in his activities a clear boundary between them.

Ross refutes the idea of an expert’s power, relying on a pretty optimistic dream. The necessary precondition for containing expertise of applied social science in the field of guidance is obviously that both experts and practitioners share the same non-cognitivist philosophy, which is a (non-certain) factual issue that Machiavelli already noted in *The Prince*. And even within a shared conception, Ross does not pay attention to a possible use of instructions not as guidance, but as justifications.

However, legal politics in its turn is a peculiar applied social science, “applied legal sociology or legal technique” (OLJ, 328). The particular knowledge needed for it is “of relevance as soon as the technique of the law is employed for a solution of social problems irrespective of their objective.” That

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<sup>8</sup> See for the major works, A. Ross, *Kritik der sogenannten praktischen Erkenntnis. Zugleich Prolegomena zu einer Kritik des Rechtswissenschaft* (Levin & Munksgaard, Copenhagen-Leipzig, 1933).

can only be “sought in the legal-sociological knowledge concerning the causal connection between the normative function of the law and human behaviour,” in other words, “concerning the possibilities of influencing human action by the apparatus of legal sanctions” (OLJ, 328). Ross establishes there a clear and strong distinction between determinism, that is a necessary condition for legal politics as it is, and fatalism or predestination. From that point of view, he provides a strong critique of the Historical School (Savigny) and of the Economic Historicism of Marx, both seen as conceptions denying the possibility of legal politics (of influencing social actions through legal technique). His assumption is nevertheless not an assumption of a free will (that prevents legal politics from any utility) opposed to predestination, but the assumption of a moderate determinism: that “rational deliberation and argumentation are among the factors determining the actions of human beings” (OLJ, 341). Because Ross’ position here seems to meet one of the most popular issues in contemporary legal philosophy, it could be useful to repeat that for him, none of the referred questions (instructions or expertise, decisions or prescriptions) are susceptible of any truth-value.

Legal politics is a technology: a scientifically-founded policy-making. As Ross states, it is an applied legal sociology, able to provide views on questions such as “what influence does the formulation of the rules of damage have upon the caution people exhibit in various situations” or “what part is played in this connection by facilities for insurance against liability” (OLJ, 332). The point is that a legal sociology of this form is not available. There is no knowledge (until now) of this kind, which is a systematic science, based on methodical research. This was true in Ross’ time, and it perhaps is still true, even if Ross mentions small beginnings of that science and even if he ardently urges the construct of such a sociology of law. But that which we know as the sociology of law rarely provides answers based on a systematic analysis of facts in order to be used as an exact knowledge for legal politics. Furthermore, in legal politics today, the sociological aspect is often minimized compared to other aspects: economics for instance, through the Law and Economics approach, or ethics. Hence Ross is obliged to accept that the lawyer operates with “knowledge obtained from the common experience of life, supplemented with more or less fortuitous statistical data” (OLJ, 332). The result is that legal politics is often marked by vagueness, which we must accept, but which perhaps condemns the very idea of a rational and scientifically-founded legislative guidance.

## G. GUIDANCE FOR THE LEGISLATOR

In our modern states, legal politics involves particularly legislation. Ross does not exclude judicial decisions from this. As well as *de lege ferenda* can occur in legal politics, can *de sententia ferenda* also occur. Such an assertion is consistent with Ross’ empiricist point of view (it is a fact that enactment is at the same time the most common way of a legal political action, and a special technique of law-making requiring special skills) and his theory of the sources of law. According to Ross himself, “legal politics is possible because the legislator is not impotent.” On the other hand, “the possibilities of legal politics are limited because the legislator is not almighty either” (OLJ, 354).

As far as legal politics implies legal technique, “there are no problems of legislation that are specifically legal-political, but every problem of legislation has a legal-political aspect”, even if this aspect is contingent in different situations (OLJ, 329). But this contingency does not depend on the technical complexity. Ross indicates, for instance, that in tax law, a very technical and evolutive area, the legal-technical problems are of secondary importance: legal politics, or the legal-technical problem, deals with the link in the causal chain between normative enactments and compliance, and not with the technical complexity of the provisions. On the contrary, legal-technical problems are predominant in rather simple legal institutions, such as property, contract and marriage. This is because these institutions are deeply rooted in a relatively permanent ideology, and therefore, they seeming not to be political in a common perception, they become legal-political. As for validity, this is more a degree of difference than of nature.

What should a lawyer do in his expertise work? Ross first refutes that lawyers feel concerned by solely strictly legal-political questions: Legislation is a whole and it is hardly possible to divide all the questions implied in a piece of legislation in clearly separate matters for which a specific expert is necessary. This is why Ross advocates a collective body, a commission to report on legislative reforms, composed of experts having different knowledge. On the other hand, the respective places of different experts are difficult to draw between dilettantism and domination. It is obvious that Ross at that point believes in a rational collective deliberation that presupposes from everyone “discernment and tact” (OLJ, 330); “legal politics has the character of an art, a skill, where the value of the result is measured by being in fact accepted by others, particularly those in power, as the decision that best harmonises with all the dominating attitudes and operative beliefs” (OLJ, 331). Here again, Ross has no other

possibility than to observe that his dream of a scientifically-founded policy-making is quite unattainable.

What should a lawyer do in his expertise work? Second, according to Ross, the lawyer must state the premises of the legislation: “to study the objectives and attitudes which in fact are predominant in influential social groups and thus determinative for the legislative organs” (OLJ, 334). Such are to be studied not as general interests or principles, but as concrete and effective results of the prevailing ideology and common or conflicting interests. Ross admits that this is a difficult program: interpretation and subjectivity are inevitable. To avoid transforming himself into a “high priest,” the lawyer must be aware of this, and understand that the motivating attitudes (the premises he has to establish) are only hypothesis.

What should a lawyer do in his expertise work? Third, according to Ross, the lawyer must formulate conclusions. As far as the previous questions were concerned, this was a question of facts. Now, legal politics supposes that a theoretical inquiry is assumed, defining “the causal correlations operative in relation to the premises” (OLJ, 337). But the conclusions formulated in the form of an instruction to the legislator are not of a logical character: they relies on “psychic causality” (OLJ, 337). They are of a practical nature, and indicate the manner in which the legislator should act on the basis of premises (attitudes and beliefs) he accepts.

From this, the role of the lawyer is derived as that of a legal politician: “to function, as far as possible, as a rational technologist. In this role he is neither conservative nor progressive. Like other technologists, he simply places his knowledge and skill at the disposal of others, in his case those who hold the reins of political power” (OLJ, 377).

## H. CONCLUSION

If Ross had good reasons not to do develop a specific argumentation about legislation from the point of view of his non-cognitivist theory of law, and to reserve it to the part in which he deals with a descriptive theory of the sources of the law, the way he reintroduces legislation under the concept of legal politics is then artificial. Feeling dissatisfaction with such a conception is understandable from whatever standpoint is taken: Whether one accepts non-cognitivist premises and the correlative positivistic theory of law and legal science proposed by Ross, or whether one advocates any form of jurisprudence. This attempt lacks critics, and self-critics. The idea and methods of legal politics are clearly and consistently presented according to Ross’ conception of what law is. Despite this, it is possible to consider that the price of this consistency rests on the practical impossibility of that activity, as Ross states it. It is clear that this part of his theory is not descriptive but prescriptive. It is not a sociology of the work of experts, of their preconceptions, or their production. It should be surprising to observe that Ross dedicated long pages at the end of his book to justifying an activity that on the basis of his own analysis, he claims is not a scientific one and can hardly be practised, if not honestly, at least safely (taking in consideration the practical political uses of instructions as formulated). It is difficult not to see in this a kind of self-justification, and one knows how legal realists, including Ross, participated as legal politicians to the social-democratic experiences. On the other hand, realism later was rejected by Scandinavian legal philosophers on a basis of a moral and practical evaluation of what legal politics means (and what it meant in practice), more than on a rational discussion of the core of their theories. Perhaps one can agree that a legal political analysis on such a basis (a prescriptive doctrine of a non-scientific activity) is not necessary for realist theories, and that self-justification is not a relevant reason for including it in a theory. The modern realism in Europe (the Genoa or Nanterre Schools, for instance) has considered that this part of Ross’ work should be allowed to remain in the books as a testimony of a given period, and of the human problems of that period. This author sees no reason to reactivate it, neither for the good of an empiricist theory of law, nor for the ends of giving a non-realist foundation to dogmatics.

## **B – American Realism**

**CROSS PURPOSES & UNINTENDED CONSEQUENCES:  
KARL LLEWELLYN, ARTICLE 2 AND THE LIMITS OF SOCIAL TRANSFORMATION**

Danielle Kie Hart\*

**Abstract**

Despite attempts to reform the law to eliminate hierarchies that subordinate groups of people, the law usually ends up re-instantiating those hierarchies. This “preservation through transformation” phenomenon occurs consistently, over time and across legal disciplines. Karl Llewellyn’s efforts at drafting Article 2 of the Uniform Commercial Code are no different. Llewellyn attempted a paradigm shift in contract formation when he sought to decouple contract law from its formalistic roots and bring it back in touch with reality. But in so doing, the law-in-action strand of Legal Realism ended up working at cross-purposes with the other, critical strand of Realism. As a result, Llewellyn’s paradigm shift only served to exacerbate structural problems built into the contract law system. This essay attempts to explain why Llewellyn’s efforts to reform contract law have had such serious long-term but unintended consequences for the modern contract law system. It does so in an unorthodox way. Instead of drawing from traditional contract-law scholarship, the essay imports insights from two seemingly unrelated fields – civil rights law and social philosophy. The essay’s central thesis is that revising existing doctrine will rarely if ever result in meaningful change in the modern contract law system. In fact, doctrinal reform will almost always be counter-productive, as reforms from within will only rebuild power, advancing and further protecting the interests of the privileged. Understanding and revealing this trap is essential to finding a path to lasting change. Contrary to traditional contract-law critiques, meaningful reform will only occur by understanding power – who has it, why they have it, and how they keep it.

**Keywords:** Legal Realism – Contract Law – Karl Llewellyn – Pierre Bourdieu

A. INTRODUCTION

Contract law is full of unacknowledged contradictions that have real life consequences. It purports, for example, to provide neutral and objective rules to govern every aspect of a contract, from its making to its performance, to its remedies in the event of breach. But instead of living up to its promise of providing neutral rules, contract law continues to privilege and protect unequal bargaining power, which in turn reinforces societal inequities and privileges rather than reduces the coercion that exists in every contract. In a world of dramatically expanding inequality, it seems more than appropriate to examine contract law’s role in this reproduction of inequality.

Last century’s attempt at a paradigm shift in contract formation is embedded in one strand of Legal Realism scholarship – a strand most often identified with Karl Llewellyn and Article 2 of the Uniform Commercial Code. That strand of legal realism, commonly referred to as the reformist or law-in-action strand, sought to decouple contract law from its formalistic roots and bring it back in touch with reality. But in so doing, the law-in-action strand of Legal Realism ended up working at cross-purposes with the other, critical strand of Realism. As a practical consequence, Llewellyn’s paradigm shift in contract law only served to intensify the structural problems built into the contract law system.

This essay takes a preliminary stab at explaining why Llewellyn’s efforts to reform contract law have had such serious long-term but unintended consequences for the modern contract law system. It does so in an unorthodox way. Instead of drawing from traditional contract-law scholarship, the essay imports insights from two fields that at first blush seem distant: civil rights law and social philosophy. The essay’s central thesis is that tweaking existing doctrine will never meaningfully change the modern contract law system. In fact, doctrinal reform will almost always be counterproductive, as reforms from within will only rebuild power, advancing and further protecting the interests of the privileged. Understanding and revealing this trap is essential to finding a path to meaningful, lasting change.

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The essay has three parts. Part I (sect. B) sets the stage by summarizing the contributions made by the Legal Realists and, in particular, Karl Llewellyn. Part II (sect. C) then explores how Llewellyn's project within Legal Realism has worked at cross-purposes to the goals of other Legal Realists. Specifically, by pursuing law in action, Llewellyn ultimately, although unintentionally, increased the power embedded in contract law and exacerbated, rather than reduced, inequities. Drawing from leading scholarship in other fields, Part III (sect. D) reveals why the law-in-action strand of Legal Realism was destined to fail and continues to fail. The essay concludes with some tentative thoughts on how to move forward (sect. E).

A key point to underscore before continuing is that this essay's aim is not to provide a comprehensive recipe for contract law reform. Such an ambitious project is beyond the scope of an essay. But while perhaps less ambitious, the essay's bottom line is equally important. It reveals an intrinsic failing in the dominant approaches to contract law reform and seeks to spur scholarly discussion on how to more meaningfully dismantle current inequities entrenched in the law. Contrary to traditional contract law critiques, this essay concludes that meaningful reform will only occur by understanding power – who has it, why they have it, and how they keep it.

## B. LEGAL REALISM AND KARL LLEWELLYN

The story of Legal Realism of the 1920s and 1930s is still debated and full of contradictions, both internal and external. This essay does not attempt to resolve these contradictions or to engage in the substantive debate surrounding Legal Realism. That said, there seems to be no disagreement that Karl Llewellyn was a Legal Realist. Consequently, a brief history of Legal Realism is necessary, if only to situate Llewellyn within it. This essay therefore offers the following as one, obviously simplified, version of the Realism story, one that intentionally glosses over the contradictions.

Legal Realism of the 1920s and 1930s was not an intellectual movement. It did not represent a distinctive methodology or embody a systematic jurisprudence. Instead, Legal Realism, with its emphasis on social science, is probably best seen as a continuation of the sociological jurisprudence of the pre-World War I Progressives, which directly challenged early twentieth century classical legal thought.<sup>1</sup> Notwithstanding this continuity, there are enough differences to treat Legal Realism as a distinct intellectual outlook. And, regardless of approach, “[a]ll Realists shared one basic premise – that the law had come to be out of touch with reality.”<sup>2</sup>

The attack on classical legal thought spawned contradictory responses from Legal Realists. As a result of these contradictions, two strands of Legal Realism emerged: one critical and one reformist.

The critical strand of Legal Realism challenged classical legal thought's conceptions of law and legal reasoning, which drew sharp distinctions between law and politics and portrayed law as an autonomous and self-executing discourse. By systematically deconstructing the free market and challenging the coherence of what was supposed to be purely private law in the form of property and contract rights, the Realists were able to expose the omnipresence of the state in the creation and distribution of rights and wealth in society.<sup>3</sup> In so doing, the Realists sought to debunk the claim of the older legal orthodoxy that law was neutral, natural, and apolitical, and expose the politically conservative, status-quo-oriented nature of classical legal thought. The critical strand of Legal Realism, therefore, was at least in part a critique of power – power that was embedded but concealed in law, in the ostensibly free market, and in society in general.

The reformist strand of Legal Realism set out to determine the “law in action;” that is, to figure out the way the law actually worked in society in terms of its impact on individuals and institutions.<sup>4</sup> To bring the law back in touch with reality, the Realists believed that the law needed to correctly mirror social relations. To accomplish this task, the Realists adopted naturalism, a methodology that required legal theorizing to be firmly situated and in line with the empirical approach in the natural sciences. In conformity with this approach, the Realists set out to develop and collect a series of social science

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<sup>1</sup> M. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 189, 209 (New York, Oxford University Press, 1992).

<sup>2</sup> *Ibid.* 187.

<sup>3</sup> See, e.g., R.L. Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 *Political Science Quarterly* 470; R.L. Hale, ‘Bargaining, Duress, and Economic Liberty’ (1943) 43 *Columbia Law Review* 603; MR Cohen, ‘Property and Sovereignty’ 13 *Cornell Law Quarterly* 8; M.R. Cohen, ‘The Basis of Contract’ (1933) 46 *Harvard Law Review* 553.

<sup>4</sup> See, e.g., W.W. Cook, ‘The Logical and Legal Bases of the Conflict of Laws’ (1924) 33 *Yale Law Journal* 457; H. Oliphant, ‘A Return to Stare Decisis’ (1924) 4 *American Bar Association Journal* 71; H.E. Yntema, ‘The Hornbook Method and the Conflict of Laws’ (1928) 37 *Yale Law Journal* 468.

studies that would accurately describe social reality. Laws and institutions could then be crafted that would better reflect and be better prepared to deal with a more complex social reality. This undertaking was specifically non-normative in nature. The “Is,” in other words, was consciously separated from the “Ought.” The purpose of legal theory, therefore, was merely to identify and describe, not justify, the social reality that was uncovered.

Karl Llewellyn is known as one of the most important figures in Legal Realism, though this, too, is debated. Regardless of his actual place in the historiography, it seems undisputable that Llewellyn pursued the law in action or reformist strand of Legal Realism. Nowhere is this better reflected than in Llewellyn’s own writings. A couple of examples will have to suffice to establish this point. In the conclusion to “A Realistic Jurisprudence,” for instance, Llewellyn argued that the “focus of study... for all things legal has been shifting,” such that a “clearer visualization of the problems involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior.”<sup>5</sup> Then, in “Some Realism About Realism,” Llewellyn remonstrated that, “no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing.”<sup>6</sup> Tellingly, Llewellyn went on to state that, “[l]aw without effect approaches zero in its meaning. To be ignorant of its effect is to be ignorant of its meaning. To know its effect without study of the persons whom it affects is impossible.”<sup>7</sup>

To situate Karl Llewellyn within Legal Realism, therefore, seems relatively straightforward. To pin down Llewellyn’s contribution(s) to American jurisprudence in general or to Legal Realism in particular, however, is beyond the scope of this essay. Others are much more qualified to undertake that task.<sup>8</sup> It is sufficient for the purposes of this essay to note that the Uniform Commercial Code (the “Code”) has been called “the flower of the legal realist movement in American law,”<sup>9</sup> and Karl Llewellyn, as the Chief Reporter of the UCC, was its “principal architect.”<sup>10</sup> Notwithstanding his contribution to the UCC project as a whole, Llewellyn is probably most well known for drafting Article 2 (covering the sale of goods). Llewellyn’s pursuit of the law in action is stamped all over this part of the Code. Unfortunately, in pursuing the law in action, Llewellyn ultimately worked at cross-purposes with the critical strand of Legal Realism, and this produced (and continues to produce) serious but unintended consequences.

### C. CROSS PURPOSES AND UNINTENDED CONSEQUENCES

Karl Llewellyn was extremely critical of the orthodox conception of contract law that was premised on what he considered an archaic formation structure consisting of offer, acceptance, and consideration. To Llewellyn, this model was unrealistic because it did not actually function well and did not comport with reality. He therefore attempted a paradigm shift away from the idea of a promise as the basis of contractual obligation in favor of the parties’ agreement in fact. He did so in a specific attempt to substitute a more dynamic agreement construct, one that was transaction-oriented, for the old, static model of formation premised on offer, acceptance, and consideration. To Llewellyn, his new construct represented the law in action – it was functional and represented the way businesses actually conducted business. And by “business,” Llewellyn meant “merchants.” Llewellyn, in other words, drafted Article 2 to reflect mercantile customs and practices.<sup>11</sup>

Under Llewellyn’s agreement-in-fact construct, therefore, formation of a contract was (and is) made much easier. For example, under Article 2, contracts can be formed by conduct and not just through an exchange of communications that constitute an offer followed by an acceptance. In addition, a contract can be formed even though the exact moment of mutual assent cannot be identified, and even if material terms are missing, provided that the parties intended to make a contract and an appropriate remedy can be crafted. The Code’s rules regarding acceptance are also relaxed, thus making it easier to conclude that acceptance occurred, and, hence, a contract was formed. As for consideration, it is not even required for a valid contract in certain instances.<sup>12</sup>

<sup>5</sup> K.N. Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ (1930) 30 *Columbia Law Review* 431, 464.

<sup>6</sup> K.N. Llewellyn, ‘Some Realism About Realism – Responding to Dean Pound’ (1931) 44 *Harvard Law Review* 1222, 1236-37.

<sup>7</sup> *Ibid.* 249.

<sup>8</sup> See generally W. Twining, *Karl Llewellyn and the Realist Movement* (London, Weidenfeld & Nicholson, 1973).

<sup>9</sup> E.F. Mooney, ‘Old Kontract Principles and Karl’s New Kode: An Essay on the Jurisprudence of Our New Commercial Law’ (1966) 11 *Villanova Law Review* 213, 254.

<sup>10</sup> W. Twining, *Karl Llewellyn* 367.

<sup>11</sup> E.F. Mooney, ‘Old Kontract Principles’ 218-27.

<sup>12</sup> D.K. Hart, ‘Contract Formation and the Entrenchment of Power, (2009) 41 *Loy. U. Chi. L.J.*, 202–05.

At the same time, Llewellyn also introduced two concepts that were new to contract law: good faith and unconscionability. Together, these doctrines incorporated norms of fairness and cooperation into contract law and ostensibly worked to benefit the weaker contracting party by circumscribing the types of terms that would theoretically get enforced and the behavior of the contracting partners in the performance and enforcement of their contract.<sup>13</sup>

Where Llewellyn may have gotten his ideas for Article 2 of the Uniform Commercial Code may be open to question, but one thing is clear: By making formation easier, Llewellyn ended up increasing and further entrenching the power embedded in contract law – power that according to the critical strand of Legal Realism, takes the form of state-sponsored coercion.

According to the “critical” Realists, coercion is ubiquitous in contracting. In fact, coercion is “at the heart of *every* bargain.”<sup>14</sup> This is because every party is entitled by law to withhold from his contracting partner *everything* that he owns, whether it be his land, labor, capital, money, etc. “Coercion, therefore, is a function of ownership.”<sup>15</sup> Ownership, in turn, is determined by the state, because ownership is very much “a function of legal entitlements[;] it was and is the state that creates and protects property rights.”<sup>16</sup> It follows that the more one party owns, the stronger that party’s threat to withhold what he owns becomes. Coercion therefore exists every time a party decides to enter into a contract “to avoid the consequences with which the other [party] threatens him.”<sup>17</sup> Thus, because every contract involves mutual threats to withhold – for example, where one party says “pay me what I am asking, or I will withhold my goods” and the other party responds “give me your goods, or I will withhold my money,” – *every* contract is the product of state-sponsored coercion.<sup>18</sup>

In the context of contract formation, the amount a party owns determines that party’s bargaining power or capacity to coerce. The more coercive capacity/bargaining power a party has the more that party gets to dictate the terms of the contract. A party’s coercive capacity does not in and of itself pose a problem. But this capacity is coupled with two structural features of the modern contract law system that make it extremely difficult for the weaker party to effectively challenge whether a contract was formed at all. First, regardless of ideology, all the competing tests for mutual assent (*i.e.*, the doctrine by which the individual agreement of the parties is tested) make it very easy to establish mutual assent in practice; and, as a general rule, consideration is usually present in market-based transactions. Second, a presumption of contract validity springs into existence at the moment a contract is formed via mutual assent and consideration.<sup>19</sup>

This presumption of contract validity is extremely difficult to rebut in practice because of what I have referred to elsewhere as the “process problem” in contract law. To begin with, the process problem imposes the burden on the party challenging the contract or defending a breach of contract action to show that the contract is unenforceable. Moreover, *all* the other contract doctrines one might use to either challenge or defend against the contract (including but not limited to contract interpretation and defenses to performance) presume that a valid contract has already been formed. In addition, several practical realities exist, such as the costs of litigation, the ubiquity of certain contract boilerplate clauses (*i.e.*, merger, arbitration, choice of law, choice of forum clauses), and the fact that courts are reluctant to allow parties out of their contracts, regardless of the legal excuse raised. All of this together means that a successful rebuttal of the presumption of contract validity is highly unlikely in practice.<sup>20</sup>

Thus, as a direct result of the presumption of contract validity, a contract formed via Article 2’s formation rules will usually be binding and all of its terms, including any unreasonable ones, will most likely be enforceable in court. Significantly, the difficulty of disproving the presumption of contract validity may well give license, if not perverse incentive, to the party with greater coercive capacity to impose more onerous terms during contract formation. The result, even if such incentives are not capitalized on, is to increase the coercive capacity of the stronger contracting party. This is because the stronger party will not only be able to reap more gains (in terms of money, land, capital, etc.) through each contract it enters into, but the presumption of contract validity will also enable that party to retain those gains. Recall that the amount one owns determines one’s bargaining power/coercive capacity. It thus becomes a vicious circle: the more a party owns, the more bargaining power/coercive capacity that party has; the more that party gets to dictate contract terms, the more property that party gets to

<sup>13</sup> E.F. Mooney, ‘Old Kontract Principles’ 247-51.

<sup>14</sup> B. Mensch, ‘Freedom of Contract as Ideology’ (1981) 33 *Stanford Law Review* 753, 764.

<sup>15</sup> D.K. Hart, ‘Contract Law Now – Reality Meets Legal Fictions’ (2011) 41 *University of Baltimore Law Review* 1, 29 (footnote omitted).

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

<sup>17</sup> *Ibid.* (footnote omitted).

<sup>18</sup> See also M.R. Cohen, ‘Property and Sovereignty’ 11-13; R.L. Hale, ‘Coercion and Distribution’ 471-73.

<sup>19</sup> D.K. Hart, ‘Contract Formation’ 206-15.

<sup>20</sup> *Ibid.* 210-15.

acquire; and so on. In the end, the coercion present in contract law is increased and entrenched. More than that, the coercion that exists is concealed, because satisfying Article 2's formation rules provides a veneer of voluntariness. A contract is by common understanding an act of free will (autonomy); after all, one must "agree" to be bound. Hence, there is (usually) no coercion in contracting.<sup>21</sup> Or so the argument goes.

In short, by pursuing the law in action in Article 2, specifically, by making it easier to form a contract, Llewellyn ended up increasing, further entrenching, and concealing the coercion present in contract law. In so doing, he worked at cross-purposes with and arguably even undermined the other critical strand of Legal Realism that exposed and critiqued power. This result is not surprising and, in fact, is to be expected.

#### D. THE LIMITS OF SOCIAL TRANSFORMATION

##### 1. "Preservation Through Transformation"

By changing contract law's formation rules, Llewellyn ended up increasing the coercion present in contract law. This result is to be expected because this is what the law does. That is, regardless of any attempts to bring about change, the law tends to evolve in such a way as to preserve and privilege established hierarchies. Two groundbreaking articles, one by Reva Siegel and the other by Cheryl Harris, illustrate this phenomenon.

In "'The Rule of Love': Wife Beating as Prerogative," Reva Siegel documents the evolution of the law governing marital violence (or wife beating) from the days when husbands possessed a "chastisement prerogative," to the enactment of the Violence Against Women Act. Notwithstanding consistent efforts to reform the law to better protect women, violence against women within their own households continues to persist in staggering numbers.<sup>22</sup> In "Whiteness As Property," Cheryl Harris traces the transformation of the concept of "whiteness" from a description of skin color used merely as a way to distinguish white indentured or bond servants from captured Africans who were sold in the Americas, to a property right with legal and social value and consequences.<sup>23</sup>

It is not possible to do justice to either of these articles in the short space that this essay will devote to them. But collectively, both articles tell a very similar story, and it is this collective story that has resonances for contract law. That story goes like this:

Despite periodic success, the law governing marital violence and race evolved in such a way as to reflect and perpetuate racial, gender, and class hierarchies such that heterosexual white men, usually but not necessarily limited to the middle and upper classes, were privileged and their interests protected by law. For example, by the 1870s, a husband's prerogative to physically chastise his wife was unequivocally repudiated by the courts. Violence in marriage, however, continued to exist. The law's response to the ongoing violence was hostile to any remedy "that might assist wives in separating from their husbands"<sup>24</sup> because nineteenth-century judges assumed "that a wife was obliged to endure various kinds of violence as a normal – and sometimes deserved – part of married life."<sup>25</sup> These same judges also assumed that a certain amount of violence was an accepted fact of life for the married poor. Some marital violence was subject to criminal prosecution, but those prosecutions were usually limited to African-American men and members of the "vicious [and dangerous] classes,"<sup>26</sup> *i.e.*, the poor, who beat their wives. Middle and upper class white men were rarely if ever prosecuted, and, in fact, were granted various legal immunities, both criminal and civil, for wife beating in the name of "affective privacy."

This privileging of heterosexual white men translated into the unequal distribution of social and material benefits and goods. Ownership of property, for example, was originally limited to white men. In addition to social standing, public reputation, and the "'public and psychological wage'" of being white,<sup>27</sup> white identity also "conferred tangible and economically valuable benefits"<sup>28</sup> because property

<sup>21</sup> See generally D.K. Hart, 'Contract Formation' 198-219.

<sup>22</sup> R.B. Siegel, 'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105 *Yale Law Journal* 2117, 2121-2200.

<sup>23</sup> C.I. Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707, 1709, 1715-77.

<sup>24</sup> R.B. Siegel, 'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105 *Yale Law Journal* 2132.

<sup>25</sup> *Ibid.* 2133-34.

<sup>26</sup> *Ibid.* 2138-39 (internal quotation marks omitted).

<sup>27</sup> C.I. Harris, 'Whiteness as Property' 1734-1737, 1741-1750.

<sup>28</sup> *Ibid.* 1726; see also R.B. Siegel, 'The Rule of Love' 2154-61, 2161-70.

was and is broadly construed to include “all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression... and free and equal opportunity to use personal faculties.”<sup>29</sup>

But more than this, heterosexual white male privilege (material and social), together with its status on top of the hierarchy, were normalized such that the category and its privileges became the baseline, the quintessential objective, neutral, apolitical, and unquestioned norm. A mechanism was then used that enabled the legal system to mask, or at least divert attention away from, the hierarchy with its attendant and unequal privileges. For Harris, this mechanism is her ingenious “whiteness” construct, and for Siegel it is the use of ostensibly neutral legal language that reflects neither gender, nor class, nor race. “Whiteness,” for example, not only ameliorated class hierarchies but also enabled the class exploitation present in labor markets to be evaded. This is because whiteness enabled white workers to “accept their lower class position in the hierarchy ‘by fashioning identities as ‘not slaves’ and as ‘not Blacks.’”<sup>30</sup>

What changes from one period to another in the evolution of the law is simply the rhetoric and legal strategies or doctrines used to legitimate the new hierarchical regimes. A husband’s right to physically chastise his wife, for instance, was replaced by criminal and tort immunities for wife beating; and the legal rhetoric changed from justifications that were authority-based and explicitly hierarchical to the language of companionate marriage and affective privacy.<sup>31</sup> In each instance, however, the hierarchies (men over women, rich men over poor men, white men over Black men) and a husband’s prerogative to physically chastise his wife remained intact.

Harris paints the same picture in the context of race. She argues, for example, that the United States Supreme Court’s interpretation of the Equal Protection Clause in *Brown v. Board of Education*<sup>32</sup> simply modified its earlier interpretation of that Clause in *Plessy v. Ferguson*<sup>33</sup> and thus “accommodated both Blacks’ claims for ‘equality under the law’ and the global interests of white ruling elites.”<sup>34</sup> What ended up changing was some of society’s formal rules. But, “[w]hat remained consistent was the perpetuation of institutional privilege under a standard of legal equality... What remained in revised and reconstituted form was whiteness as property.”<sup>35</sup>

Some might argue that the collective story told by Siegel and Harris is about status law (gender, race, class) and is a public law (civil rights) story to boot, while contract law is private law, does not implicate a status category, and has nothing whatsoever to do with civil rights. But this argument would be wrong. Although it is true that contract law and civil rights are rarely if ever discussed together, contract law *does* implicate a status category. Specifically, contract law is very much intertwined with class. Viewed from this perspective, the collective story told by Siegel and Harris is also the story of contract law.

Class hierarchy is intimately connected to contract law by virtue of the fact that pre-existing and unequal distributions of property (land, capital, resources, etc.) are taken as a given and never questioned, as if such unequal distributions are natural, apolitical rights that are sorted out by individuals competing in a free market. In reality, property rights are state conferred rights that are literally premised on racial and gender subordination. Recall that property ownership was originally limited to white men. Consequently, the state did not distribute property rights equally from the very beginning. This unequal distribution is thus perpetuated and exacerbated over time because one’s property rights determine one’s bargaining power in the market, and hence what and how much one will ultimately be able to acquire.<sup>36</sup>

And, like the collective story of gender and race hierarchy Siegel and Harris detail, contract law also evolved (and continues to evolve) in such a way as to reflect and maintain class hierarchy. The only things that change during the evolution of contract law are the rhetoric and legal doctrines used to legitimate the hierarchical regime.

Contract law rhetoric went from the bucolic images of the nineteenth century’s arm’s length, face-to-face transaction to trade a horse, for example, to Llewellyn’s savvy merchant seller or buyer who was wise to the ways of the twentieth century market. These changes in contract law rhetoric were

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<sup>29</sup> C.I. Harris, ‘Whiteness as Property’ 1726 (quoting L.S. Underkuffler, ‘On Property: An Essay’ (1990) 100 *Yale Law Journal* 127, 128–29).

<sup>30</sup> C.I. Harris, ‘Whiteness as Property’ 1742 (quoting D. Roediger, *The Wages of Whiteness* (London, Verso Books, 1991) 13).

<sup>31</sup> R.B. Siegel, ‘The Rule of Love’ 2122–2170.

<sup>32</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>33</sup> *Plessy v. Ferguson*, 168 U.S. 537 (1896).

<sup>34</sup> C.I. Harris, ‘Whiteness as Property’ 1757.

<sup>35</sup> *Ibid.*

<sup>36</sup> See generally M.R. Cohen, ‘Property and Sovereignty’; R.L. Hale, ‘Coercion and Distribution.’

probably prompted by the dramatic social and economic transformation of American society, including, but certainly not limited to, the increasingly greater concentration of capital among a smaller number of companies vis-à-vis the rights of workers who attempted to organise “in response to their collective dependence on these emerging monopolies... exploitation of the Third World, [and] advancing technology.”<sup>37</sup>

The classical rules of contract law simply did not reflect the power disparities that were part and parcel of everyday life. Legal doctrine thus shifted from the static offer-acceptance-consideration construct of the nineteenth century to Llewellyn’s transaction-oriented agreement-in-fact construct, which was cabined by good faith and unconscionability to help ensure its fairness in operation. This change in formation structure did (and does) produce some positive individual results, but not that often. Because the shift in contract doctrine did not produce a systemic remedy and the pre-existing and unequal distribution of property was not tampered with, let alone questioned by the new formation structure and doctrines, the existing class hierarchy with its attendant privileges and power was and is preserved.

The mechanism used in the contract law context to conceal the class hierarchy that contract law helps to maintain is the “free” market. In the ostensibly “free” market, the baseline from which everyone starts is never discussed but is nevertheless premised on pre-existing and unequal distributions of property. Despite the fact that people do not start from the same baseline, the assumption is that the free market will be the great equalizer. That is, everyone has the same chance to succeed because all it takes to succeed in a free market is individual merit. And because success is made an entirely individual endeavor under market mythology, so is failure. Consequently, if you have not succeeded in the market, something is wrong with you, not with the market in particular or society in general.

Notwithstanding the realities of the market, including the unequal baselines from which people start, the mystical but cherished belief is that, in the free market, anyone can acquire as much as anyone else and, hence, everyone can be equal. Of course, this belief is not true, given everyone’s vastly different starting positions; and it only makes sense “in a society [like ours] that defines individualism as the highest good, and the ‘market value’ of the individual as the just and true assessment.”<sup>38</sup>

Nevertheless, and as a result, everyone has a stake in maintaining the ideology of the free market as a way to separate me from you and “us” from “them.” In other words, acknowledging that the free market is a myth and that the normalized baseline is anything but equal threatens self- and group-identity, the very personal understanding that I am better than you and “we” are better than “them” *because I/we have done better than you/them in the market*. To acknowledge that the market is not free and the baseline is not equal would expose the class hierarchy present in American society and also force everyone to confront the very real possibility that, absent the unequal distribution of property, that is, if I/we started from the same place as you/them, I/we might be no better than you/them. Worse still, I/we could be worse off (*i.e.*, lower) than you/them in the hierarchy. Hence, the myth of the free market persists and provides a powerful tool that not only reinforces the classical liberal trope of individual merit but also masks the class hierarchy that exists in society at large and contract law’s role in helping to maintain it.

Thus, the story of contract law is very similar to the collective story told by Siegel and Harris. The law, including contract law, tends to evolve in ways that end up preserving and privileging established hierarchies, thereby perpetuating existing unequal distributions of material and social goods. Siegel calls this phenomenon “preservation through transformation.”<sup>39</sup> Preservation through transformation, therefore, gives concrete form to Audre Lorde’s haunting maxim: “the master’s tools will never dismantle the master’s house.”<sup>40</sup> At best, Lorde said, “they may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.”<sup>41</sup> And so it is with contract law as well.

## 2. Some Thoughts on Law, Social Structures, and Agency

That law serves power seems to be a provable phenomenon. In and of itself, this is an important insight, particularly in the context of contract law where such things are not comfortably discussed. But

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<sup>37</sup> P. Gabel, J. Feinman, ‘Contract Law as Ideology’, in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* 3<sup>rd</sup> edn 504 (New York, Basic Books, 1998).

<sup>38</sup> C.I. Harris, ‘Whiteness as Property’ 1778.

<sup>39</sup> R.B. Siegel, ‘The Rule of Love’ 2119-20, 2184.

<sup>40</sup> A. Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 110, 112 (Berkeley, Crossing Press, 2007) (emphasis omitted).

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

two interesting questions lurk in the background of this preservation through transformation analysis. Specifically, *why* does this phenomenon happen at all, let alone happen so consistently over time and across disciplines? And what explains Karl Llewellyn's role in all of this, given that his own convictions and commitments suggest that he would not have consciously tried to increase the coercion present in contract law?<sup>42</sup> This essay will sketch out brief answers to these questions.

According to French social philosopher Pierre Bourdieu, conflict and competition define social life. At stake in this contest is the power to determine what will be deemed legitimate in the social world, where legitimacy means deciding who and what has value *and* the amount of that value. Systems of classification are thus produced that not only make up and order the social world, but also constitute and order the people within it.<sup>43</sup>

The competition and struggle to define legitimacy take place in social structures called fields. Fields are sites of contestation with boundaries that extend only so far as the capital at stake within each field is given effect. Capital is broadly defined to mean "all forms of power,"<sup>44</sup> and therefore includes *any and all* resources that "become objects of struggle as valued resources."<sup>45</sup> Typical kinds of capital include: economic (money and property), cultural (which "covers a wide variety of resources, such as verbal facility, general cultural awareness, aesthetic preferences, scientific knowledge, and educational credentials"),<sup>46</sup> social (acquaintances, networks, family), and symbolic ("capital in any of its [other] forms insofar as it is accorded positive recognition, esteem, or honor by relevant actors within the field").<sup>47</sup> The values and types of capital at stake differ from field to field.

Regardless of the field, however, a cardinal principle applicable to every field is that each actor has to buy into that field. Specifically, in order to participate in a given field, each actor tacitly agrees to the rules of the game, including the value given to the capital at stake in that field. This "buy-in" is made possible because each actor who participates in a field shares unquestioned opinions and perceptions about the social world that are mediated by the relatively autonomous fields in which she or he participates. These taken-for-granted assumptions or orthodoxies not only determine what constitutes "natural" practice within a field, they also condition and inform each actor's internalized sense of limits and aspirations. In short, these internalized self-evident and unquestioned but tacitly accepted rules of the game in each field determine to a large extent what can and cannot be done within that field and by whom. Equally as important, and specifically because of these self-evident beliefs, the social world as represented in each field is perceived to be completely natural and not arbitrary. Consequently, actors within the field often perceive it to be in their best interest "to act in ways that end up both lending credence to, and reproducing,"<sup>48</sup> the practices within that field.<sup>49</sup>

Furthermore, all action taken by actors within a field is "interested." In capitalist societies, *interest* is generally associated with material forms of accumulation. The pursuit of economic capital would be the primary example. But according to Bourdieu, "interest" is much more broadly defined to include "all... goods, material as [well as] symbolic, without distinction, that present themselves as *rare* and worthy of being sought after."<sup>50</sup> That said, Bourdieu also takes the position that "practice never ceases to conform to economic calculation, even when it gives every appearance of disinterestedness by departing from the logic of interested calculation... and playing for stakes that are non-material and not easily quantified."<sup>51</sup> To say that all action is interested, therefore, means that every action an actor takes within a field is designed to maximize his or her economic and symbolic profit. Significantly, and specifically because "the game" taking place within each field is always competitive, actors strive to maintain or improve their field position.

While there are many different types of capital, economic capital is the most efficient and powerful. Consequently, economic capital, particularly in capitalist societies, is the most coveted. But

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<sup>42</sup> See, e.g. Z.B. Wiseman, "The Limits of Vision: Karl Llewellyn and the Merchant Rules," 1987 100 Harv. L. Rev. 465, 492.

<sup>43</sup> P. Bourdieu, *Outline of a Theory of Practice* 169, 170, 174 (Cambridge, Cambridge University Press, 1977); P. Thomson, 'Field,' in M. Grenfell (ed.) *Pierre Bourdieu: Key Concepts* 67, 69 (Durham, Acumen Publishing, 2008).

<sup>44</sup> Ibid. 118-20, D. Swartz, *Culture and Power The Sociology of Pierre Bourdieu* 73 (Chicago, University of Chicago Press, 1997).

<sup>45</sup> D. Swartz, *Culture and Power* 73-74.

<sup>46</sup> Ibid. 43.

<sup>47</sup> M. Emirbayer and V. Johnson, 'Bourdieu and Organizational Analysis' (2008) 37 *Theory and Society* 1, (emphasis omitted).

<sup>48</sup> D. Schubert, 'Suffering/Symbolic Violence' in M Grenfell (ed.) *Pierre Bourdieu: Key Concepts* 183, 185 (Durham, Acumen Publishing, 2008).

<sup>49</sup> P. Bourdieu, L. Wacquant, *An Invitation to Reflexive Sociology* 98-99 (Chicago, University of Chicago Press, 1992); P. Bourdieu, *Outline of a Theory of Practice* 159-71.

<sup>50</sup> P. Bourdieu, *Outline of a Theory of Practice* 178.

<sup>51</sup> Ibid. 177.

economic capital is not distributed equally, since it is a product of accumulation and inheritance. This unequal distribution of economic capital results in the unequal accumulation of other types of capital, as economic capital can and is easily convertible. For example, economic capital enables an actor to obtain cultural capital in the form of educational credentials. Formal education also results in the establishment of acquaintances and networks, which is social capital. Agents, therefore, do not enter fields with the same kinds or amounts of capital.<sup>52</sup>

Because of this unequal accumulation of capital, there are two poles within each field – the dominant and dominated poles. Dominant actors are therefore the actors (*i.e.*, individuals, groups, institutions, entities, corporations) with the most capital of the right type(s) as defined by the field. Conversely, dominated actors are the people and entities with the least amount of the right type of capital.<sup>53</sup>

But to reiterate, economic capital is the most powerful and determinant, and as a result, it must be symbolically mediated, meaning it must be disguised. It must be disguised because leaving the reproduction and accumulation of economic capital undisguised “would reveal the arbitrary character of the distribution of power and wealth” in society.<sup>54</sup> Hence, the reproduction of domination in modern capitalist and highly differentiated societies is largely left to symbolism.

Critical to Bourdieu’s theory of reproduction, therefore, is the idea that interest (discussed above) is often misrecognized; that is, *none* of the actors in the field recognize it as an action designed to maximize profit.<sup>55</sup> This suggests that even though action is always interested, the actor undertaking the action may not be consciously aware that his action is interested. For example, a person may want to become a scientist for the seemingly altruistic purpose of finding a cure for AIDS. Becoming a scientist requires certain educational credentials. Obtaining the educational credentials enables the actor to accumulate social capital (*i.e.*, networks formed with classmates and colleagues in various post-doctoral positions). And given that scientists are held in high esteem in society, the actor also accumulates symbolic capital. All of this symbolic profit (social and symbolic capital, together with any economic capital associated with being a scientist) would result, even unknowingly, in either a more secure or an improved field position (depending on the actor’s original field position) for the newly minted scientist, his altruistic desire to cure AIDS notwithstanding.

Significantly and as a result of misrecognition, the actor whose interested action is misrecognized is able to accumulate symbolic capital, which to Bourdieu “is perhaps *the most valuable form of accumulation* in society.”<sup>56</sup> Symbolic capital, defined as “capital in any of its [other] forms insofar as it is accorded positive recognition, esteem, or honor by relevant actors within the field,”<sup>57</sup> is simply a “*disguised* form of physical ‘economic’ capital.”<sup>58</sup> As such, it plays a pivotal role in Bourdieu’s theory of reproduction not only because it conceals its own economic origins, but also because all practice in the social world conforms to economic calculation, even when it appears disinterested. Because accumulation of symbolic capital creates a certain distance (*i.e.*, time and resources) from necessity (the need to satisfy basic biological requirements like food, shelter, etc.), actors within the dominant group are most likely the ones who will be able to accumulate symbolic capital.

Symbolic capital thus enables the misrecognized but nevertheless interested actions of the dominant actor to be legitimated, which means that the misrecognized act or the thing produced by that action is given value by all the actors in the field. One consequence of this process is that the dominant actor has now acquired even more capital. More capital, of course, translates into a better or at least a more secure field position within the dominant group. So, this portion of the hierarchy is maintained.

Another important consequence of misrecognition, however, is that because the dominant actor’s misrecognized action now has value, meaning that it is now symbolic capital, it is something to be sought, emulated, or adopted by the other actors within the field. And in seeking to acquire, adopt, or emulate this symbolic capital, the dominated actor essentially reproduces the hierarchy (dominant/dominated) that already exists in the field. The hierarchy is reproduced by virtue of the fact that the dominated have implicitly (unconsciously) ceded to the dominant actor (or group) the power to determine what is legitimate in the social world. An example will help illustrate this point.

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<sup>52</sup> P. Bourdieu, *Outline of a Theory of Practice* 195; Swartz, *Culture and Power* 79.

<sup>53</sup> M. Emirbayer, V. Johnson, ‘Bourdieu and Organizational Analysis’ 6.

<sup>54</sup> M. Postone, E. LiPuma and C. Calhoun, ‘Introduction: Bourdieu and Social Theory,’ in C. Calhoun, E. LiPuma and M. Postone (eds), *Bourdieu: Critical Perspectives* 1, 5 (Chicago, University of Chicago Press, 1993).

<sup>55</sup> D. Swartz, *Culture and Power* 89; R. Moore, ‘Capital,’ in M. Grenfell (ed), *Pierre Bourdieu Key Concepts*, 104 (Durham, Acumen Publishing, 2008).

<sup>56</sup> P. Bourdieu, *Outline of a Theory of Practice* 179, 183.

<sup>57</sup> M. Emirbayer, V. Johnson, ‘Bourdieu and Organizational Analysis’ 12.

<sup>58</sup> P. Bourdieu, *Outline of a Theory of Practice* 183.

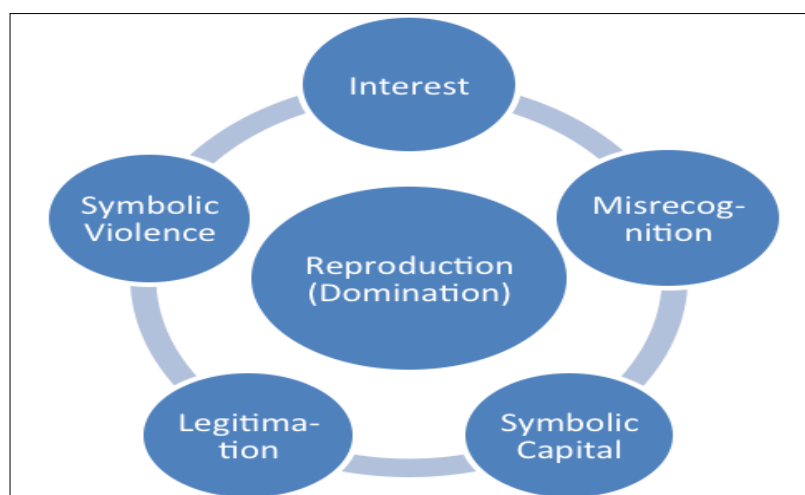


Harvard and Yale law schools account for nearly half of all professors in the legal academy.<sup>59</sup> The orthodoxy is that having a law degree of some kind (*i.e.*, J.D., LL.M., S.J.D.) from one of these two law schools will make getting a job as a law professor much easier. A law degree from one of these two schools, therefore, constitutes two types of capital: social (in the form of educational credentials) and *symbolic* because symbolic capital is simply capital in *any of its other forms* including social capital, that “is accorded positive recognition, esteem, or honor by relevant actors within the field.”<sup>60</sup> It is in its role as symbolic capital that the Harvard or Yale law degree enables the aspiring law professor to get her foot in the door in the legal academic field. Some people in this field will remain dominated because they simply lack the capital necessary (economic, social, cultural) to acquire a law degree from either Harvard or Yale. Other people, however, will be able to acquire such a degree. Perhaps not as intuitively, if these people acquired their Harvard or Yale law degree simply because of its value as symbolic capital, they, too, remain dominated. “Hierarchies and systems of domination are... reproduced to the extent that the dominant and the dominated perceive these systems to be legitimate, and thus think and act in their own best interests within the context of the system itself.”<sup>61</sup>

Significantly, the symbolic capital can be and often is converted into economic capital, which to reiterate, is the most powerful and determinant. In fact, this is one of the aspects of symbolic capital that makes it so important in Bourdieu’s theory of reproduction. In the example above, the Yale or Harvard law degree (the symbolic capital) may very well be the ticket that enables an actor to obtain the relatively high paying job (*vis-à-vis* other professors in the academy) as a law professor. More economic capital plus the symbolic capital associated with being a law professor translates into either a more secure or improved field position, and, as a direct result, the professor’s voice is given more weight in determining the legitimacy of the social world specifically because of her position.

Together, interest, misrecognition, symbolic capital, and legitimation create what Bourdieu calls “symbolic violence.” Symbolic violence, which Bourdieu understands “as the capacity to impose the means for comprehending and adapting to the social world by representing economic and political power in disguised, taken-for-granted forms,”<sup>62</sup> results when actors *misrecognize as natural* the hierarchies and systems of domination produced through the struggle within fields to determine legitimacy, and agree to play by the rules of the game as laid out for them. Symbolic violence is an effective and efficient form of domination because the dominant group and the various actors within it “have only to *let the system they dominate take its own course* in order to exercise their domination.”<sup>63</sup> Schematically, Bourdieu’s theory of domination might look something like this:

Figure 1



Symbolic violence thus replaces physical coercion as the means by which the dominant continue to dominate. And the dominated become complicit in their own domination, because collective

<sup>59</sup> B.R. Leiter, *Where Current Law Faculty Went to Law School*, (Mar. 17, 2009) [www.leiterrankings.com/jobs/2009job\\_teaching.shtml](http://www.leiterrankings.com/jobs/2009job_teaching.shtml).

<sup>60</sup> M. Emirbayer, V. Johnson, ‘Bourdieu and Organizational Analysis’ 12.

<sup>61</sup> D. Schubert, ‘Suffering/Symbolic Violence’ in M Grenfell (ed) *Pierre Bourdieu: Key Concepts* 183, 184 (Durham, Acumen Publishing, 2008).

<sup>62</sup> D. Swartz, *Culture and Power* 89.

<sup>63</sup> P. Bourdieu, *Outline of a Theory of Practice* 190.

misrecognition, which is essentially a “collective denial of the economic reality of exchange,”<sup>64</sup> “is only possible... when the group lies to itself in this way” and everyone believes those lies.<sup>65</sup>

Change within a field, such as changing established values or assessments of capital, is certainly possible. Crises (like the Cold War) and the development of new technologies (like the digital and biotechnology revolutions) can force changes in a field. Change is also possible, however, because of the way fields are constructed. Since fields are sites of perpetual struggle, there will never be an ultimate winner because the “game” that is the struggle taking place in a given field will be unending. This means that changing demographics may lead to changes in individual strategies within a field, which, in turn, could also change values within a given field.<sup>66</sup>

In the specific context of the field of law, which Bourdieu calls the “juridical field,” the struggle is over the right to determine the law and for control of access to legal resources. The dominant actors in this field are the lawyers and judges (still mostly white men) because they possess the right kinds of capital – namely, cultural *and symbolic* (in the form of educational credentials, training, and knowledge of legal processes and texts), social (networks), and economic.

With exceptions, the dominated actors are clients because they lack the right kinds of capital, particularly cultural capital. The exception is clients who have a lot of economic capital. In this circumstance, the client is the dominant actor, and the lawyer is dominated. The reason for this role reversal is because economic capital is the most powerful kind of capital in every field. Hence, it is not hard to imagine that there are numerous subfields within the legal field where the client is the dominant actor. The exception may therefore be bigger than the rule. But in the subfield of law dealing with identity politics, specifically, claims based on race, gender, class, etc., chances are the client will not be a powerful economic actor and will therefore be the dominated actor.

All of the actors within the field tacitly accept “the field’s fundamental law... which requires that, within the field, conflicts can only be resolved *juridically* – that is, according to the rules and conventions of the field itself.”<sup>67</sup> Actors thus assume without question, and therefore misrecognize, that the law is neutral, apolitical, and objective. They also mistakenly believe that conflicts between people can be converted into clearly defined legal claims that can then be decided by independent and objective third-party professional proxies (specifically by the parties’ lawyers and the judge) who know and understand the law because of their education and training, and hence can properly and correctly resolve the disputes to achieve justice under the law. Actors also agree to accept “the rules of legislation, regulation, and judicial precedent by which legal decisions are ostensibly structured”<sup>68</sup> as part of the rules of the game. As a result, case outcomes or “solutions are accepted as impartial because they have been defined according to the formal and logically coherent rules of a doctrine perceived as independent of the immediate antagonisms.”<sup>69</sup>

Because the objectivity, neutrality, and universality of the law and its processes are taken for granted and assumed, all the actors misrecognize that the legal field is actually set up to serve the dominant group’s interests. For instance, actors in the dominant group share a closeness of interest resulting from their similar holdings of social (family) and cultural (educational backgrounds) capital. This identity of background and interest fosters similar dispositions (what Bourdieu calls *habitus*) and kindred world-views. As a result, “the choices which those in the legal realm must constantly make between differing or antagonistic interests, values, and world-views are unlikely to disadvantage the dominant forces.”<sup>70</sup>

The problem, of course, is that the field of law also adheres to precedent. This adherence to precedent ties the present to the past and “guarantee[s] that... the future will resemble what has gone before, that necessary transformations and adaptations will be conceived and expressed in a language that conforms to the past.”<sup>71</sup> The language and the world views expressed in legal precedents protect and continue to protect the dominant group’s interests. Hence, despite the changes wrought in the law based on evolving demographics and the identity politics surrounding race, gender, and class, the law going forward was and is unlikely to upset the hierarchy by disadvantaging the dominant group’s interests.

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<sup>64</sup> Ibid. 196.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid. 169; P. Thompson, ‘Field’ 79.

<sup>67</sup> R. Terdiman, ‘Translator’s Introduction, to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805, 831.

<sup>68</sup> Ibid. 807.

<sup>69</sup> Ibid. 830.

<sup>70</sup> Ibid. 842.

<sup>71</sup> Ibid. 845.

This is obviously an overly simplified explanation of the intricacies of how the legal field works. But it should suffice to make the basic point that symbolic violence is perpetrated on all the actors in the field of law because the actors – clients, lawyers, judges – end up *misrecognizing as natural* the hierarchies and systems of domination produced within that field and agree to play by the rules of the game as laid out for them. And because they tacitly agree to play by rules of the game, the arbitrariness present in the taken-for-granted and self-evident assumptions in the field of law remain concealed. As a result, the hierarchies (men over women, rich men over poor men, and white men over Black men) get reproduced consistently, over time and across disciplines.

As for Llewellyn, his capital holdings (economic, cultural, social, and symbolic) would have ensconced him firmly within the dominant group in the legal field.<sup>72</sup> He therefore would have possessed, consciously *and subconsciously*, similar predispositions and world-views with other members of the dominant group. And because Llewellyn was also an actor in the legal field, he, too, would have internalized the rules of the game and tacitly agreed to play by them. All of these things – his position as a dominant actor, his predisposition and worldview, and the orthodoxies of the field – make certain things, such as disturbing the status quo, difficult, if not unthinkable. Hence, none of the changes Llewellyn implemented disturbed the status quo.

It therefore seems fairly safe to say that elites, like Llewellyn, do not necessarily conspire to maintain their dominant position in society. Instead, Llewellyn, his predecessors in the legal field, and his contemporaries, were probably acting in good faith. But even if true, good faith does not absolve Llewellyn – or any of us, for that matter – for our roles in perpetuating the reproduction of hierarchies and domination or the inequality that is part and parcel of them. It goes without saying, however, that while we may all be complicit, we do not all share equally in the adverse consequences that result from this collective complicity.

#### E. CONCLUSION – USING THE MASTER’S TOOLS

One thing is clear from the foregoing discussion. Audre Lorde is correct: We cannot dismantle the master’s house using the master’s tools because *all* tools are the master’s tools, and as a result, they all end up serving the master.

Audre Lorde may be correct, but if all tools are the master’s tools, what is left to work with? The social world (reality) with its hierarchies, its domination, and its ever-present adverse material consequences, remains and must be confronted. Law is one of the master’s tools, one that has proven to be a double-edged sword. It both changes and reifies. But if the only choice is to use one of the master’s tools or no tool at all, it seems clear that the tool must be used.

The final question, then, is to decide how best to move forward. An important ongoing step is to be continually aware of the arbitrary ways in which the social world is constructed and to expose that arbitrariness. Public exposure may destroy the legitimacy of embedded interests, or at least help in that endeavor, thereby creating the space to first consider other possibilities and then, ultimately, to alter existing social arrangements. This is not a new approach. The Critics (including the Legal Realists, Feminists, Critical Race Theorists, Critical Legal Studies, and Queer Legal Theorists) have been doing this for a very long time, which is not surprising, given the way domination is reproduced in society. Notwithstanding the daunting nature of this task, it must continue. To gain traction, however, this effort cannot be carried out individually. It must be a collective effort, organized by and around race, gender, class, sexual orientation, etc., and in which strategies of action by actors in one field are shared with similarly situated actors in other fields. At stake in this struggle, of course, is the power to determine what will be deemed legitimate in the social world. As such, this is a struggle worth undertaking.

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<sup>72</sup> See generally W. Twining, *Karl Llewellyn* 87-113.

## FELIX COHEN ON LEGISLATION

Michael S. Green\*

### Abstract

Felix Cohen's and Walter Wheeler Cook's prediction theory of law was a fundamentally positivist theory, according to which the law of a jurisdiction is reducible to regularities of official behavior. Cohen used the prediction theory to argue for philosophical anarchism – that is, the view that the existence of law does not entail a duty, even a *prima facie* duty, of obedience. In particular, Cohen extended philosophical anarchism to adjudication. The fact that officials in a jurisdiction regularly behave in a certain way does not give a judge adjudicating a case a moral reason to do the same. In deciding whether she should follow the law, a judge must always engage in particularized moral deliberation. Philosophical anarchism is a normative position concerning adjudication. But it also suggests a descriptive position. Cohen argued that the law often fails to have a causal effect on adjudication, not because it is rationally indeterminate (in the sense of failing to recommend a unique decision) but because judges resist the law on moral – or perceived moral – grounds. As a result, Cohen argued that legislation cannot be assessed solely on the basis of its expressed content. Any evaluation of legislation must consider law resistance, not merely by those subject to the law's commands, but also by those officials tasked with administering the law.

**Keywords:** Felix Cohen, Walter Wheeler Cook, legal realism, legislation, prediction theory of law, philosophical anarchism

### A. LEITER AND THE “RECEIVED VIEW” OF LEGAL REALISM

The American legal realists tended to focus on how judges respond to and produce law through adjudication. Teasing out their views about legislation is a difficult matter, which is why this special issue devoted to the topic is so welcome. In this essay, I will consider Felix Cohen's views on legislation. (I will have a bit to say about Walter Wheeler Cook as well, but my primary emphasis will be Cohen.) In exploring Cohen's views, I will rely upon the reading of the realists that I have presented in other writings.<sup>1</sup> I'll begin, therefore, with an account of this reading, by contrasting it both with what Brian Leiter calls the “Received View” of the movement and with Leiter's alternative.

For Leiter, the “Core Claim” of legal realism is that judges respond “primarily to the stimulus of facts” and to “non-legal reasons” – such as fairness to the parties – rather than to the applicable rules of law.<sup>2</sup> The realists accepted the Core Claim because they thought the law is rationally indeterminate, that is, that it is insufficient “to *justify* only one outcome.”<sup>3</sup> Judges must look outside the law because it fails to provide them with sufficient guidance.

Although the Received View of the movement accepts the Core Claim, Leiter objects to the way that it formulates the Claim. According to the Received View:

Legal Realism is fundamentally: (1) a *descriptive theory* about the nature of judicial decisions, according to which, (2) judges exercise *unfettered discretion*, in order (3) to reach results based on their *personal* tastes and values, which (4) they then *rationalize* after-the-fact with appropriate legal rules and reasons.<sup>4</sup>

The problem, as Leiter sees it, is in theses (2) and (3). Thesis (2) is mistaken because the realists did not think that judges' discretion is unfettered, in the sense of being completely unconstrained by legal rules. The law is not globally indeterminate, that is, indeterminate in all cases. Indeterminacy is

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<sup>1</sup> M.S. Green, ‘Leiter on the Legal Realists’ (2011) 30 *Law & Philosophy* 381; M.S. Green, ‘Legal Realism as Theory of Law’ (2005) 46 *William and Mary Law Review* 1915.

<sup>2</sup> B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford, Oxford University Press 2007) 21, 24.

<sup>3</sup> *Ibid.* 9.

<sup>4</sup> *Ibid.* 16.

local – primarily only in cases that make it to “the stage of appellate review.”<sup>5</sup> Furthermore, even in appellate cases, a judge’s options are restricted to some extent by the applicable legal rules. Leiter argues that thesis (3) is also mistaken because – Jerome Frank and Joseph Hutcheson excepted – the realists did not think that judges’ decisions are based upon personal tastes and values.<sup>6</sup> Judges’ decisions are not idiosyncratic. Instead, judges respond predictably to cases on the basis of shared views about the relevant non-legal considerations.

Another important difference between Leiter’s reading of the realists and past readings concerns the prediction theory of law, which Leiter describes as an “account of the concept of law according to which, ‘The law is just a prediction of what a court will do’ or ‘The law is just whatever a court says it is on the present occasion.’”<sup>7</sup> Past interpreters have generally attributed a prediction theory to the realists, although it is usually added that the theory is implausible or incoherent.<sup>8</sup> Leiter argues that the realists could not have been committed to the theory, because it is incompatible with their claims about legal indeterminacy. The realists claimed that the law – including statutes and past judicial decisions – is rationally indeterminate. They therefore must have been committed to the view that statutes and past judicial decisions – not merely the decision the court will make in the immediate case – are the law.<sup>9</sup> Leiter argues that what appears to be the expression of the prediction theory in the realists’ writings “is not a claim about the ‘concept’ of law, but rather a claim about how it is *useful* to think about law for attorneys who must advise clients what to do.”<sup>10</sup>

Concerning the realists’ views about legal indeterminacy, my reading largely overlaps with Leiter’s. I agree with him, for example, that theses (2) and (3) of the Received View are mistaken. The realists’ indeterminacy thesis was not global (even if it was not precisely limited to cases that make it to appeal). The realists recognized that the law sometimes recommends a unique decision to a judge, given the facts of the case. Furthermore, they generally did not think that in those cases in which the law is indeterminate, judicial decisions are based on personal values. They thought judges predictably adjudicate upon the basis of shared views concerning non-legal considerations.<sup>11</sup>

The heart of my disagreement with Leiter has to do with the prediction theory of law (or rather prediction theories, for – as we shall see – at least two prediction theories can be identified in the realists’ works). There is overwhelming evidence that, by speaking of the law in terms of judicial decisions and predictions of decisions, the realists were concerned with more than how it is useful for lawyers to think about the law when advising their clients.<sup>12</sup> The realists claimed that the prediction theory applies to a judge adjudicating a case just as much as it does to lawyers advising their clients.<sup>13</sup> By offering the theory, they hoped to reveal something important and essential about the nature of law. It is not surprising, therefore, that Leiter is virtually alone in claiming that the realists were not committed to a prediction theory of law.

To be sure, Leiter is correct that the realists must have relied on a conventional theory of law, in which statutes and precedent can be law, when making their claims about legal indeterminacy. But that is not enough to show that they didn’t offer a prediction theory. First – as we shall see – the prediction theory might be compatible with the view that statutes and precedent are law. Second, even if the prediction theory is incompatible with the usual view about the scope of the law, the realists might have offered the theory as useful reformation of the concept of law. The realists clearly recognized that there was a conventional concept of law – which they called “law in books”, “formal law”, “Bealish Law” (after Joseph H. Beale), and “paper rules” – in the light of which statutes and precedent were law.<sup>14</sup> The fact that their claims about legal indeterminacy were made in reference to this conventional concept does not mean that they didn’t think that the prediction theory (or “law in action”<sup>15</sup>) was a superior alternative.

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<sup>5</sup> Ibid. 77.

<sup>6</sup> Ibid. 16, 25, 28.

<sup>7</sup> Ibid. 69.

<sup>8</sup> H.L.A. Hart, *The Concept of Law* (2nd edn., Oxford, Oxford University Press, 1994) 124-54; J.G. Murphy and J.L. Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* (Boulder, Westview Press 1990) 34.

<sup>9</sup> B. Leiter, *Naturalizing Jurisprudence*, *supra* n. 2, 72-73.

<sup>10</sup> Ibid. 71

<sup>11</sup> M.S. Green, ‘Leiter’, 384-89.

<sup>12</sup> Ibid. 403-16.

<sup>13</sup> Ibid. 405-06, 410.

<sup>14</sup> F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Westport, Greenwood Press 1976, originally published 1933) 237; J. Frank, ‘What Courts Do in Fact: Part One’ (1931) 26 *Illinois Law Review* 645, 648; J. Frank, *Law and the Modern Mind* (Garden City, Anchor Books 1963, originally published 1930) 59; K. Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ (1930) 30 *Columbia Law Review* 431, 448.

<sup>15</sup> F.S. Cohen, *Ethical Systems*, *supra* n. 14, 237.

The question therefore is not whether the realists held the prediction theory, but why – something past readings of the realists have not adequately explained. In addressing this matter, it is useful to draw a distinction between two forms that the theory took in the realists' writings.

## B. THE DECISION THEORY OF LAW

The first is a decision theory of law, in which the law concerning an event is whatever concrete judgment a court will issue when the event is litigated. This theory, which is most evident in the writings of Jerome Frank, is indeed incompatible with the view that statutes and precedent are law. Although the decision theory was not advocated by Felix Cohen (or Walter Wheeler Cook), it is helpful to outline briefly the possible reasons some realists held the theory.

One is legal indeterminacy. To the extent that the relevant legal rules – that is, statutes, precedent, and the like – are indeterminate, a judge adjudicating a case must make law to fill in the gaps. If the realists believed in global legal indeterminacy, they might be inclined to say that the law consists of the concrete decisions of courts. Imagine that the relevant legal rules never give judges any guidance about how a case should be resolved. If so, there would be some sense in the claim that the law really consists of how a judge would decide the case, since it is only through such a decision that the parties could have any concrete guidance about their legal obligations.

But it is unlikely that legal indeterminacy was the primary motivation for the realists' decision theory. The reason is that, as Leiter emphasizes, the realists did not believe that legal indeterminacy is global. Indeed if they did, their decision theory would collapse. We can identify courts only on the basis of preexisting legal rules. These rules must be able to provide meaningful direction or we would never be able to identify the judicial decisions to which the decision theory purports to reduce the law.

Furthermore, even if the realists did believe that global indeterminacy was true of the American legal system, the resulting decision theory would not be a genuine theory of law – that is, an account of what is essential to law. Unless global legal indeterminacy is necessarily true, the theory would not be true of every possible legal system.

An alternative explanation of the realists' advocacy of the decision theory – one offered by H.L.A. Hart – ties the theory to the phenomenon of judicial supremacy. Assume that the law is completely determinate. The fact remains that if a judge misapplies the law, her judgment is generally considered binding upon the parties, unless overturned on appeal.<sup>16</sup> This power to issue binding judgments in defiance of the applicable legal rules is commonly known as *weak* judicial supremacy. In addition, in the American legal system the highest court of appeals also generally has *strong* supremacy, in the sense that its misinterpretations of the law are considered binding upon officials in similar cases in the future. Officials are bound to replace the language of the legal rule with the court's misinterpretation.

These two forms of judicial supremacy give judges a type of freedom of decision that is unrelated to legal indeterminacy. To be sure, the freedom is not unlimited. A judge's misapplication of the law might be so profound (she, for example, might read the Due Process Clause of the United States Constitution as demanding that her salary be increased by \$1 million a year) that weak judicial supremacy would not apply. Her judgment could permissibly be ignored by officials even if it had not been overturned on appeal. There are, one might say, misapplications of the law that undermine the status of the court's decision as a judgment at all.<sup>17</sup> By the same token, a highest court of appeals' misinterpretation of the law might be so extreme that strong judicial supremacy would not apply. American officials would be legally permitted (or required) to ignore the misinterpretation in future cases. Nevertheless, the simple fact that a judge misapplied or misinterpreted a determinate legal rule is not on its own sufficient for officials to deny the judge's decision legal effect.

Given the existence of judicial supremacy, there is again some sense in saying that the law consists of how a judge will decide a particular case. And it is clear, particularly in Jerome Frank's writings, that judicial supremacy sometimes motivated the realists to present a decision theory.<sup>18</sup>

But there are problems with this version of the decision theory as well. Once again, it is not a genuine theory of law, for a legal system need not recognize judicial supremacy and – as we have seen – even in those systems with judicial supremacy, there are limits on the extent to which officials will give deference to judicial decisions that misapply or misinterpret the law. Second, the decision theory

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<sup>16</sup> E.g. Th.W. Merrill, 'Judicial Opinions as Binding Law and as Explanations for Judgments' (1993) 15 *Cardozo Law Review* 43, 46.

<sup>17</sup> M.S. Green, 'Legal Revolutions: Six Mistakes about Discontinuity in the Legal Order' (2005) 83 *North Carolina Law Review* 331, 393-94.

<sup>18</sup> M.S. Green, 'Leiter', 389-91, 403-05; M.S. Green, 'Theory', 1987-93.

cannot apply to those fundamental legal rules that identify courts and their decisions. Although it is possible for a court to use its supremacy to increase (or decrease) its jurisdiction by misinterpreting existing legal rules on the matter, for judicial supremacy to function, nonjudicial officials must engage in the threshold application of legal rules to identify courts and their jurisdiction. Concerning this threshold application, judicial supremacy cannot coherently apply.

Furthermore, even in those areas where weak judicial supremacy applies, the fact that a court's judgment is legally binding upon other officials does not necessarily mean that it establishes the law. As H.L.A. Hart argued, participants in a legal system can understand the court's judgment as binding despite being legally in error. If so, the judgment would not change the prevailing legal rules, even concerning the event in connection with which the judgment was issued.<sup>19</sup> The same point is true about strong judicial supremacy. It is possible for the participants in the legal system to draw a distinction between the law and the court's binding interpretation of the law. The court's opinion can be understood as binding upon officials going forward despite being legally in error.

### C. THE PREDICTION THEORY OF LAW

So much for the decision theory. But there was a very different theory of law offered by the realists – which we can call the prediction theory – that did not depend upon legal indeterminacy or judicial supremacy. Consider the following statements made by Walter Wheeler Cook:

[W]e must as always guard ourselves against thinking of our assertion that “rights” and other legal relations “exist” or have been “enforced” as more than a conventional way of describing past and predicting future behavior of human beings – judges and other officials.<sup>20</sup>

[A] statement, for example, that a certain “rule of law” is the “law of England” is ... merely a more or less convenient shorthand way of saying that, on the basis of certain observations of past phenomena, we predict certain future behavior of the appropriate English officials.<sup>21</sup>

Cook used the prediction theory to criticize the prevailing view about a court's legal duty to apply the law of a foreign jurisdiction. According to the vested rights or “obligatio” theory, if a jurisdiction enacts a law concerning activities in its territory, a violation of the law gives the wronged party a vested right to the application of the jurisdiction's law, which foreign courts taking the case are legally obligated to respect.<sup>22</sup> This obligation transcends social facts in the forum, in the sense that the forum court is legally obligated to respect the foreign right no matter what forum officials say or do.

Cook used the prediction theory to critique this notion of vested rights. A right legally binding upon the forum, he argued, must be tied to social facts about forum officials. This means that there are as many legal rights concerning an event as there are jurisdictions willing to adjudicate in favor of the plaintiff, even when the event being litigated has no connection with the forum. There are no necessary limits on the territorial scope of a jurisdiction's law:

Shall we, must we, say that there are as many ‘rights’, all growing out of the one group of facts under consideration, as there are jurisdictions which will give the plaintiff relief? Since such an assertion is merely a shorthand way of making the prophecy that the appropriate persons, the officials, in each of these jurisdictions would react to the situation, if it were presented to them, so as to ‘give relief’ to the plaintiff, there seems to be no other statement to make. Thus interpreted, the statement is not only not startling but plain common sense.<sup>23</sup>

Notice that there is nothing in Cook's argument that depends upon legal indeterminacy or judicial supremacy. Rather, Cook offers the prediction theory of law as a fundamentally positivist account of the law – that is, an account in terms of social facts in a jurisdiction. The problem with vested rights theory according to Cook is that it assumed the existence of legal rules (in particular, rules limiting the territorial scope of a jurisdiction's law) that did not depend upon such social facts.

Notice as well that Cook's prediction theory is not the same as the decision theory. Under the decision theory, the law concerning an event is how the court that gets the case will in fact adjudicate it. The prediction theory, in contrast, looks beyond a court's actual decision in two ways: it looks to the

<sup>19</sup> Hart, *The Concept of Law*, *op. cit.*, 141-46.

<sup>20</sup> W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge, Harvard University Press 1942) 33.

<sup>21</sup> *Ibid.* 29.

<sup>22</sup> *Ibid.* 34-39.

<sup>23</sup> *Ibid.* 33.

behavior of officials (not just judges) and to officials generally (not the behavior of any particular official). To the extent that the judge that gets a case diverges from officials in general, the judge has diverged from the law. Indeed, Cook even looks beyond the behavior of officials to the citizenry as a whole. It is not enough that officials predictably act in certain ways. The population as a whole must acquiesce in the officials' actions for law to exist.<sup>24</sup>

So understood, the prediction theory may not be incompatible with a conventional understanding of the law as including statutes and precedents. If statutes and precedents are predictably enforced by officials in a jurisdiction and the population as a whole generally abides by them, there is a sense in which they are law under the prediction theory.

To be sure, there are differences between the prediction theory and other positivist accounts of law. Consider H.L.A. Hart's theory of law, as presented in *The Concept of Law*. Hart insists that officials' attitudes, not merely behavior, are relevant to the existence of law. For a statute to be law, it is not enough that officials predictably enforce it and the population generally abides by it. Officials must take the "internal point of law" – that is, they must enforce the statute because it satisfies criteria that they have accepted as appropriately governing their actions.<sup>25</sup> Under the prediction theory, in contrast, it does not appear essential to law that officials adopt the internal point of view. They might, for example, all act as they do simply because of fear of reprisals for disobedience.

Second, under the prediction theory statements about the law are about social facts. For this reason, a statute, understood as a propositional entity or a norm, is not, strictly speaking, law. To say a statute is law is really an elliptical way of speaking about social facts concerning official behavior and popular acquiescence. For Hart, in contrast, officials' statements about the law of their own legal system do not describe but instead presuppose social facts about officials and the citizenry and are normative in the sense that they express the speaker's acceptance of the legal system.<sup>26</sup> Thus, under Hart's theory, when an official says that a statute is law, she is genuinely speaking of the statute as a norm. Indeed, Hart criticized legal realism because it treated legal statements solely as descriptions of social facts.<sup>27</sup>

There is another possible difference between the prediction theory and Hart's. Under Hart's theory, something can be law only if it satisfies the criteria to which officials actually appeal when justifying their actions, criteria that Hart calls the "rule of recognition" of the legal system.<sup>28</sup> A statute is law if it satisfies these official criteria, even if the statute is, as a matter of fact, ignored by judges when adjudicating cases. Conversely, something is not law, even if it is a regular determinant of courts' decisions, if it fails to satisfy the official criteria for law.

The prediction theory, on the other hand, might treat as relevant all and only those considerations that actually have systematic effects on courts' decisions (or other official action). Consider the obligation of good faith in contractual dealing, which Karl Llewellyn thought regularly motivated decisions in contract cases, even though it was not a reason explicitly identified as law.<sup>29</sup> Under Hart's theory the obligation would not be law. In contrast, some realists, applying the prediction theory, would call it law. These realists recognized, however, that in calling it law they were recommending that the concept of law be reformed, rather than identifying the scope of the concept as it is currently employed.<sup>30</sup>

#### D. THE PREDICTION THEORY AND PHILOSOPHICAL ANARCHISM

As we have seen, Cook introduced the prediction theory in the context of the conflict of laws. The existence of a foreign legal right simply means that an event will be treated in a certain way by foreign legal officials. Such social facts do not necessarily generate any legal restrictions on the forum. The legal rights of the parties as far as the forum is concerned is solely a question of social facts about the forum's legal officials.

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<sup>24</sup> Ibid. 30 n. 54 ("If, for example, a majority of the community were not in the habit of acquiescing in the acts of the officials, there would be not law but the absence of law.").

<sup>25</sup> See M.S. Green, 'Leiter', 414-15; M.S. Green, 'Theory', 1997-98.

<sup>26</sup> H.L.A. Hart, *The Concept of Law*, *op. cit.*, 102-03.

<sup>27</sup> Ibid. 104.

<sup>28</sup> Ibid. 94.

<sup>29</sup> B. Leiter, *Naturalizing Jurisprudence*, *supra* n. 2, 30.

<sup>30</sup> M.S. Green, 'Leiter', 406-07. Cohen's position on the matter is equivocal. See F.S. Cohen, *Ethical Systems*, *supra* n. 14, 236-38.



But the prediction theory also has implications for how a court treats domestic legal rights.<sup>31</sup> Under the prediction theory, the existence of a domestic legal right is simply a question of the behavior of domestic officials. For the judge adjudicating the case, it is merely a descriptive fact. Nothing about this fact tells the court how it ought to behave.

The realist who most emphasized this argument is Felix Cohen. Cohen argued that the law, as a set of social facts, does not give a court a moral reason to adjudicate one way rather than another. Even when the law is fully determinate, it cannot on its own tell a judge how to decide a case, for it does not answer the question of whether the judge should decide in accordance with the law:

Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment, which classical jurisprudence lumps under the same phrase. Such a distinction realistic jurisprudence offers with the double-barreled thesis: (1) that every legal rule or concept is simply a function of judicial decisions to which all questions of value are irrelevant, and (2) that the problem of the judge is not whether a legal rule or concept actually exists but whether it *ought* to exist. Clarity on two fronts is the result.<sup>32</sup>

The problem with past conceptions of the law, Cohen argued, is that they muddled the descriptive question of what the law is with the moral question of how a judge should adjudicate in the light of the law. Sometimes this undermined accurate description of the law: “If legislatures or courts disagree with a given theory, it is a simple matter to show that this disagreement is unjust, unreasonable, monstrous and, therefore, not ‘sound law’.”<sup>33</sup> But past conceptions of the law also undermined the moral evaluation of the law. Judges would take the fact that the law exists to answer the question of how they ought to adjudicate: “[I]f the law is something that commands what is right and prohibits what is wrong, it is impossible to argue about the goodness or badness of any law, and any definition that deters people from criticism of the law is very useful to legal apologists for the existing order of society.”<sup>34</sup>

The prediction theory forces judges to face the fact that adjudication is always a moral decision that cannot be answered by determining existing law. Under the prediction theory, “[t]he ghost-world of supernatural legal entities to whom courts delegate the moral responsibility of deciding cases vanishes; in its place we see legal concepts as patterns of judicial behavior, behavior which affects human lives for better or worse and is therefore subject to moral criticism.”<sup>35</sup>

Like Cook, Cohen did not argue for the prediction theory on the basis of legal indeterminacy. Indeed, Cohen criticized other realists for exaggerating the extent to which the law is indeterminate.<sup>36</sup> Nor did Cohen’s argument for the prediction theory depend upon judicial supremacy. He did not reduce the law to how a judge actually decides a case. If a judge’s decision deviates from how other judges and officials would treat the case, her decision deviates from the law.<sup>37</sup> To be sure, given judicial supremacy, her decision will remain legally binding, unless overturned on appeal. But this legal effect of her decision is, for Cohen, itself a function of regularities of behavior among officials – including the non-judicial officials who enforce the decision.<sup>38</sup> In the absence of such regularity there is no judicial decision at all.<sup>39</sup> The heart of Cohen’s prediction theory was not legal indeterminacy or judicial supremacy, but a fundamentally positivist approach to the law as constituted by social facts.

In arguing that the law does not generate moral obligations on a judge to adjudicate one way rather than another, Cohen did not deny, of course, that there are often – indeed usually – good moral reasons for adjudicating as the law recommends. For example, he noted that adjudication in accordance with law will often uphold “human expectations based upon past decisions, the stability of economic transactions, and the maintenance of order and simplicity in our legal system.”<sup>40</sup> But he thought that there was no necessary relationship between the existence of law and reasons to adjudicate in accordance with the law. Identifying such reasons always requires particularized moral deliberation:

[T]he ethical value of certainty and predictability in law may outweigh more immediate ethical values, but this is no denial of the ethical nature of the problem. Consistency ... is

<sup>31</sup> M.S. Green, ‘Leiter’, 397; W.W. Cook, *supra* n. 20, 43-45.

<sup>32</sup> F.S. Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia Law Review* 809, 841.

<sup>33</sup> *Ibid.* 838.

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

<sup>35</sup> *Ibid.* 828-29.

<sup>36</sup> F.S. Cohen, *Ethical Systems*, *supra* n. 14, 238.

<sup>37</sup> M.S. Green, ‘Theory’, 1934.

<sup>38</sup> F.S. Cohen, ‘Transcendental’, 844.

<sup>39</sup> F.S. Cohen, ‘The Problems of a Functional Jurisprudence’, (1937) 1 *Modern Law Review* 5, 8 (reducing the law to regularities of, not just judicial decisions, not also “other acts of state-force”).

<sup>40</sup> F.S. Cohen, ‘Transcendental’, 840.

relevant to such a problem only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical. The question, then, of how far one ought to consider precedent and statute in coming to a legal decision is purely ethical. The proposition that courts ought always to decide ‘in accordance with precedent or statute’ is an ethical proposition the truth of which can be demonstrated only by showing that in every case the following of precedent or statute does less harm than any possible alternative.<sup>41</sup>

I have argued elsewhere that Cohen’s position amounts to extending philosophical anarchism – that is, the view that there is no moral duty to conform to the law – from private citizens to judges adjudicating cases.<sup>42</sup> For the philosophical anarchist, the existence of law does not on its own create a moral duty of obedience. It does not even create a *prima facie* duty, that is, a duty that might be defeated by countervailing moral duties. If philosophical anarchism applies to judges, that means that there is nothing about being in the position of a judge that necessarily entails a *prima facie* moral duty to adjudicate in accordance with the law.

That Cohen would adopt philosophical anarchism concerning adjudication is understandable given his largely consequentialist ethical perspective.<sup>43</sup> The moral advisability of adjudicating in accordance with the law depends upon its effects, and what effects an act produces is always a contingent matter. Indeed, even if Cohen recognized non-consequentialist *prima facie* duties to adjudicate in accordance with the law – for example, those flowing from a judge’s promise as part of her oath of office<sup>44</sup> – a judge would not necessarily have these duties by virtue of holding her position, although being a judge and possessing the duties would, of course, usually coincide.

Philosophical anarchism is a normative position concerning the law. In attributing it to the realists, therefore, I depart from both Leiter’s reading and the Received View, both of which treat realism as primarily a descriptive claim about adjudication, according to which the law fails to have a causal effect on how judges resolve cases because it does not recommend a unique decision to them.

Nevertheless, by emphasizing the lack of a necessary relationship between the existence of law and moral reasons to adjudicate in accordance with the law, my reading does suggest that the realists held a descriptive account of adjudication – different from Leiter’s and the Received View – according to which the law fails to have a causal effect on how judges resolve cases, not because it fails to recommend a unique decision to them, but because they find insufficient moral reasons to adjudicate in accordance with the law. To be sure, simply because there is no necessary relationship between the existence of law and moral reasons for a judge to adjudicate as the law recommends, it does not follow that the law’s causal effect on adjudication will be reduced, for judges might wrongly believe such a necessary relationship exists or might adjudicate in accordance with law blindly, without considering whether it is morally justified. Philosophical anarchism merely suggests the possibility that judges resist applying the law due to moral objections. It does not show that they actual do so. Nevertheless, the normative position of philosophical anarchism highlights the descriptive possibility that judges choose, for actual or perceived moral reasons, to ignore the law.

Leiter recognizes as a minor theme in the realists’ writings that even determinate law can fail to have a causal effect on adjudication. Curiously, however, he offers only “ineptitude or corruption” as the explanation.<sup>45</sup> Any “rational, honest, competent, and error-free” judge, he argues, will adjudicate as determinate legal rules recommend.<sup>46</sup> He ignores the possibility that a judge might ignore determinate legal rules on legitimate moral grounds.

## E. THE PREDICTION THEORY APPLIED TO LEGISLATION

With Cohen’s account of adjudication in mind, we can now attempt to tease out his views concerning legislation. As realism is usually understood – that is, as a claim about the causal inefficacy of legal rules due to their rational indeterminacy – not much interesting about the act of legislation follows. The most one can say is that legislation can, as a descriptive matter, suffer from the same rational

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<sup>41</sup> F.S. Cohen, *Ethical Systems*, *supra* n. 14, 33.

<sup>42</sup> M.S. Green, ‘Theory’, 1925-26.

<sup>43</sup> E.g., F.S. Cohen, *Ethical Systems*, *supra* n. 14, 51-52.

<sup>44</sup> Cohen notes that judges often take their acceptance of their office as putting upon them a duty of loyalty to the legal order. *Ibid.* 241-42. But I have not been able to find him saying that they are right.

<sup>45</sup> B. Leiter, *Naturalizing Jurisprudence*, *supra* n. 2, 64.

<sup>46</sup> *Ibid.* 9.

indeterminacy as judge-made law and that, as a normative matter, it is best when it overcomes this indeterminacy.

But what would Cohen say about legislation under my reading? One might think that the consequences of the prediction theory for legislation are relatively minor as well. After all, everyone agrees that a legislator generally engages in autonomous moral reasoning. Legislation is the attempt to bring about good moral consequences within certain social constraints. What is radical about my reading is that Cohen applied this same perspective to a judge.

To be sure, it would also follow from my reading that, for Cohen, a legislator should have the same attitude toward the law governing his activities that a judge should have toward the law governing hers. Just as the existence of a statute does not give a judge a moral reason to adjudicate in accordance with the statute, the existence of, say, a constitutional restriction does not give a legislator a moral reason to take the restriction into account. To say that a constitutional restriction exists is simply a descriptive claim about social facts concerning official behavior. What a legislator should do in response requires particularized moral reasoning. (I have not been able to find Cohen making such a claim, but it is a natural consequence of his prediction theory.)

But the prediction theory has another important implication for a normative theory of legislation. As we have seen, by drawing a distinction between the law, as a set of social facts, and the moral reasons judges have to adjudicate in accordance with the law, the prediction theory draws attention to the possibility that legal rules can fail to have a causal effect on judicial decisions, not because they are indeterminate, but because judges resist applying them due to moral, or perceived moral, objections. Any assessment of legislation must take into account this phenomenon.

Cohen forcefully criticized those assessing statutes for ignoring law resistance. Statutes are generally evaluated solely on the basis of their expressed content:

A rule of law commanding or permitting a good thing or prohibiting a bad thing is held to be good, and a rule commanding or permitting a bad thing or prohibiting a good thing, bad. All questions of the actual extent to which law will secure obedience and of the actual nature and results of this degree of obedience are held to be irrelevant to our value judgments.<sup>47</sup>

Furthermore, to the extent that law resistance is considered, the emphasis is on popular resistance, in which a statute is resisted by those to whom it is directed.<sup>48</sup> The evaluation of statutes and other legal rules ignores the “personal moral reactions of individuals to whom the administration of law is entrusted toward the substance of the particular legal element.”<sup>49</sup>

Once law resistance among judges and other officials is taken into account, a statute with positive expressed content can be rejected, and one with negative expressed content affirmed. As Cohen noted, this occurs when courts of appeals assess the legal rules created by trial courts: “The appellate judge, aware of the tenuous and sporadic nature of his control over lower courts, is inclined to approach a case on appeal with some bias in favor of a judgment of affirmance.”<sup>50</sup> Despite finding the expressed content of the rule articulated by the lower court deficient, the appellate court can be inclined toward accepting it, even in cases where the appellate court’s formal standard of review is *de novo*. But Cohen argued that the same point should be true of legislation. A statute should be accepted – despite the moral deficiencies of its expressed content – because of anticipated judicial resistance to alternatives.

Law resistance by judges was a reason that the realists often recommended replacing the language of a legal rule with the considerations that have been actually driving judicial decisions. A classic example of such an approach is Karl Llewellyn’s inclusion of an obligation of good faith in contractual dealing in Article 2 of the Uniform Commercial Code,<sup>51</sup> on the ground that this criterion was already being employed by courts in contract cases. Another example is the Supreme Court’s transformation of the law of personal jurisdiction over out-of-state corporations in *International Shoe Co. v. Washington*,<sup>52</sup> a decision that appears strongly influenced by Cohen’s article ‘Transcendental Nonsense and the Functional Approach’.<sup>53</sup> Cohen argued that the actual factors driving judicial decisions in such cases were non-legal considerations such as the difficulties “that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation” and “the possible

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<sup>47</sup> F.S. Cohen, *Ethical Systems*, *supra* n. 14, 62.

<sup>48</sup> *Ibid.* 259.

<sup>49</sup> *Ibid.* 241.

<sup>50</sup> *Ibid.* 242.

<sup>51</sup> See U.C.C. § 2-103(j).

<sup>52</sup> 326 U.S. 310, 316-19 (1945).

<sup>53</sup> See G. Rutherglen, ‘*International Shoe* and the Legacy of Legal Realism’ (2001) 2001 *Supreme Court Review* 347, 349-50.

hardship to corporations of having to defend actions in many states.”<sup>54</sup> In *International Shoe* and subsequent cases,<sup>55</sup> these non-legal considerations were incorporated into the applicable legal rule.

It is my sense that Cohen’s recommendation that the assessment of statutes take into account law resistance is still largely being ignored. Statutes tend to be evaluated on the basis of their expressed content. To the extent that law resistance is considered, it is resistance by those to whom the statutes directly apply. Crafting statutes to take into account resistance by the officials who enforce the law is, as Cohen put it, still thought to be vaguely “obscene.”

I would like to end by considering one more question about Cohen’s attitude toward legislation. This concerns how judges respond, and should respond, to legislation, compared to judge-created law. As we have seen, Cohen argued that the existence of law does not entail moral reasons for a judge to adjudicate as the law recommends. Whether a judge has reasons to follow the law is a contingent question requiring particularized moral reasoning. He gives us no reason to think that this is any less true when a judge is considering legislation as opposed to judge-made law. Nevertheless, it might be the case that she has moral reasons to abide by legislation more often than judge-made law, or that these reasons, when they exist, are more weighty. Since democratically-enacted legislation expresses other citizens’ views about the appropriate content of legal rules, she might give the statute greater weight in her deliberation about how to adjudicate, even when she thinks the content of the legislation is morally misguided.

After considerable searching, however, I have not been able to find Cohen expressing such a position. This reveals, I believe, a significant gap in his normative views on adjudication. Cohen – adopting a broadly consequentialist approach – emphasized a judge’s obligation to consider the effects of her actions when determining whether she should adjudicate in accordance with law. He does not draw attention to broader moral considerations that would recommend that she defer to the views of her fellow citizens.

In offering this criticism, I do not mean to suggest that Cohen’s philosophical anarchist position is incorrect. Particularized moral reasoning is still required to determine whether adjudication in accordance with a statute is morally justified. The question is simply what sorts of considerations this reasoning might take into account.

This normative gap in Cohen’s account has a descriptive corollary. Just as Cohen ignores the question of whether judges should defer to statutes more than judge-made law, he also ignores the descriptive question of whether statutes in fact have greater causal effect upon adjudication, precisely because judges feel themselves to be more bound to comply with their demands. If so, the phenomenon of law resistance would be less significant in connection with statutes.

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<sup>54</sup> F.S. Cohen, ‘Transcendental’, 810. In *International Shoe*, the reason the original legal rule was ignored was largely its rational indeterminacy, however, rather than judges’ law resistance.

<sup>55</sup> E.g. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

## THE NEW LEGAL REALISM AND STATUTORY INTERPRETATION

Frank B. Cross\*

### Abstract

Truly descriptive legal realism must recognize some role for the law. This does not amount to acceptance of formalism, though. While the law influences judicial decisions, it is plain that far more is also considered, including ideological objectives. Formalistic law does not rule the court. Attitudinalism and a degree of strategic behavior characterizes judicial decisions. But these extralegal effects are not all powerful. Instead, it appears that traditional legal concerns are also quite important to judges. The formalistic vision is not dead. Legal realism must deal with this reality. Statutory interpretation is applying rules created by legislators, and separation of powers reasons alone are enough to question attitudinalism in this set of circumstances. Unlike common law, statutes are not to be revised by judges. Statutory interpretation is a delegated power, where judges are supposed to do the bidding of the legislature. Presumably, a rational Congress of politicians seeking to achieve political ends would try to bind the judiciary to those ends. Because the judiciary is swayed by legal content, Congress has a path to achieving its ends. In the United States, there is relatively little evidence that Congress pays much attention to subsequent judicial interpretation, but it should. This approach to restraining the judiciary would be to adopted more detailed and specific legislative language. Or Congress may intervene after the fact with new laws or other measures to constrain the judiciary. However, this may not be the wise approach, which the legislature may recognize. And it is not clear that Congress would want to prevent realist judging. For whatever reason, Congress sometimes directly delegates authority to judges and in other cases deliberately includes language so ambiguous as to leave key questions to the judiciary. The legislature is itself ideological and consciously temporary. But Legal realism is not so arbitrary as some early realists suggested. Neither is it so purely ideological as the attitudinalists contended. Instead of fighting judicial realism in practice, Congress might be well served to embrace it and dedicate discretion to the judiciary. While ideology of course matters, the key to legislating is to be effective. So Legal realism and statutory interpretation should be at peace.

**Keywords:** Legal Realism – Judicial Decision-making – Statutory Interpretation – Attitudinalism

### A. INTRODUCTION

Perhaps we are all legal realists now. But we may lack a shared meaning of that term. For many the term simply means that judges ignore the law and decide however they wish, for whatever reason. But by its name, legal realism is truly just descriptive and does not necessarily deny a role for the law. In this article, I review the considerable empirical research on judicial decision-making and its implications for legal realism in statutory interpretation. Realism should be about descriptive facts, and I review those facts in order to present a theory.

My focus is to analyze the empirical research on judicial decision-making and statutory enactment and interpretation to consider the role of legal realism. When I use legal realism, I depart somewhat from the conventional but unclear definition. Historically, realism simply meant that judicial decisions were not based on “formalistic law,” with little prediction of what they were based upon. More logically, realism simply should mean a descriptive analysis of how judges decide. Thus, if judges were truly purely legal, *realism could mean formalism*.

In reality, the evidence on how judges decide cases is complex and not completely legal. The law does matter but so do numerous extralegal considerations. The extralegal considerations include the justices’ personal preferences but also some strategic consideration for the position of other branches of government. Realism should recognize that various factors can influence the courts.

To some degree, legal realism in statutory interpretation is a bit of a red herring. The evidence indicates that Congress can possibly create clear enough rules that will be followed by the judiciary, as

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is their responsibility. This task of producing clarity is not an easy one, though, and it may not prove a wise one for the legislature. It may profit the legislature more to selectively delegate authority to the courts to address unanticipated circumstances, using the judgment of the judiciary even as it may be influenced by ideology. I argue that understanding legal realism should mean leaving considerable discretion to the judiciary when implementing statutes.

## B. WHAT IS LEGAL REALISM?

While most people have a general understanding of the meaning of legal realism, the concept is actually poorly theorized. In general, the term is used as meaning that judges do not make decisions according to law but not necessarily declaring what does explain decisions. More logically, legal realism should be an empirical determination of whatever causes judicial decisions, one that holds open the possibility of law's relevance.

The original legal realism of the early 20<sup>th</sup> Century was more of a mood than a theory. It fundamentally suggested that judges' decisions were not constrained by legal materials, as often claimed in then contemporary law schools. The original legal realists suggested that decisions might be explained by various external factors, such as what judges ate for breakfast, though this was neither supported nor very helpful. In fact, it appears that judges' sentencing decisions are affected by eating lunch,<sup>1</sup> a demonstration of the accuracy of legal realism but surely not one that explains most judicial findings.

The original realists simply contended that legal decisions were not based on the traditional legal materials, such as text and precedent but on some characteristic of the individual judge. In fact, legal history was never so formalistic as to suggest that it was the law, and only the law, that dictated all judicial outcomes.<sup>2</sup> However, the degree to which the law is important is vital and may still be contested. Does it drive 90% of outcomes or 10%? Traditional legal realism is far more profound in the latter case.

Unfortunately, while the original legal realists were dismissive of the law as explaining judicial outcomes in general, they said little about what did drive such outcomes. Legal realism was not a theory but only a mood and, perhaps for this reason, legal realism fell into dormancy and was largely replaced by the legal process movement.<sup>3</sup> If legal realism can offer no explanatory variable but simply deny the law's influence, it amounts to little more than nihilism.

More recently though, the "new legal realism" has given greater meaning to the concept.<sup>4</sup> This new legal realism is borne of extensive research in political science. Jeffrey Segal and Harold Spaeth propounded the "attitudinal model" of Supreme Court decision-making.<sup>5</sup> This behavioralist thesis contended that judges made decisions, not because of the content of the underlying law, but because of their personal ideological predispositions. Segal and Spaeth documented this by noting the systematic nature of the voting patterns of Supreme Court Justices. Justice Rehnquist voted far differently than Justice Brennan, even in the same cases with the same law. Of course, both were supposedly applying the law, but they reached different conclusions. The authors were able to explain about three-fourths of the justice-votes on this attitudinal model. Their findings have been consistently confirmed by subsequent research and are essentially undeniable – it's not secret that Justice Thomas, for example, is likely to reach the more conservative result. Judges, involved in governance, are surely to some degree politicians. The attitudinal model suggests that they are entirely consumed by policy considerations and downplay the content of the law, as projected by legal realism. Studies show that substantial policy preferences of the justices commonly trump more structural legal considerations on matters such as federalism, for example.<sup>6</sup>

Of course, opinions appear to be grounded in the law. The typical opinion is stuffed with references to precedent and other legal materials as justification of its outcome. Rarely are prior decisions overruled. But to the attitudinalist/realists this is all a sham to create the false appearance of

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<sup>1</sup> S. Danziger, J. Levav, L. Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108 (17) *Proceedings of the National Academy of Sciences*, 6889, 6890-6892.

<sup>2</sup> B. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*, (Princeton University Press 2010).

<sup>3</sup> N. Duxbury, *Patterns of American Jurisprudence* (Oxford University Press 1995).

<sup>4</sup> F.B. Cross, 'Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance' (1997) 92, *Northwestern University Law Review* 251.

<sup>5</sup> J.A. Segal, H.J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993).

<sup>6</sup> F.B. Cross, E.H. Tiller, 'The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence' (2000) 73 *Southern California Law Review* 741.

relying on the law. There are purportedly precedents available to support any possible outcome, and the justices simply choose those convenient to their ideological preferences.

For a time, this attitudinal model was the uncontested conventional wisdom of political scientists. More recent research, though, has shown it to be somewhat simplistic. The relative frequency of unanimous opinions among widely divergent ideologies obviously contradicts the hypothesis. There is a reason why the legal briefs presented to the Court are flush with legal materials – the justices will only adopt an approach that is at least legally defensible. The attitudinal model was seriously limited by the inability to have any measure of the law itself.

Some have expanded on this attitudinal model to incorporate strategic considerations. This approach accepts that the justices are fundamentally policymakers but posits that they want to be effective policymakers. Consequently, they must be strategic to ensure that their policies go into place. Before a decision is issued, justices may need to be strategic to gain the votes of their colleagues and obtain majority support for an opinion. We know the justices issue bargaining statements to shape an opinion.<sup>7</sup> Alienating colleagues is not a prescription for influencing policy.

Moreover, the justices may attend to an external strategy. The judiciary is notoriously the weakest of the branches, having neither the purse nor the sword. Therefore, they may wish to attend to the preferences of the other branches of government and stay within their acceptable policy bounds. Their ability to achieve their goals may depend on the preferences of other actors and their likely reaction to a judicial decision. Consequently, justices may hedge their preferred positions to avoid antagonizing other branches. The federal government in general and the Solicitor General in particular are notoriously successful at court,<sup>8</sup> and this may reflect a judicial strategic acquiescence in the preferences of others.

The Court may also attend to broader public preferences. Given its structural weakness as an institution, the justices may recognize the need for public support. A Supreme Court victory may have little practical meaning, if it is ignored in practice.<sup>9</sup> Various opinions have seen a backlash that prevented their effective implementation.<sup>10</sup> And statistical research reveals that the Supreme Court appears to be influenced by public opinion.<sup>11</sup> Additionally, the court may be influenced by the opinions of a subset of the public, such as social and professional colleagues and the news media.<sup>12</sup> While individual ideology may be most important, there are countless factors that could influence the outcome of a particular opinion.

All of these factors provide support for legal realism. If the justices are strongly influenced by their personal ideological proclivities, that is what realism might expect. Other extralegal influences, such as strategy or public opinion, are also consistent with a more elaborate legal realism. While the presence of these influences provides partial support for legal realism, the evidence is far short of showing that the more formalistic law is meaningless in judicial decisions.

Research has since shown the process to be somewhat more complicated and that the law matters. For example, numerous researchers have sought to study the true effect of precedent at the Court. Anyone familiar with decisions knows that precedents are commonly distinguished or occasionally ignored in order to reach a preferred outcome. However, the inability of precedent to completely control courts does not mean it cannot be influential.

To a casual observer, precedent appears to have had some influence at the Supreme Court. Conservative critics of precedents like *Roe* or *Miranda* have winnowed away their scope but not altered their core holdings. Overturning decisions are quite rare, and even rarer is the case that loses its influence through lesser distinctions.<sup>13</sup> Yet the total effect of precedent on Supreme Court opinions was unproven.

One study sought to dispel the influence of precedent by examining subsequent votes after justices dissented from a precedent.<sup>14</sup> They found that justices who dissented from the original

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<sup>7</sup> P.J. Wahlbeck, J.F. Spriggs, II, and F. Maltzman, 'Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court' (1998) 42 *American Journal of Political Science* 294.

<sup>8</sup> L. Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Random House 1987).

<sup>9</sup> G.N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press 1991).

<sup>10</sup> M.J. Sweet, *Merely Judgment* (University of Virginia Press 2010).

<sup>11</sup> T.R. Marshall, *Public Opinion and the Rehnquist Court* (State University of New York Press 2008); W. Mishler, R.S. Sheehan, 'The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions' (1993) *American Political Science Review* 87.

<sup>12</sup> L. Baum, *Judges and their Audiences* (Princeton University Press 2006).

<sup>13</sup> M.J. Gerhardt, *The Power of Precedent* (Oxford University Press 2008).

<sup>14</sup> J.A. Segal, H.J. Spaeth, 'The Influence of *Stare Decisis* on the Votes of U.S. Supreme Court Justices' (1996) 40 *American Journal of Political Science* 971.

precedent in an ideological direction were likely to continue their ideological position in future cases involving that precedent. This analysis was too simplistic, however. A subsequent analysis found that moderate justices, who are likely to drive Court outcomes, were much more likely to respond and follow the precedent.<sup>15</sup> A more profound criticism considers the nature of the cases. The Supreme Court never takes the same or even a closely similar case. The subsequent decision may represent an attempt to expand the precedent. The former dissenting justices may fully respect a precedent but simply choose not to expand it. This reveals the effect of ideology on the Court but does not effectively dispel the concern for precedent.

Political scientists have sought to study the true effect of precedent. They have found that while political preferences influence the use of precedent, the precedent itself has power. Stronger, vital precedents affect subsequent decisions.<sup>16</sup> Prior opinions also affect the legal content of future opinions. If a prior higher court opinion calls for consideration of certain factors, a subsequent opinion is likely to evaluate them. If it requires a certain standard of review, subsequent judges will follow that standard.

A sophisticated analysis considered the effects of precedent in controversial cases.<sup>17</sup> Its significance differed by justice and by the ideology of the precedent, but there was a clear overall effect. Current members of the Court were highly respectful of precedent, even when it opposed their ideological preferences.<sup>18</sup> And even if precedent were not the driving force, it may exercise a sort of gravitational pull in which it at least puts bounds on the content of Supreme Court opinions. Even an attitudinal outcome might not be so attitudinally expressed as justices may desire.

Attendance to law and precedent is often considered the judicial duty, and it may please justices to attend to their designated role and training. In fact, such adherence may instead be strategic – a court with more reputation of following precedent and less reputation of political activism may be more respected and more likely to see its opinions accepted. The more courts are perceived as extralegal “philosopher-kings,” the less respect their decisions may receive. Without this respect or legitimacy, courts have little power.

Alternatively, greater respect for precedent may simply be a matter of efficiency; it can take less effort for the Court to reach decisions if it need not reopen every question in every case. Some cases may not be ideologically salient, so justices have no reason not to follow the law. But the reason for such respect is not important to legal realism, which only seeks determinants of opinions, not the underlying rationale.

Of course, the simplest possibility is that judges consider the law in decision-making because they affirmatively want to do so. Richard Posner suggests that judges want to be good judges and therefore recognize theoretically governing legal materials.<sup>19</sup> This position has plausibility because of the nature of their training and their role orientation. Justices spend much of their lives being trained in a legal role that directs them to adhere to law, and this should have some effect on their actions.<sup>20</sup> Judges are thus boxed in by the judicial method and expectations and not unconstrained. They desire respect from others for their craftsmanship and may get utility from the very act of legal judging.

What’s more, there is an ideological reason to attend to precedent. The creation of precedents is how judges project power into the future. If past decisions were not governing, justices can only create the law of today; if they are governing, their preferences continue on in future Courts. It could be strategic for a justice to sacrifice today’s preferences for influence in the future. To the degree that legal decision-making enhances the Court’s legitimacy, reliance on the law can even enhance influence at the time of the decision. Pure attitudinal legal realism does not recognize this prospect.

Another limitation of pure judicial realism at the Supreme Court is the dog that didn’t bark, or the cases the Court does not hear. The Court has stepped into some profound political areas, such as abortion or campaign financing or most recently the Obama health care reform. However, it also declines to accept *certiorari* on other key public policy issues. When the law is clear the court feels constrained by that law and simply chooses not to review a case. Perhaps the most important political issues are economic, such as the rate of taxation, government spending programs, the deficit, and Federal Reserve Board monetary policy. The Court does not address the “big picture” issues here but leaves them to other institutions. This is testimony to their recognition of legal limits on their authority.

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<sup>15</sup> S. Brenner, M. Stier, 'Retesting Segal and Spaeth's *Stare Decisis* Model' (1996) 40 *American Journal of Political Science* 1036.

<sup>16</sup> T.G. Hansford, J.F. Spriggs, II, *The Politics of Precedent on the U.S. Supreme Court* (Princeton University Press 2006).

<sup>17</sup> M.A. Bailey, F. Maltzman, *The Constrained Court* (Princeton University Press 2011).

<sup>18</sup> *Ibid.* at 76-77.

<sup>19</sup> R.A. Posner, *What Do Judges Want?* (Harvard University Press 2008).

<sup>20</sup> J.L. Gibson, 'Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model' (1978) 72 *American Political Science Review* 911.



Truly descriptive legal realism must recognize some role for the law. This does not amount to acceptance of formalism, though. While the law influences judicial decisions, it is plain from looking at votes that far more is also considered, including ideological objectives. Formalistic law does not rule the court.

Beyond the fact that the law appears to matter somewhat, claims of judicial attitudinalism focused heavily on the Supreme Court and for that reason were subject to criticism. The American Supreme Court has control over its docket of cases to be heard. The Court will hear only the most important difficult (legally indeterminate) cases involving federal law.<sup>21</sup> These are the issues that have confounded lower courts, perhaps because the law was unusually unclear. A finding that judges allow extralegal factors to influence their opinions in cases where the law provides no plain answer is not so significant. If the law does not govern, something extralegal must. The Supreme Court simply doesn't generally take cases where the law is clear. Most scholars of the area treat the Supreme Court as different in its policy orientations.<sup>22</sup>

Moreover, the attitudinalists studied only the binary outcome of the case, not the content of the opinion that actually establishes the law. And the content of these opinions does have demonstrable power in driving future decisions.<sup>23</sup> When a case sets a particular legal standard, future cases apply it. The earlier opinion structures future decisions in a "jurisprudential regime." Thus, if the Court declares that restrictions on free speech cannot be grounded in the content of that speech, that principle becomes law accepted by conservatives and liberals alike.<sup>24</sup> The mere study of decisions does not truly address the law, because different cases come before the Court.

Moreover, while the Supreme Court is quite prominent, its significance to the corpus of law may not be so great. The Court hears relatively few (less than one hundred) cases out of the many thousands of cases decided in the United States. Plausibly, the most important level of American courts is that of the circuit courts, which decide far more cases and which set the law for a significant geographic region (and are persuasive for other geographic regions of the country).<sup>25</sup> Supreme Court decisions have impact only so far as they are faithfully followed by lower courts.

The attitudinal model applies to some degree to circuit court decisions.<sup>26</sup> Research has shown that liberal judges are more likely to reach liberal outcomes than conservative judges, though the differences are much less than at the Supreme Court level.<sup>27</sup> One study using a large data base found that overall ideological values could predict circuit court decisions with statistical significance, but ideology was not nearly so significant as certain legal variables.<sup>28</sup> The attitudinal model that works so well at the Supreme Court level explains much less for lower courts.

When the content of the law shifts, thanks to statutes or Supreme Court opinions, so too do the results of lower courts. Ample research shows that these courts respond as faithful agents to changes in the law created by the Supreme Court.<sup>29</sup> When Supreme Court precedent changes, the lower courts faithfully follow the change.<sup>30</sup> Lower courts, which decide the overwhelming bulk of cases, are faithful agents who follow the law.

In addition, there are some purely legal variables that profoundly affect lower court opinions. For example, circuit court judges are to give deference to many of the conclusions reached by lower courts according to the law. Judge Newman contends that district court decisions are upheld, due to prescribed deference, even when reviewing judges would have held contrary on a blank slate.<sup>31</sup> A purely ideological judiciary, of course, would decline to do so and follow its own objectives. While this effect is commonly ignored in academic research, when studied it has been found to be enormously powerful, a much stronger determinant than any attitudinal measure.<sup>32</sup>

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<sup>21</sup> Cross, *supra* n. 4, 251.

<sup>22</sup> L. Baum, *The Puzzle of Judicial Behavior* (University of Michigan Press 1997).

<sup>23</sup> M.J. Richards and H.M. Kritzer, 'Jurisprudential Regimes in Supreme Court Decision Making' (2002) 96 *American Political Science Review* 305.

<sup>24</sup> *Ibid.*

<sup>25</sup> F.B. Cross, *Decision Making in the U.S. Courts of Appeals* (Stanford University Press).

<sup>26</sup> *Ibid.*

<sup>27</sup> D.R. Pinello, 'Linking Party to Judicial Ideology in American Courts: A Meta-Analysis' (1999) 20 *The Justice System Journal* 219.

<sup>28</sup> Cross, *supra* n. 25.

<sup>29</sup> Baum, *supra* n. 22.

<sup>30</sup> S.C. Benesh, M. Reddick, 'Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent' (2002) 64 *Journal of Politics* 534.

<sup>31</sup> J. Newman, 'Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values' (1984) 72 *California Law Review* 200.

<sup>32</sup> Cross, *supra* n. 25.

The failure to find any association with the law in studies of judicial decision-making may be due to the failure to attempt to study the law. Law is difficult to measure quantitatively but hard to dismiss unless it is measured. An extensive study of circuit court decisions that considered the impact of the law, found some attitudinal effect but concluded that the judges primarily were engaged in the search for legally sound solutions.<sup>33</sup> Those who have studied citations as a measure of the law have likewise found that they do influence decisions. For judges, especially those on lower courts, the law matters.

In the rare research that attempts to incorporate legal variables, they prove to be significant. An interesting new study examined the significance of attitudes, precedent, and strategic variables and found that all three seemed to influence decisions, with statistical significance.<sup>34</sup> Precedent had a powerful impact. The authors did the same evaluation in different contexts (type of case, constitutional or statutory) and find that different factors matter. Attitudinalism is at its height in constitutional rights cases, but strategic considerations matter more in statutory decisions, though precedent remains highly important. The ultimate conclusion of the research is that outcomes are the product of a complex stew of factors, varying by individual case. And this study considered only outcomes and not the content of opinions, which may be more important.

The research shows that attitudinalism and a degree of strategic behavior characterizes judicial decisions. But these extralegal effects are not all powerful. Instead, it appears that traditional legal concerns are also quite important to judges. The formalistic vision is not dead. Legal realism must deal with this reality.

This is an intrinsic problem of legal realism. By its nature, it is a descriptive concept that simply attempts to set out how judges reach decisions. However, it is also strongly associated with anti-formalism, the claim that these decisions are not based on the law. Obviously, the theory has severe impressionistic problems if the descriptive analysis were to reveal that judges were formalistically oriented in their decisions. Of course, formalistic decision-making does not mean that judges are truly bound by the law, it might simply be that judges simply like formalistic decision-making. But the results are similar in either case.

Fortunately for legal realism, it need not fully face this contradiction. The evidence does not indicate that judges are pure formalists, uninfluenced by attitudinal or other extralegal features. However, traditional formalistic use of legal materials and standards does seem to explain a considerable amount of judicial decision-making. It is this descriptive understanding of how judges make decisions that is truly important. Results appear to be a product of multiple factors interacting with one another in different ways in different circumstances. And it is this analysis that informs the relevance of legal realism to statutory interpretation.

### C. STATUTORY INTERPRETATION CONTEXT

The common law is by nature a collection of judge-made legal rules, sometimes rules made out of whole cloth. As such, legal realism might seem less objectionable; any rules creating regime must be imbued with values and there is little reason to prefer the values of past judges in old cases. But statutory interpretation is applying rules created by legislators, and separation of powers reasons alone are enough to question attitudinalism in this set of circumstances. Unlike common law, statutes are not to be revised by judges. Statutory interpretation is a delegated power, where judges are supposed to do the bidding of the legislature.

With this somewhat uncertain status of descriptive legal realism, what is the practical relevance of the statutory context? In a truly cynically realist world, context would not matter, as judges would ignore the law, whatever its source. However, since we know that judges sometimes follow the law as directed and other times depart, the context becomes crucial. How might Congress act in order to constrain judicial preferences in statutory interpretation questions?

One prominent theory is that the judges are strategically constrained by the preferences of Congress itself, because of the risk of congressional override. This is an example of the strategic theory of judicial decision-making propounded by William Eskridge.<sup>35</sup> He suggested that courts would not be attitudinal in statutory interpretation decisions, because Congress could simply amend the legislation to negate the effect of the judicial opinion. He demonstrated that such legislative overrides of opinions

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<sup>33</sup> D.E. Klein, *Making Law in the United States Courts of Appeals* (Cambridge University Press 2002).

<sup>34</sup> R.R. Pacelle, Jr., B.W. Curry, and B.W. Marshall, *Decision Making by the Modern Supreme Court* (Cambridge University Press 2011).

<sup>35</sup> W.N. Eskridge, Jr. 'Overriding Supreme Court Statutory Interpretation Decisions', (1991) 107 *Yale Law Journal*, 331.

happen. While the existence of overrides actually contradicts the theory, one may imagine strategic mistakes.

Assuming the override theory were accurate, judges are still not confined by the approach of the enacting legislature, in this view, because it is no longer in existence. The traditional legal approach is not affirmed. Eskridge calls for dynamic statutory interpretation in which judges respond to preferences of the then contemporary legislature who might override a decision.<sup>36</sup> This is not truly strict legal realism, because decisions are driven primarily by preferences of Congress rather than that of the judges, though neither is it formalism. However, it is not at all clear that it is the judicial practice.

In fact Congress rarely overturns judicial statutory interpretations. The meaning of this absence of overturns is somewhat unclear though. It might simply be a tribute to judicial strategic calculations – the courts simply avoid issuing those outcomes that are likely to be overturned by the legislature. However, it seems likely that the infrequency can be explained by congressional difficulty in responding to judicial holdings. It can be quite difficult for the legislature to act. Passing a bill requires the approval of both houses, acceptability to committee chairmen, and an ability to overcome other veto points.<sup>37</sup>

Perhaps attention is the greatest barrier to congressional action. Enacting an override of an opinion takes time and energy. When Congress is dealing with budgetary matters or pressing national issues, a lone judicial opinion may not seem worthy of the time an effort required. Congress simply does not have the resources to respond to most judicial opinions, though occasional ones may produce overrides. Nor is it clear that judges could accurately predict when overrides would occur and when they would not. It would be more logical for the judge to risk an override than to sacrifice preferences when congressional action very well may not develop.

Moreover, even in the rare cases when overrides occur, the justices are not powerless in response. They may find ambiguities in language of the override itself. Judges have the final word on the application of the law in particular cases. The override language may be read narrowly or even found unconstitutional.<sup>38</sup> The override could be written to have some impact but ultimately is at the mercy of judicial interpretation, so the judiciary is not truly at the mercy of congressional preferences.

The empirical evidence behind the legislative override theory is also quite thin. Segal examined the contemporaneous preferences of Congress and the judiciary and their effect upon the outcome of Supreme Court decisions.<sup>39</sup> Others have found likewise.<sup>40</sup> The overrides that do occur do not appear to be driven by ideological disagreement.<sup>41</sup> As a result, the probability of an override cannot readily be predicted by courts. The override theory seems weak as a determinant of judicial action. The cases where Congress has overridden a bankruptcy opinion have been carefully studied.<sup>42</sup> The author found that the best predictor of such an override was a highly formalistic, textualist opinion. A pragmatic interpretation, by contrast, was much less likely to be overridden. True dynamic statutory interpretation would seem to counsel for the most pragmatic result.

The fact that the prospect of overrides doesn't much influence the Court does not mean it is unconstrained by other branches of government. The impeachment power is not much used, but Congress has other means of influence. It has the power to strip the Court's jurisdiction over particular questions. Perhaps most significantly, Congress controls the resources of the Court. While judicial salaries may not be cut, staff and facilities can be. The Chief Justice regularly comes to Congress to plead for more resources. There is some evidence that this motivates Court decisions more appealing to the sitting Congress.<sup>43</sup> Congress can also simply refuse to implement a decision or at least set up barriers to implementation.

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<sup>36</sup> Ibid.

<sup>37</sup> K. Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (University of Chicago Press 1998).

<sup>38</sup> D. Widiss, 'Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation' (2012) 90, *Texas Law Review* 859.

<sup>39</sup> J.A. Segal, 'Separation-of-Powers Games in the Positive Theory of Congress and Courts' (1997) 91 *American Political Science Review* 28.

<sup>40</sup> B.R. Sala, J.F. Spriggs II, 'Designing Tests of the Supreme Court and the Separation of Powers' (2004) 57 *Political Research Quarterly* 197.

<sup>41</sup> M.E. Solimine, J.L. Walker, 'The Next Word: Congressional Response to Supreme Court Statutory Decisions' (1992) 65 *Temple Law Review* 425.

<sup>42</sup> D.J. Bussell, 'Textualism's Failures: A Study of Overruled Bankruptcy Decisions' (2000) 53 *Vanderbilt Law Review* 887.

<sup>43</sup> E. Froedge Toma, 'Congressional Influence and the Supreme Court' (1991) 20 *Journal of Legal Studies* 131.

One study found that these congressional tools had influence on the Court, but it varied greatly by justice, was not great, and was exceeded by the justices' devotion to legal commands.<sup>44</sup>

If judicial overrides or other forms of influence are not a strong influence on the courts, Congress may still exert significant control over judicial outcomes simply by enacting clear statutory language. Judges will not put someone in jail for a crime that does not exist (common law crimes have disappeared). When the legislature criminalizes an activity, it is prosecuted, and judges do put individuals in prison.

The same is true for the creation of new liabilities. Consider for example the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Before its passage, parties might have to pay for damages created by the deposition of hazardous waste, under common law doctrines such as nuisance, but plaintiffs faced great difficulties of proof on issues such as causation, and the ability to recover very large cleanup costs was uncertain at best. Yet CERCLA created a new cause of action, used by government and private parties in countless cases, which has created enormous liabilities and caused a great deal of remediation of contamination with hazardous substances. The statute made a great difference, though it left much for judicial interpretation.

Presumably, a rational Congress of politicians seeking to achieve political ends would try to bind the judiciary to those ends. If the judiciary were so attitudinalist/realist as sometimes portrayed, Congress could do nothing. The judiciary would effect its will regardless of the content of legislative action. But because the judiciary is swayed by legal content, Congress has a path to achieving its ends. In the United States, there is relatively little evidence that Congress pays much attention to subsequent judicial interpretation, but it should.

There is little study of how to draft a statute that the judiciary will more faithfully follow. However, there are some fairly obvious hypotheses that Congress should pursue. First, insofar as possible, the legislature could make statutes so specific that any judicial flexibility would be obvious in its manipulation. If the language is clear, judges, will follow it or be reversed.

This approach to restraining the judiciary would be to adopted more detailed and specific legislative language. Brevity in statutory language leaves many matters undecided. Resolution of those matters left undecided will be in the courts, as they apply the statute to the case's circumstances. Brevity thus seems to empower more extralegal considerations by courts simply because the statute does not resolve key questions. Some theorize this is the intent of Congress, delegating to the judiciary to develop the law.<sup>45</sup>

The classic example of this brevity is found in the American Sherman Act in the area of antitrust. The law, passed in 1890 to control concentrations of economic power is extraordinarily concise and therefore vague. Section 1, an important key to the act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations." The potential breadth of such language, taken literally, could proscribe all contracts, which restrain trade by limiting particular goods to a particular buyer. Certainly, any covenant not to compete would be prohibited. Even sincerely formalist judges would surely have to use extralegal factors in interpreting the statutory language to define the contracts and avoid the abolition of capitalism, which plainly was not contemplated by Congress.

Needless to say, the courts have not interpreted the prohibition so expansively as to ban all contracts. But the interpretation of the law has varied considerably over the years, as the judges emphasized different factors. All interpretations put the implicit "unreasonable" qualification on illegal restraints of trade. While liberals once interpreted the Sherman Act fairly aggressively, more conservative judges have since taken the law and analyzed it in a purely economic fashion. This economic analysis took hold and has become the governing rule for all judges in applying the statute, though there is little evidence it was what the original adopting Congress intended.

The courts have essentially treated the law as if Congress dumped the problem in their laps and told the judiciary to solve it.<sup>46</sup> Although legislative intent was certainly unclear and there was no indication that Congress meant to create a common law regime of antitrust law, courts took it that way. Realistically, they had little choice; the statutory language was so vague that they were left to their own devices. While the law has been amended, the changes were not substantial and there is little evidence that legislatures were displeased with judicial interpretations of the statute.

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<sup>44</sup> F.B. Cross, B.J. Nelson, 'Strategic Institutional Effects on Supreme Court Decision-making' (2001) 95 *Northwestern University Law Review* 1437.

<sup>45</sup> E.J. Leib, M. Serota, 'The Costs of Consensus in Statutory Construction' (2010) 120 *Yale Law Journal Online* 47.

<sup>46</sup> R.A. Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 *Case Western Reserve Law Review* 179.

But Congress could have written the law with much more detail and constrained the judiciary at least somewhat. Today's more professional legislature that writes much more detailed legislation (often reaching thousands of pages) would surely have done so. Legal realism can be limited by writing much more specific statutes.

Federal securities law provides another substantial example of courts going well beyond what a statute says. The original Exchange Act did not expressly create a private right of action to enforce its terms. Yet the courts created such a private right and elaborated it with an extensive series of judge-created doctrines for private recovery, such as the efficient market presumption that eliminated reliance requirements. Congress has occasionally altered these private remedies with amendments but only at the margin, and judges have done far more to change the content of this law over time. The Court has felt bound where the legislature created a clear standard, such as the particular statute of limitations for bringing claims, but otherwise has acted freely in defining when private parties can and cannot recover for securities fraud. The federal securities laws are listed as "common law statutes."<sup>47</sup>

The approach of congressional statutory specificity has its limits. Consider the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). This was a very long and detailed statute passed in 1980 that created a strict regime of liability for cleanup of hazardous substances. Yet even the very lengthy statute contained frequent areas that were uncertain or ambiguous. There was no resolution on many key matters such as the liability of lenders or parent companies or the ability of responsible parties to recover. While the statute has been amended to clear up some questions, many liability issues have essentially reverted to common law, with the court creating the governing standards. Many of the governing statutory standards prevail, as courts have recognized the law, in areas such as strict, joint and several liability. Certainly some conservative judges consider these requirements to be too onerous, but they faithfully follow them. But in the presence of statutory indeterminacy, courts have clearly created their own standards. Even a very detailed law, such as CERCLA, has interstices that must be filled by the courts.

Prominent examples, such as these, demonstrate that statutes do constrain the judiciary, when clear and specific, but leave much to judicial legal realism. If Congress creates even more specific statutes, trying to anticipate every possible eventuality, judges will have less discretion. In theory, Congress can thus restrain legal realism.

In practice, though, this tool has difficulties. First, it is difficult to anticipate every future event, especially when statutes may remain in effect for many decades. CERCLA has an extensive legislative history and lengthy terms, yet it left many events undecided, such as the liability of parent companies for the actions of their subsidiaries. The courts have stepped into the breach and created rules, often relying upon principles of the common law.

Second, Congress can only act after obtaining at least a majority of the votes in both houses. This requirement can make great specificity difficult, because each term of a statute is subject to amendment or rejection. Agreement is more likely when difficult questions are not resolved. Mark Graber has noted that the legislature has left many important issues to the judiciary due to its inability to agree on legislation.<sup>48</sup>

For whatever reason, Congress sometimes directly delegates authority to judges and in other cases deliberately includes language so ambiguous as to leave key questions to the judiciary. A study of labor legislation found cases of deliberate delegation to the judiciary, for a variety of reasons.<sup>49</sup> Practical difficulties can prevent the legislature from resolving important statutory questions.

Another step to constrain the judiciary might be for Congress to participate more actively in litigation. Congress seldom does so and relies on the Executive.<sup>50</sup> Congress could create an office to file amicus briefs on contested issues. The effectiveness of this measure, though, is quite uncertain. The Congress engaging in litigation over the meaning of a statute is likely not the Congress that passed the statute. Consequently, it is likely to be advancing its own preferences, not the meaning of the statute when enacted. This process could simply be a means for post facto statutory amendment without use of the legislative process.

The Senate also has some influence over the judicial practice of realism in its appointment power. It could choose not to confirm judges who profess legal realism. This authority is quite a weak one, though, because the ability to predict realism is poor. Nominees typically reject any theory of realist judging, regardless of their proclivities, and Congress cannot see inside their hearts. Given judicial life

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<sup>47</sup> W.N. Eskridge Jr., 'Public Values in Statutory Interpretation' (1989) 137 *University of Pennsylvania Law Review* 1007.

<sup>48</sup> M. Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary' (1993) 7 *Studies in American Political Development* 35.

<sup>49</sup> G.I. Lovell, *Legislative Deferrals* (Cambridge University Press 2003).

<sup>50</sup> A. Frost, 'Congress in Court' (2012) 59 *UCLA Law Review* 914.

tenure, there is little the legislature can do to punish those who do not adhere to their professions in congressional testimony.

Nor is it clear that Congress would want to prevent realist judging. The legislature is itself ideological and consciously temporary. Legislators know they may be replaced by members of the opposite ideology. But they can put into place justices with life tenure who may advance their ideology well beyond their own tenure in Congress. It is probably in the interests of at least the members of Congress to promote attitudinalist legal realism and appoint justices who would be ideological in the manner they desire (though this of course would be tempered by any needs to gain votes from across the aisle).

Indeed, this has become the common practice in the United States. Presidential appointments (and Senate confirmations) are based largely on the presumed ideology of the judge.<sup>51</sup> Conservative presidents strive to appoint very conservative justices, and liberals the opposite. Senate voting is commonly close to party lines. Youth is important in choosing nominees, because it suggests a longer tenure to project such ideology.

For those familiar with empirical evidence on legal realism, this is a good thing. Because ideology is important to judicial decisions, ideologies should not be chosen at random. The involvement of democratically elected officials in nomination processes helps ensure that the judiciary will reflect the people's ideology.<sup>52</sup> Judges have life terms, and tend to stay on the bench longer than their appointers. The Court would follow public opinion, but with a time lag. This creates a branch ideologically in tune with the past, which arguably undermines democracy but also enhances stability and prevents bursts of mass prejudice.

Attitudinalism enables legislative confirmers to project their preferences beyond their time of service, but these influences are not so strong at the judiciary as they might wish. Judges are also concerned about the law and even about the just resolution of the particular dispute between the parties. While the sense of justice will be affected by ideology, other factors will also be at play, such as the pragmatism of creating the best rule to resolve the cases heard in litigation.

Legislating is also necessarily constrained by limited information. The technical complexity of issues may overwhelm even the most expert, and legislators are generalists. Given all the demands upon the legislature, its members can learn about a problem but not comprehensively. This fact makes designing laws difficult, *ex ante*, when the legislators are necessarily unfamiliar with the facts of many of the cases that may arise. In some cases, Congress may not have even thought about the problem arising in future litigation. They lack the time and expertise to micromanage policy questions.

Judges, by contrast, get an *ex post* exposure to legislation. They see its operation in practice, when cases arise. Although the judiciary may not see a fully representative set of cases, they typically have to resolve those closer to the margin of the law, where the law is more ambiguous. The courts see the law in action and how it affects individuals, giving them information not available to legislators at the time of passage. In theory, if the courts are reliable actors, they should be able to improve a system in adaptation to the circumstances of cases. Politicians will be judged by, and care most about, the outcome of the policies they adopt.<sup>53</sup> They surely consider the possibility that judicial discretion could improve this system by allowing courts the flexibility to design appropriate outcomes to the unique circumstances of particular cases.

Legislative delegation to administrative agencies has been more studied than delegation to courts. Research shows that Congress is more likely to delegate discretion to administrative agencies who are politically aligned with the Congress.<sup>54</sup> Such agencies are viewed as more likely faithful agents, and the same is presumably true of more politically aligned judges. However, there remains considerable delegation even when the bureaucracy is not aligned with Congress, more than eighty percent as much. This is testimony to the difficulty of Congress drafting legislation that considers every possible issue and/or faith that the agencies will try to follow the law. The same should be true of courts.

Legislatures might realize that they can benefit from judicial legal realism in which courts are not fully bound by statute. A legislator adopts a statute to create a certain objective, but he or she cannot foresee every possible application of a given legal rule. Rather than creating a clear rule, Congress might realize that leaving discretion to judges will produce a better long term result. Even if the judiciary does not resolve every case the way that the enacting majority might have chosen, it can create a workable process.

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<sup>51</sup> W.E. Hulbary, T.G. Walker, 'The Supreme Court Selection Process: Presidential Motivations and Judicial Performance' (1980) 33 *Western Political Quarterly* 185.

<sup>52</sup> T. Jennings Peretti, *In Defense of a Political Court* (Princeton University Press 1999).

<sup>53</sup> J.D. Humber, C.R. Shipan, *Deliberate Discretion?* (Cambridge University Press 2002).

<sup>54</sup> D. Epstein, S. O' Halloran, *Delegating Powers* (Cambridge University Press 1999).

Although the ultimate maximand for judges remains somewhat uncertain, they appear to have two primary interests. These are to follow the law and to produce just results. Of course, the two may conflict, and realists suggest that the latter predominates. The latter concern is that influenced by ideology, in the judges' own personal sense of justice. Judges will sublimate their desire for justice, though, in the presence of a clear law.

The desire to do justice, though, is not purely attitudinal. Judges of different ideologies may agree that a particular outcome is unjust on the facts of a particular action. Even in the legally indeterminate cases heard by the varied ideological justices of the U.S. Supreme Court, unanimous opinions are not rare. Our polarizing ideological differences may be exaggerated in light of common agreement. The justices are also concerned with pragmatic functionality of the law.

Intriguingly, Court attitudinalism is at its lowest in statutory interpretation cases. A study examined many different contexts and found attitudinalism far less (about half as strong) in statutory interpretation cases, as opposed to constitutional actions or other contexts.<sup>55</sup> The author's implication was that legal factors were playing a greater role. Statutory language can be far more specific than the language of the Constitution or the common law of admiralty and hence more constraining upon the justices.

I have empirically examined statutory interpretation in the United States Supreme Court and the methods used by the justices.<sup>56</sup> One approach, often associated with liberals, is the consultation of legislative history to interpret the statute. This approach has been criticized as enabling attitudinal legal realism, permitting the justices to look out over a crowd and pick out their friends. I found some support for this criticism, as the use of legislative history in opinions appeared to be associated with decisions according to the justices' ideologies.

The converse conservative position is textualist, deciding cases only according to the "plain meaning" of the statutory text. Interestingly, this did not materially constrain legal realism either. The justices tended to find meaning of a statute plain when it was associated with their own ideologies. These findings are to some degree infected by the context of the Supreme Court, which typically takes the most unclear, contested cases. The conventional approaches to statutory interpretation may perform better at the lower court level.

However, even given the close nature of Supreme Court cases, pragmatism was not so highly correlated with judicial preferences. Justices saw statutory "plain meaning" as lining up with their preferences; they saw legislative history that was convenient as well. When using the tools of pragmatism, though, they were least ideological. This counterintuitive result suggests that justices care about more than attitudinal preferences but also worry about functionality or nonideological concepts of justice.

Moreover, the cases that used pragmatism also tended to receive more citations from later lower court opinions.<sup>57</sup> Citations are the essential way in which a Supreme Court opinion expresses itself. Receipt of more citations means that an opinion is relatively more useful in the corpus of the law. The finding is not conclusive, because the distribution of pragmatism cases was not random, but it suggests that pragmatism is a valuable judicial philosophy.

Pragmatism is essentially judges making up the best law that suits the situation. The notion of "best" is not overwhelmingly biased by ideology, indeed it is less ideological than the typical alternatives. Pragmatism is essentially the system of the common law, where judges adapt to the case circumstances.

Thus, Eskridge and Frickey suggest that statutory interpretation inevitably involves some creative policymaking by courts.<sup>58</sup> On difficult questions, they contend there is no way to discern the legislators' meaning, so judges must impose their own. Using several case studies, they demonstrate how this is done. If the judicial role were purely attitudinal, the results might be troublesome, but the authors suggest that the justices have instead often used a form of practical reasoning that examines the facts. While surely imperfect, this approach may be better than any available alternative. Congress has to delegate various questions, and judicial application may be the best means of resolving ambiguities.

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<sup>55</sup> B.L. Bartels, 'Choices in Context: How Case-Level Factors Influence the Magnitude of Ideological Voting on the U.S. Supreme Court' (2010) 39 *American Politics Research*, 142.

<sup>56</sup> F.B. Cross, *The Theory and Practice of Statutory Interpretation* (Stanford University Press 2009).

<sup>57</sup> *Ibid.* at 195.

<sup>58</sup> W.N. Eskridge, Jr., P.P. Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Stanford Law Review* 321.

#### D. CONCLUSION

Descriptively speaking, informed by considerable empirical evidence, we know that legal realism is not so arbitrary as some early realists suggested. Neither is it so purely ideological as the attitudinalists contended. However, the realists certainly had it right in the claim that judicial decisions are not some algorithmic application of legal materials. They are influenced by extralegal circumstances. The key to understanding legal realism is appreciating what those circumstances are, when they apply, and how their application can be molded to produce more desirable results.

Congress has some power to influence those circumstances. It can write far more specific and detailed statutes that expressly define the resolution of issues that arise in litigation. It may intervene after the fact with new laws or other measures to constrain the judiciary. However, this may not be the wise approach, which the legislature may recognize.

Indeed, the Sherman Act experience is instructive. The courts eventually constructed constraining doctrines that were objective, coherent, and grounded in economic learning. As learning evolved along with circumstances on the ground, so did the legal rule. Richard Posner contends that an attempt to apply legislative intent, which was vague but had at least some redistributive content, could have shipwrecked the economy.<sup>59</sup> Dedication to judicial legal realism worked well here, apparently enhancing the interests of society and of the Congress itself. The study of overridden bankruptcy opinions confirms this – Congress likes results that are pragmatic.

Here, an analogy to contract interpretation is instructive. When drafting a contract, the parties include much detail to evidence their intent. However, typical contracts also leave a great deal unresolved and have an overarching flexible covenant of good faith and fair dealing. The parties may do this because they cannot agree on specific language for a provision. Yet they do not let this disagreement interfere with the contract. Instead, they trust the courts to deal fairly with the matter, should it arise.

Instead of fighting judicial realism in practice, Congress might be well served to embrace it and dedicate discretion to the judiciary. While ideology of course matters, the key to legislating is to be effective. The judiciary, at least in a nation with an independent and capable court, can help legislation be effective. Judges can adapt statutory language to different circumstances that arise and create a scheme that is workable and fair.

Contrary to claims of judicial activism, the courts are not unhinged from reality. They are influenced by public opinion, congressional opinion, and a simple desire to do the right thing. Because they see the law “on the ground,” as it operates on people’s lives, they are well positioned to apply it fairly.

Indeed, there is considerable evidence that common law nations with greater judicial discretion are more successful than countries using the statute-based civil law.<sup>60</sup> There are various possible reasons for this, but one is the “bottom up” nature of common law, with the courts making law based upon the circumstances of the cases brought before them. The statutory interpretation process is not common law, but it can share some of its characteristics at the margins.

Legal realism and statutory interpretation should be at peace. When Congress enacts a statute, it wants to establish a policy. The details of that policy may be set out in greater or lesser detail. Greater detail will constrain the judiciary, because descriptive legal realism is bound by clear law. However, greater detail may also lead to a much less effective law, because so many unforeseen events may occur. Giving the courts breathing room for pragmatic judgment to address those unforeseen events and the development of the economy and society can make Congress more effective.

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<sup>59</sup> R.A. Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 *Case Western Reserve Law Review* 179.

<sup>60</sup> R. La Porta, F. Lopez-de-Silanes, A. Shleifer, 'The Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285.



## **C – Questioning Realism Today**

## SOME REALISM FOR HARD CASES

Álvaro Núñez Vaquero\*

### Abstract

This paper presents the main features of a model of legal dogmatics that aims to give solutions for hard cases. It does not present a history of legal thought. Rather it attempts to provide a conceptual reconstruction of normative intuitions based on the realist tradition – including realists, and precursors of and heirs to those realists – in the light of ethical consequentialism. To that end I propose four different types of arguments. First, I present a set of criticisms that advocates of the technological model of dogmatics direct against argumentativist and formalistic dogmatics, that seem to assume consequentialist theses. Second, I lay out a series of quotes in which the defenders of the technological model refer to the best consequences as an argument about the rightness of solutions for hard cases. Third, I point out that ethical consequentialism offers the best way to understand some of the meta-ethical claims of sceptical type put forth by these authors. Fourth, I claim that, although there is no conceptual connection between reductionist empiricism and consequentialist ethics, if the former is adopted it would be more consistent to adopt the latter as well. Finally, some tasks that the technological dogmatics should develop are presented.

**Keywords:** Technological Legal Dogmatics, Realism, Hard Cases, Consequentialism, Non-objectivism, Non-cognitivism, Reductionist Empiricism.

### A. INTRODUCTION

The debate on the theory of legal science – the discipline that analyses what legal scholars do, what they can do and what they should do – has traditionally focused on discussing the scientific nature of the method used by legal scholars (civil, criminal, constitutional, etc.). In particular, the discussion has aimed to determine whether or not the method used by these scholars can be considered scientific, and if not, what method should be used. By “legal science” I understand the method and activity usually developed by legal research professionals dedicated to establishing what is the content of law. Of course, it is not just legal scholars who can do legal science, but what is important to note is that legal science is the activity that aims to establish which legal qualification a behaviour (particular or generic) receives based on a certain legal system, besides the proceedings to which the legal system itself recognizes legal value.<sup>1</sup>

However, in the last third of the 20<sup>th</sup> Century, a radical shift in the theory of legal science has occurred, in which this debate has been replaced by another debate of meta-theoretical and normative type, from which a mainstream position is now clearly emerging. This is a meta-theoretical and normative debate because it is not a discussion about which method legal scholars should use in order to qualify their activity as scientific, but what is debated is whether such activity must pursue scientific standards, and moreover, if this activity should try to be at least descriptive, or if on the contrary it should be eminently practical. It is possible to sum up this predominant thesis in the words of Carlos Santiago Nino in *Algunos modelos metodológico de 'ciencia' jurídica* (3<sup>rd</sup> ed., Fontamara, Mexico 1999, 13): “One can be found in a somewhat ridiculous position of having to argue about obvious and almost trivial things, such as that legal activity of jurists satisfy other functions than these [scientific methods to study the law] allow.”

This criticism, made by Nino but also attributable to many authors,<sup>2</sup> is composed of two theses: One descriptive and another normative in character. First, it is false that legal scholars devote

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<sup>1</sup> See A. Núñez Vaquero, ‘Models of Legal Science’ (2012) *Revus* (forthcoming).

<sup>2</sup> A. Aarnio, R. Alexy, and A. Peczenik, ‘The Foundation of Legal Reasoning’ (1981) 12 *Band, Rechtsatheorie* 133-58, 257-79, 423-48; P. Amselek, ‘El paradigma positivista de la dogmática jurídica’ (2006) 7 *Anuario de Derechos*

themselves exclusively to describing the content of law (descriptive thesis). Second, and most importantly, it is absurd to claim that legal scholars should devote themselves exclusively to describing the content of law, to utter purely descriptive statements (normative thesis). Rather, as Atienza and Ruiz Manero claim in “Dejemos atrás el positivismo jurídico” (*Isonomía* 2007, 277, 21), their activity would be interesting precisely when they leave describing aside and offer solutions for cases in which the law, at least *prima facie*, does not provide a single solution for the particular case at hand, *i.e.* hard cases. Here, by “hard case” I mean all generic or specific cases for which – regardless of any existing effective agreement in jurisprudence or in the legal community – incompatible solutions can be construed yet may be legally justified on the basis of legal reasons admitted in the legal community. This does not immediately imply that all cases are hard cases but it is a broader notion of “hard case” than usually adopted: we face a hard case every time that it is possible to justify incompatible solutions for the same case. Whether a case will be considered hard will depend on the legal reasons admitted by the legal community, which is an empirical question.

Throughout the last third of the twentieth century numerous methods for solving hard cases have been formulated. Despite the differences between these methods, however, most of them assume a model of practical reasoning based on norms and principles. That is, according to the defenders of the predominant thesis, what legal scholars should do is to provide arguments in favour of a particular normative solution based on legal and/or moral norms and principles. If this is true, then it can be claimed that these models of legal dogmatics presuppose deontological ethics. Here, I use the term “legal dogmatics” to refer to a type of legal science, in particular the activities and/or the method recommended by those who believe that legal scholars should not only describe the content of law but must propose solutions for hard cases. I will call this model “argumentativist legal dogmatics.”

This argumentativist legal dogmatics model has often been presented as the only plausible method for solving hard cases. This is clearly the methodological model that currently enjoys greatest support among legal theorists and legal scholars. However, alongside this method, we can find at least two other methods that allow solutions to be proposed for hard cases.

First, formalist or conceptualist legal dogmatics can offer solutions to hard cases by constructing and applying dogmatic concepts, thus offering solutions to hard cases.<sup>3</sup> Here, by “dogmatic concepts” I mean the concepts formulated by formalist legal scholars that refer directly to the content of law – e.g. marriage, or due process –, without any negative connotation. This method was first theorized and used by a large group of German legal scholars of the 19<sup>th</sup> Century, such as Laband, Jellinek, Gerber and – foremost – Savigny. Today, it still attracts attention. In short, what characterizes this form of legal dogmatics is the application of a method that leaves considerations of evaluative nature aside, and by which solutions for cases that are not clearly resolved by the legal system (self-integrative methods of law) could be generated.

A second model offering potential solutions is the one that I will call “realistic-technological dogmatics.” This model was first theorized and used, on the one hand, by a group of scholars usually identified as legal realists (Scandinavian as well as American, Italian and French), and other hand, by authors who are often considered as their precursors (Jhering, Holmes, Pound and Cardozo) or heirs (Hans Albert, Richard Posner and Brian Leiter), as well as others. Much has been said on different occasions regarding the realist method of proposing solutions for hard cases (*i.e.* constructive method<sup>4</sup>) as applied especially by the Americans. However, most of these reconstructions present the normative intuitions of these authors as naive or directly incoherent.<sup>5</sup>

The main aim of this paper is to show that the normative intuitions that the legal realists seem to assume are neither ingenuous nor contradictory. Rather, I will argue that – in addition to a descriptive

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*Humanos* 17; M. Atienza, ‘Sobre la jurisprudencia como técnica social’ (1986) 3 *Doxa* 297; A. Peczenik, *Scientia Juris*, (Springer, Dordrecht, 2005); G. Zagrebelsky, *Il diritto mite* (Einaudi, Turin 1992) 168ff.

<sup>3</sup> F. Galgano explains what the development and use of dogmatic concepts means (‘I dogmi diritto nel diritto’, in *Dogmi e dogmatica nel diritto*, Cedam, Padova 2010, 7). In any case, the description of Jhering about the use and abuse of this method is still very illustrative. R. Von Jhering *Bromas y veras en la ciencia jurídica: ridendo dicere verum* (Civitas, Madrid 1987). See also A. Nuñez Vaquero, ‘Dogmática jurídica’ (2013) 4 *Eunomía* (forthcoming).

<sup>4</sup> R. Summers, *Instrumentalism and American Legal Theory* (Ithaca, Cornell University Press 1982); W.E. Rumble, *American Legal Realism* (Ithaca, Cornell University Press, New York 1968); M. Martin, *Legal Realism* (Peter Lang, New York 1997).

<sup>5</sup> Two examples of uncharitable reconstructions of the normative theses of the legal realists are found in Summers (*supra* n. 4, 71-79) and D. Lyons ‘Legal Formalism and Instrumentalism: a Pathological Study’, in *Moral Aspects of Legal Theory* (Cambridge University Press, Cambridge 1993). On biased reconstructions of the Scandinavian realists see P. Mindus, *A Real Mind* (Springer, Dordrecht 2009); T.T. Arvind, ‘Beyond ‘Right’ and ‘Duty’: Lundstedt’s Theory of Obligations’, in A. Robertson and D. Nolan(eds.), *Rights and Private Law* (Hart Publishing, Oxford 2011) 151-181.

and a predictive legal science model of judicial decision-making<sup>6</sup> – it is possible to attribute to most legal realists a method for suggesting solutions to hard cases, and that the best way to understand this method is from the point of view of consequentialist ethics. It is not, of course, a model without flaws, but it is a plausible and an interesting alternative method for legal scholars.

This paper is divided into four sections: (B) I make two brief remarks about the scope of my thesis; (C), I present the criticisms that the defenders of the realistic-technological model direct both against the conceptualist model and the argumentativist model; (D) I present some arguments that allow this method of solving hard cases to be attributed to most of these legal realists; (E) I end with a conclusion based on these arguments.

## B. TWO CONSIDERATIONS ON THE SCOPE

Before starting, it is necessary to make two preliminary remarks.

1. The first remark refers to the fact that my reconstruction of the technological dogmatics model is conceptual and not a “collage” thesis. That is, rather than trying to attribute specific ideas to one or more authors from a long list, ranging from Jhering to Posner, through Holmes, Lundstedt, Llewellyn, Felix Cohen, Oliphant, Ross, Guastini and Chiassoni (or even Hans Albert, even though he is not a jurist), I have chosen to present, from an analytical point of view, the general characteristics of a legal dogmatics model that, despite its difficulties, is internally consistent and plausible. It is, indeed, possible to affirm that little attention has been paid to realistic-technological legal dogmatics, despite several examples of it can be found such as the method of social welfare of Vilhelm Lundstedt (*Law and Justice*, Almqvist & Wiksell, Stockholm 1952, 40). While in other legal cultures, especially in the U.S., more attention has been paid to this model of studying law, European legal theory has shown little interest in this model of legal dogmatics, even though exception are Chiassoni and Pérez Lledó. Therefore, I will base the theses that I put forward on the normative theory of legal science,<sup>7</sup> on concrete proposals of legal dogmatics made by authors clearly identified within the realm of legal realism,<sup>8</sup> and on arguments formulated by precursors or heirs of legal realism.<sup>9</sup> In this sense, five warnings need to be made:

- i) As in any model or reconstruction, some of the authors considered are closer to the core theses of the model, while others fit less well into the reconstruction.
- ii) My reconstruction is not intended to be part of the history of legal ideas about the supposed unity of method between authors who are so geographically and temporally diverse and distant. I am not trying, therefore, to present a phylogenetic thesis about the continuity of method between Jhering and Posner.
- iii) Some of the theses that are part of this technological model of legal dogmatics have not been made explicit by these authors. In particular, I will reconstruct the normative intuitions of these authors in terms of consequentialist ethics, although the majority did not explicitly theorize their positions on this matter.
- iv) It must be emphasized that this is a method for making legal scholars solve hard cases. I do not intend to claim that this is the model of judicial decision-making defended by these authors, a topic that would require another paper.

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<sup>6</sup> A. Núñez Vaquero, ‘Ciencia jurídica realista: modelos y justificación’ (2012) 35 *Doxa* (forthcoming).

<sup>7</sup> P. Chiassoni *Law and Economics. L'analisi economica del diritto negli Stati Uniti* (Giappichelli, Turin 1992); J.A. Pérez Lledó's *El instrumentalismo jurídico americano* (Palestra-Themis, Lima 2007); K. Llewellyn, ‘On the Good, the True, the Beautiful, in Law’ (1942) 9 *University of Chicago Law Review* 224; F. Cohen, *The Legal Conscience* (Yale University Press, New Haven 1960); V. Lundstedt, *Legal Thinking Revised* (Almqvist & Wiksell, Stockholm 1952); A. Ross, *On Law and Justice* (University of California Press, Berkeley 1959) chapters XIV-XVI.

<sup>8</sup> G. Tarello, ‘Tecniche interpretative e referendum popolare’, in *Cultura giuridica e politica del diritto* (Il Mulino, Bologna 1988) 323; R. Guastini, ‘Teoria e ideologia della funzione presidenziale’ (2008) 31 (2) *Ragion Pratica* 597; P. Chiassoni, ‘Lo stato laico secondo madre chiesa: libertà di coscienza e libertà religiosa in una società liberal-democratica’ (2007) 28 (1) *Ragion Pratica* 77; M. Troper, ‘Montesquieu e la separazione dei Poteri negli Stati Uniti’ (1990) 20 *Materiali per una storia della cultura giuridica* 71; H. Oliphant, ‘The Problems of Logical Methods, from the Lawyer's Point of View’, in *Proceedings of the Academy of Political Science in the City of New York* (1923) 10 (3) *Law and Justice* 17; W. Douglas, ‘Vicarious Liability and Administration of Risk’ (1929) 38 *Yale Law Journal* 584.

<sup>9</sup> R. von Jhering, *Lo scopo nel diritto* (Einaudi, Turin 1972); O.W. Holmes, ‘The Path of Law’ (1987) 10 *Harvard Law Review* 457; R. Pound, ‘A Survey of Social Interests’ (1943) 57 *Harvard Law Review* 1; B. Cardozo, *The Growth of the Law* (Yale University Press, New Haven 1924); H. Albert, *La ciencia del derecho como ciencia real* (Fontamara, Mexico 2007); R. Posner, ‘The Problematics of Moral and Legal Theory’ (1998) 111(7) *Harvard Law Review* 1637.

v) This is not the only possible reconstruction of the normative intuitions of these authors, but it is faithful to the postulates of legal realism, internally consistent and plausible.

2. The second remark has to do with the reason why I call this method “technological realism.” In addition to the expression “(realistic-)technological dogmatics,” it is possible to find other expressions used to refer to a more or less coextensive group of authors, as “legal instrumentalism” or “legal pragmatism.” It is therefore necessary to provide some justification for the terminological choice. I find it advisable to discard the term “legal instrumentalism” to refer to this method for two reasons. First, “instrumentalism” is an extremely ambiguous term of which many different meanings can be given. Second, because it can be claimed that not only realists, but also normativist positivists are instrumentalists in the most commonly used sense of this expression: the law is a set of means to pursue social goals. Nor does the term “legal pragmatism” quite fit my purposes. First, the term “pragmatism” is also ambiguous because there are different versions of philosophical pragmatism. Second, pragmatism is a current of legal thought; it is more generally philosophical and markedly American. Here, for my part, I will claim that this type of legal dogmatics is not confined to Anglo-Saxon jurisprudence, but examples of it have been given – on theoretical and practical levels – on the European continent as well. Finally, Robert Summers used the term “pragmatic instrumentalism” to refer to a group of authors from the American political and legal culture that overlaps with the authors I take into consideration here. My reconstruction differs from Summers’ in important ways. He offered five reasons to dissociate “pragmatic instrumentalism” of legal realism: 1) legal realism (Summers refers only to the American one) is a movement, given the heterogeneity of theses defended, that is always very difficult to characterize; 2) Holmes, Pound, Gray and Dewey appear as mere precursors and not as active members of the movement; 3) the realists are sceptical about practical reason; 4) the term “realism” in philosophy is often associated with ontological realism; 5) the term “pragmatic instrumentalism” is used by Dewey and Llewellyn. Summers (*supra* n. 4, 36-37). I think that Summers’ decisive argument in favour of the term “pragmatic instrumentalism” is the third. For my part, it is precisely the reconstruction of a model of an alternative practical rationality that leads me to choose the term “technological realism”. For these reasons, it is preferable to avoid the term “pragmatic instrumentalism.”

The term “realistic-technological legal dogmatics” has, thus, three advantages. First, the word “technology” is associated with the noun “realism” by some of these authors; namely Karl Llewellyn<sup>10</sup> and Pierluigi Chiassoni.<sup>11</sup> Second, this expression shows that – according to the defenders of the technological model – the work of legal scholars must be based on a scientific understanding of the socio-economic and political reality. Third, it serves to underline that most of these authors subscribe to the central ideas of legal realism: The thesis of the indeterminacy of law, some variant of reductionist empiricism and meta-ethical non-objectivism.

The thesis of the indeterminacy of law states that the set of legal reasons allows the justification of, at least in some cases, more than one decision in a given case.<sup>12</sup> Therefore, when the set of legal reasons allows more than one solution to be justified, then the analysis of the legal reasons is not useful to predict the outcome of these controversies, nor is it useful to solve them.<sup>13</sup> That is, if it is possible to decide the same case in incompatible, but equally justified ways, based on legal reasons, then it is necessary to use non-legal reasons in deciding the case.

The second thesis – or rather, set of theses – states that there can only be (ontological thesis), we can know (epistemological thesis), or we should devote attention to study (methodological thesis) objects, events and causal relations, and nothing else. According to these authors, legal scholars should not assume in their theoretical framework entities having no existence in the empirical world. Put in somewhat different terms, any entity that is not supported by the epistemology of the most successful

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<sup>10</sup> “Realism is not a philosophy, but a technology...”. K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, (Little, Brown, Boston 1960) 509. See also Llewellyn, *supra* n. 7, 244.

<sup>11</sup> Pierluigi Chiassoni uses this expression, opposing “intuitionist” legal realism with “technological” legal realism, and assimilating the latter with the economic analysis of law. See Chiassoni, *supra* n. 7, 290.

<sup>12</sup> B. Leiter, ‘Legal Indeterminacy’ (1995) 1 *Legal Theory* 481.

<sup>13</sup> It may be argued that other realists, especially the Scandinavians, upheld indeterminacy of the law, such as Lundstedt, Olivecrona and Ross. See Lundstedt, *supra* n. 7, 308; K. Olivecrona, *El Derecho como hecho* (2<sup>nd</sup> ed., Labor, Barcelona 1980) 202ff; Ross, *supra* n. 7, chapters XXV, XXVII. The claim is clear as far as American, Italian and French realists are concerned. See e.g. K. Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed’ (1950) 3 *Vanderbilt Law Review* 395; M. Radin, ‘Realism in Statutory Interpretation and Elsewhere’ (1934-1935) 23 *California Law Review* 555; H. Oliphant, ‘A Return to Stare Decisis’ (1928) 71 *American Bar Association Journal* 71; J. Ferrer and G. Ratti, *El realismo jurídico genovés* (Marcial Pons, Madrid 2012); R. Guastini, *L’interpretazione dei documenti normativi* (Giuffrè, Milan 2011).

disciplines,<sup>14</sup> *i.e.* those with the highest degree of predictive success, should not be assumed to exist. The object of analysis of legal scholars must therefore be entities belonging to the empirical world. It would even be the case that the very aim of research would be to suggest solutions for hard cases.<sup>15</sup>

The last thesis that characterizes different legal realisms is meta-ethical non-objectivism, that is, the thesis that claims that we have no ultimate criteria for establishing the rightness or wrongness of our moral beliefs, independently of our own preferences or feelings. It is important to not confuse meta-ethical non-objectivism with meta-ethical non-cognitivism; *i.e.* the thesis that states that the assertiveness conditions of practical statements – those by which we morally qualify behaviours – are not objective or inter-subjectively controllable. This is because, as highlighted below, it is possible to qualify these authors as meta-ethical cognitivists only in a specific sense.

### C. TECHNOLOGICAL CRITICISM TO TRADITIONAL LEGAL DOGMATICS

There are several arguments in support of the thesis that the best way to understand the normative intuitions of these authors is from the point of view of consequentialism. The first is that the criticisms directed against other models of legal dogmatics seem to presuppose some kind of ethical consequentialism. Of course, those that I present here are not the only criticisms that these authors directed against the other models of legal dogmatics.

To understand the criticisms that have been directed against other models of legal dogmatics from the standpoint of technological dogmatics, it is therefore necessary to first clarify what I mean by consequentialism and deontological ethics. Since the definitions of both positions are controversial, I will only offer characterizations of consequentialism and deontological ethics that are sufficiently precise for my purposes.

By ethical consequentialism, I mean the kind of ethics for which the unique criterion for determining the rightness of a behaviour is whether or not it is suitable for, or will contribute to, achieving the best state of affairs, the best-known case of such consequentialism is utilitarianism.<sup>16</sup> It does not only concern, therefore, the idea according to which what has to be evaluated are the consequences of actions, but that the only way to qualify a behaviour is establishing if it is suitable for, or contributes to achieving a better state of affairs. Thus, what originally would have moral value would not be the actions (or rules, or principles) but the state of affairs, being the former entities morally qualified only in terms of the latter.

By deontological ethics, I mean the kind of normative doctrines that consider that the moral value of (at least some) actions does not depend (or does not depend exclusively) on the consequences generated by them, but on their intrinsic moral value. It is possible that deontological ethics give relevance to the consequences of actions. However, the consequences become part of a balance of reasons the outcome of which depends on the use of norms and moral principles, or on a further balance between consequences. Thus, since the suitability of an action, regarding a particular purpose (or state of affairs), is not the only criterion for attributing moral value to a behaviour, it is necessary to use standards the application of which does not rely on the verification of a statement about the suitability of certain means for certain ends. Basically, valuing or not valuing a conduct would be, from the point of view of deontological ethics, nothing but its compliance with a set of rules and/or principles from which we can qualify the conduct. One could think that, to the extent that we need criteria to establish the moral value of states of affairs, the difference between deontological ethics and consequentialism is actually minimal or irrelevant. Basically, from this point of view, it seems that no big difference could be found between, on the one hand, qualifying a behaviour as being appropriate to achieve a state of affairs and then using values to assess this state of affairs, and, on the other hand,

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<sup>14</sup> B. Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence', in *Naturalizing Jurisprudence* (Oxford University Press, Oxford 2007) 153; T. Spaak, 'Naturalism in Scandinavian and American Realism: Similarities and Differences', in M. Dahlberg (ed.), *De Lege: Uppsala-Minnesota Colloquium: law, culture and values* (Iustus, Uppsala 2009) 33.

<sup>15</sup> Regarding which entities ought to be admitted to make the practical discourse controllable, see B. Leiter, 'Objectivity, Morality, and Adjudication', in *Naturalizing Jurisprudence*, *supra* n. 15, 225.

<sup>16</sup> The literature on ethical consequentialism is more than abundant. I find especially clear W. Sinnott-Armstrong, 'Consequentialism': E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy (Winter 2011 Edition)*, <<http://plato.stanford.edu/archives/win2011/entries/consequentialism/>> accessed 30 August 2012. See also S. Scheffler, *Consequentialism and Its Critics* (Oxford University Press, Oxford 1988); E. Carlson, *Consequentialism reconsidered*, (Kluwer, Dordrecht 1997); J.C. Bayón, 'Causalidad, consecuencialismo y deontologismo' (1986) 6 *Doxa* 461; E. Rivera López, *Los presupuestos morales del liberalismo* (Centro de Estudios Políticos y Constitucionales, Madrid 1997) chapters VI-VII.

saying that we must assess the consequences of actions.<sup>17</sup> However, it is possible to affirm that the difference between consequentialism and deontological ethics is not only a difference between two types of normative doctrines, but a meta-ethical difference about the primary elements of morality or ethics. That is, while from the point of view of deontological ethics, what gives value to the behaviour is a set of values or principles, for consequentialism, it is a possible state of affairs.

To understand the meaning of the criticism that the realists directed against the other two models of legal dogmatics, it is necessary to introduce a further distinction between the two different types of deontological ethics. This distinction is based on the well-known, though controversial, difference between principles and rules. What I will hold here is that formalistic dogmatics, when suggesting solutions for hard cases, configures the rightness of actions from the point of view of deontological ethics exclusively consisting in rules. Argumentativist dogmatics, I believe, justify the qualification of the behaviour in hard cases, basing the justification on deontological ethics founded on principles and rules.

For a norm to be considered a rule, it must jointly meet two conditions: *i*) both its antecedent and consequent must include properties, the satisfaction of which can be checked exclusively by empirical determination; *ii*) it must be a conditional rule that contains in its antecedent sufficient conditions for the application of the consequent. I understand principles, in contrast, as conditionals whose antecedent has not sufficient conditions, or conditional rules the antecedent (or consequent) of which is composed of properties unrelated to facts. To this criterion of distinction between principles and rules it is necessary to add another important consideration for my purposes. If we adopt the viewpoint of the normative system and that this normative system comprises both rules and principles, the set of transformation rules admitted within it cannot be reduced to a set of rules, because, among the external applicability conditions of the norms, there are discourse properties that are not referring to facts. When the normative system is composed solely of rules (as I have defined them here), the set of transformation rules may be reduced to rules. Otherwise, if the operations supported within a system composed of rules cannot be reduced to rules, we are probably not facing merely a set of rules but rather rules and (at least some) principles.

The distinction between consequentialism and deontological ethics, and that between principles and rules, produces, in turn, a difference in the type of reasoning required to qualify behaviour from each of these perspectives. In deontological ethics, based solely on rules, the qualification of a given behaviour requires the subsumption of a particular case under a general type of case. In deontological ethics, based on both principles and rules, the qualification will depend on a balance between our values and principles. Finally, for consequentialist ethics, the qualification will depend on what means are causally necessary and/or sufficient to achieve a certain state of affairs. One might think that in the case of rule consequentialism, just as in the case of deontological ethics based only on rules, indicating proper behaviour would depend on subsuming descriptions of particular behaviour under the antecedents of the rules that describe generic cases. This is certainly true, but it is necessary to note that, as several authors have pointed out, and just as different rule-utilitarianism state, rule-consequentialism ends up collapsing with act-consequentialism.<sup>18</sup>

### 1. The Criticism of Formalist Legal Dogmatics

The first object of criticism of technological realism is formalist or conceptualist legal dogmatics. Nonetheless, the expressions ‘legal formalism’ or ‘legal conceptualism’ are ambiguous and we can confer different meanings to them.<sup>19</sup> However, this term is usually linked to the thesis according to which legal scholars can and should limit themselves to pronouncing statements of descriptive nature because the law is complete and consistent and it constitutes a closed system, requiring no further value considerations to establish what law requires. Strictly speaking, formalist dogmatics will not suggest solutions for hard cases because the law always provides a single and clear solution for any given case.

However, the latter is clearly an implausible thesis. I am not claiming that it would never be implausible to claim that the law always provides only one answer. Rather, what is clearly implausible is to assert that the law always provides a clear answer, and that it would not be necessary to resort to

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<sup>17</sup> See, for example, J. Mackie, *Ethics* (Penguin Books, London, 1990) 149; P. Comanducci, *Contrattualismo, utilitarianism, garanzie* (Giappichelli, Turin 1984) 24, 25.

<sup>18</sup> Sinnott-Armstrong, *supra* n. 17.

<sup>19</sup> See, e.g., G. Fassò, *Storia della filosofia del diritto* (Laterza, Roma-Bari 2005); M. Jori, ‘Formalismo giuridico’, in *Digesto delle discipline privatistiche (sezione civile)* vol. VIII (Utet, Turin 1992) 425; A.E. Cammarata, ‘Formalismo giuridico’, in *Enciclopedia del Diritto*, vol. XVII (Giuffrè, Milan 1968) 101. See also A. Núñez Vaquero, *supra* n. 1.

some form of reasoning to establish the only right answer for a hard case. Now, it is possible to reformulate this in slightly different terms: although the law does not offer a single possible solution for all cases, legal scholars have a method (whether it be conceptualist or formalist) that allows them to derive answers for unconsidered cases without resorting to evaluative considerations. Rather than “construct” solutions for unconsidered cases, the conceptualist legal scholars would obtain all the consequences – based on a method consisting of clear (not vague) rules, the applicability conditions of which would also be clear – that can be derived from the normative basis of the system, without needing to resort to evaluative considerations.<sup>20</sup>

The defenders of technological dogmatics directed two types of criticism against the conceptualist or formalist dogmatics: a criticism of theoretical nature and two others of practical nature.

(a) According to the first (theoretical) criticism, when formalist legal scholars propose solutions for hard cases, they are not limiting themselves to applying a method composed of rules, the applicability conditions of which are also clear. On the contrary, the application of the dogmatic method requires that legal scholars resort to evaluative considerations for two reasons. First, because among the instruments of the dogmatic method there are paralogical rules that necessarily require evaluative considerations in order to be applied, such as the analogy (which cannot be reduced to a rule because its application depends on a judgment of practical relevance). Second, because formalist dogmatics provides transformation rules that allow more than one solution to be justified – take, for example, the classic choice between analogy and the *a contrario* argument – and the meta-criteria for indicating the right answer is lacking. That is, this method provides the legal scholar with methodological rules that are also applicable and does not provide any meta-criteria about their application in case of conflict with other methodological rules.<sup>21</sup>

(b) The practical criticism has two sides:

(i) For the purposes of this argument, let us theoretically concede that formalist dogmatics would not introduce value considerations, then this instrument for solving hard cases would be irrational. That is because solutions would be proposed based on norms that would assume a set of beliefs about how the world is that cannot be justified at the time of the legal decision. If it is possible that this may happen, then the application of a norm may cause consequences, or lead to a state of affairs, completely different or even diametrically opposed to those pursued in norm creation.<sup>22</sup>

(ii) The second aspect of the criticism claims that, regardless of what the formalist legal scholars say they are doing, in order to apply such a method, it is necessary to introduce evaluative considerations that – being not explicit or conscious – become uncontrollable and unjustifiable.<sup>23</sup> They are uncontrollable because they pass solutions produced exclusively on the basis of the application of a method consisting of a set of rules when, in fact, these proposals are based on hidden value assumptions. These are unjustified because, first, arguments are not being offered in favour of these assumptions and, second, the proposed solutions are based solely on the idiosyncratic prejudices of lawyers because of their unawareness of these assumptions.<sup>24</sup>

## 2. Criticism of Argumentativist Dogmatics

According to the defenders of argumentativist legal dogmatics, legal scholars should suggest answers for hard cases based on a set of legal and/or moral principles found in legal practice and institutional history, which are implicit in the legal system or which have been turned into positive principles by constitutional documents. In this sense, the qualification of ways of behaving, at least in hard cases, depends on the extent to which they live up our legal and/or moral principles.

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<sup>20</sup> Galgano, *supra* n. 3.

<sup>21</sup> G. Tarello, *L'interpretazione della legge* (Giuffrè, Milan 1980) 346.

<sup>22</sup> Cardozo, *supra* n. 9, 73: “The right which the assailants of the statute posit as absolute or permanent is conceived of by the supporters of the statute as conditioned by varying circumstances of time and space and environment and degree. The limitations appropriate to one stage of development may be inadequate for another. Not logic alone, but logic supplemented by the social sciences becomes the instrument of advance.” See also Jhering, *supra* n. 3, 61ff.

<sup>23</sup> For an analysis of the criticisms of the American realists against legal formalism, see G. Tarello, *Il realismo giuridico americano* (Giuffrè, Milan 1962) 124ff. Good examples of these criticisms are in T. Arnold, ‘Criminal Attempt. The Rise and Fall of an Abstraction’ (1929) 40 *Yale Law Journal* 53; Cohen, *supra* n. 7, 77-94. On the treatment of dogmatic concepts by Scandinavian realists, see Lundstedt, *supra* n. 7, 43ff; Olivecrona, *supra* n. 14, chapters VI, VII; A. Ross, ‘Tù-tù’ (1957) 70 *Harvard Law Review* 812.

<sup>24</sup> See e.g. L. Green, *Rationale of Proximante Cause* (Kansas City 1927) 63ff; Tarello, *supra* n. 24, 131.



What is essential to emphasize is that, despite the differences between the various methods proposed within argumentativism, in all of them, in order to determine the best possible answer, it is not sufficient to determine the set of norms and values that govern the legal system, but further evaluative considerations are required. That is, the set of operations that must be performed to determine the best answer from a set of norms (rules and principles) and values cannot be reduced to a set of rules (the applicability conditions of which would also be clear) but it requires further value judgments. This is so for several reasons:

First, because the moral and legal principles that have found positive entrenchment in our legal orders are open to various interpretations that allow them to qualify the same behaviour in incompatible ways. One may also say that they are open to various conceptions: It is enough to think about the different versions of the principles of equality or freedom. The fact that the courts have traditionally embraced a version or interpretation of these principles is not a conclusive reason, neither from the legal point of view, nor from a philosophical-political point of view, for these very courts may decide future cases on other interpretations of the statements that entrench such principles. Without objective criteria that would indicate what the interpretation that we should adopt is, we must choose one of the possible interpretations, introducing a further value judgment.

Second, since the principles cannot be directly applied<sup>25</sup> – because they cannot function as a major premise of a legal syllogism – it is necessary to give them more precise content, transforming them into indefeasible conditional norms with a closed antecedent. The problem is that from the same principle (now understood as an interpreted statement, as a norm) we can derive different rules, all of them equally justified from a formal point of view, and the application of which does not necessarily lead to the same decision in a given case.

Thirdly, it seems justified to say that the principles are plural, not hierarchically ordered (or that we do not have a meta-criterion for sorting them independently from our preferences), and frequently clashes occur between them. The problem is that we do not have ultimate rightness meta-criteria that could indicate what would be the best possible solution to the clash of principles that is likely to arise.

To understand this last criticism that the defenders of technological dogmatics directed against argumentativism, we must return to the thesis of the indeterminacy of law. As previously argued, according to the thesis of indeterminacy, the set of legal reasons allows inconsistent legal decisions to be presented as justified for the same particular case. Then, what is characteristic of technological dogmatics is the application of the thesis of the indeterminacy in the field of practical reasoning.

To establish the best possible answer in case of conflict between principles and/or values, both moral and legal, the defenders of argumentativist dogmatics resort to conceptual tools developed by moral theory such as balancing principles, reflective equilibrium or coherentism, etc. That is, instruments that allow the harmonization of our intuitions, or that determine which intuition is more important than the others in case of conflict, thus offering a solution of the case.

Given this model of practical reasoning in general, and legal in particular, the defenders of the technological model direct three criticisms from two different standpoints: one of theoretical nature and other two from the practical point of view.

(a) The first criticism, of theoretical nature, claims that tools such as balancing principles, coherentism, the concept of reasonableness or reflective equilibrium allow incompatible practical decisions to be justified, and the meta-criteria indicating which is the correct answer is lacking. The problem is that if the criteria allowing us to decide between two justified answers are not provided, then such instruments are insufficient to take practical decisions: in other words, there is no criterion for justifying the choice between one of the possible solutions to the detriment of other possible responses.<sup>26</sup> Thus “general propositions – *i.e.* principles – do not decide individual cases”<sup>27</sup> because “they are in the habit of hunting in pairs.”<sup>28</sup>

(b.i) The first criticism from the practical point of view gives plausibility to the reconstruction of what the defenders of argumentativist dogmatics claim that they do when suggesting solutions for hard cases. But even granting that this method – the sum of principles, values and rules, on the one hand, and tools such as reflective equilibrium, coherentism or balancing, on the other – is enough to make practical decisions, it becomes objectionable for different reasons.

First, methods such as reflective equilibrium, coherentism or the use of the concept of reasonableness, are very conservative to the extent that these only serve to accommodate our moral

<sup>25</sup> Guastini, *supra* n. 14, 216ff. The opposite opinion is found in C. Bernal Pulido, ‘Estructura y límites de la ponderación’ (2003) 26 *Doxa* 225.

<sup>26</sup> Guastini, *supra* n. 14, 199ff.

<sup>27</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting O. W. Holmes).

<sup>28</sup> W. Cook, ‘Review of *The paradoxes of legal science* by Benjamin Cardozo’ (1929) 38 *Yale Law Journal* 405, 406.

intuitions. That is, they only serve to accommodate those moral beliefs that we already hold,<sup>29</sup> not to put them in question. However, it is arguable that legal dogmatics should be confined to perform only this task and should not have a critical stance towards moral intuitions, the raw material for coherentists. The consequentialist may choose between two possibilities relating to our moral intuitions: that is, to somehow try to accommodate our moral intuitions, or to reject their importance. One might think that the second way is completely nonsensical but we should not draw conclusions too quickly. The underlying idea is that moral theory should not engage to so much in harmonizing our moral intuitions as to put them into question.<sup>30</sup>

Second, it is not very rational to think that, ultimately, the correctness of the solution for a hard case should depend on norms and values that have been elaborated or formulated to address practical problems that are different from those at hand.<sup>31</sup> It is not a question, as particularism claims, of not being able to formulate principles that govern our practical judgments but that these have been formulated to solve other problems, and have very little to do with cases at hand. In the words of Benjamin Cardozo: “We live in a world of change. If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow.”<sup>32</sup>

Finally, it is implausible to make the legal qualification in hard cases depend on the application of a method that – at least for some cases – excludes considerations about the consequences of actions. Of course, deontological ethics can take into account the consequences of actions, and even authors such as Dworkin claim to be consequentialists;<sup>33</sup> others, as MacCormick, admit the possibility of consequentialist type arguments.<sup>34</sup> However, in deontological ethics – that argumentativist dogmatics is grounded in – the evaluation of at least some ways of behaving cannot depend on the consequences they generate. This does not seem quite convincing. If we take into account that much of litigation analysed by constitutional courts has to do with the clash between constitutional principles, then this distinction becomes more important.

(b.ii) The second criticism of practical nature takes the theoretical criticism seriously, and directs three other criticisms to the argumentativist model:

First, the argumentativist method could be qualified as ideological to the extent that it is presented as a sufficient means to solve hard cases. However, not providing the necessary criteria to establish which the best possible answer is ends up giving a semblance of rationality to what are in fact decisions merely based on idiosyncratic intuitions. As several American realists have said in relation to judicial decisions, it seems that the proposition of normative solutions offered by argumentativist legal scholars are also *ex post facto* justifications of decisions based on other reasons.<sup>35</sup>

Second, the argumentativist method also fulfils an ideological function of hiding the real reasons for the proposed decisions in hard cases, which are not found in the arguments offered, but in other factors.<sup>36</sup> Hereby, it is not possible to control or discuss the suggestions made by legal dogmatics because the reasons that justify (and explain) the proposed decision are concealed.<sup>37</sup>

Finally, the argumentativist method renders legal dogmatics irrelevant to the extent that, if the real reasons that motivate the decisions made by lawyers are not taken into account, then these will have no practical relevance in their decisions.<sup>38</sup> Legal dogmatics aiming to guide judicial decision-making in hard cases without taking into account what reasons motivate an operator’s preference of certain answers over others is simply condemned to practical irrelevance.

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<sup>29</sup> B. Leiter, ‘In Praise of Realism (and Against Non-Sense Jurisprudence)’ (2012) 100 *Georgetown Law Journal* 865, 888, attributed the argument to Richard Hare, who had put it forward in his review of *A Theory of Justice* by John Rawls. R. Hare, ‘Rawls’ Theory of Justice (reviewing John Rawls, *A Theory of Justice*, 1971)’ (1973) 23 (144) *Philosophical Quarterly* 144.

<sup>30</sup> See J.C. Smart and B. Williams, *Utilitarianism: For and Against*, (Cambridge University Press, Cambridge 1973).

<sup>31</sup> Jhering, *supra* n. 3, 61ff.

<sup>32</sup> B. Cardozo, *The Paradoxes of Legal Science* (Columbia University Press, New York 1928) 10.

<sup>33</sup> R. Dworkin, ‘In Praise of Theory’, in *Justice in Robes* (Harvard University Press, Cambridge 2006) 49.

<sup>34</sup> N. MacCormick, *Legal Theory and Legal Reasoning* (Clarendon, Oxford 1978) chapter VI; L. Mengoni, ‘L’argomentazione orientata alle conseguenze’, in *Ermeneutica e dogmatica giuridica* (Giuffrè, Milan 1996).

<sup>35</sup> K. Llewellyn, ‘Some Realism about Realism. Responding to Dean Pound’ (1931) XLIV (8) *Harvard Law Review* 1222, 1236.

<sup>36</sup> Which factors these are specifically is another question. To identify such factors and to make predictions based on these factors is precisely the mission of the realistic legal science. See e.g. R. Posner, *How Judges Think* (Harvard University Press, Cambridge 2010). See also Núñez Vaquero, *supra* n. 6.

<sup>37</sup> Leiter, *supra* n. 15.

<sup>38</sup> Posner, *supra* n. 9; Leiter, *supra* n. 30.

#### D. TECHNOLOGICAL REALISM: A CONSEQUENTIALIST FORM OF DOGMATICS

To demonstrate that these authors presupposed consequentialist ethics is a difficult task because the notion of consequentialism is relatively recent<sup>39</sup> and here I am referring to a set of authors spanning from Jhering to Posner. It is not, of course, just a matter of words; I have offered here a minimal (and, I hope, clear) definition of ethical consequentialism that would require formal acceptance in order to be ascribed to any author or current. However, to describe these authors as consequentialists is the best way to illustrate their normative intuitions. In support of this thesis, I will offer two types of arguments. First, I will present some quotes from these authors where they put forward what I call the argument of the best consequences, or where they adhere to some form of reformed utilitarianism. Second, even if there is not a conceptual connection between any of the main theses of legal realism and consequentialism, it is possible to better understand some of the realist theses from the consequentialist point of view.

##### 1. The Best Consequences

To show that these authors are consequentialists, I stress a series of quotes in which consequentialist arguments are explicit, or in which adherence to some form of reformed utilitarianism is expressed. By following this strategy, however, we will find some cases clearer than others. It is important to note that the fact that these authors resort to the argument of the best consequences, or even subscribe to some form of reformed utilitarianism is not yet a conclusive argument to claim that these authors are consequentialists, or that the best reconstruction of their ideas should be based on this thesis. However, this is a very good indicator. There are several reasons for this: because the argument of the best consequences does not necessarily imply consequentialism. For this argument to be enough, it would be necessary to say that the sole criterion for establishing the rightness of a behaviour would *in all cases* be that it contributes to the best state of affairs; nor is the fact that they declare themselves to be reformed utilitarians, because if utilitarianism is composed of three features – welfarism, consequentialism and additivity (addition as an aggregation procedure) – it seems conceptually possible to dispense with consequentialism and still keep the other theses. Finally, it is possible that the best reconstruction of the solutions proposed for hard cases by these authors is not reflected in what they claim to do. Yet it constitutes an excellent indicator.

Among the clearest examples is that of Richard Posner who said, in relation to what he believes should have been the decision of the Supreme Court in *Bush v. Gore*: “All that pragmatic adjudication need mean, however – all that I mean by it – is adjudication guided by a comparison of the consequences of alternative resolutions of the case rather than [...] utilizing only the canonical materials of judicial decision making, such as statutory or constitutional text and previous judicial decisions. The pragmatist [...] regards adjudication, especially constitutional adjudication, as a practical tool of social ordering and believes therefore that the decision that has the better consequences for society is the one to be preferred.”<sup>40</sup>

Another clear case would be that of Jhering. Beyond Jhering's well-known thesis according to which the purpose of law is to ensure the existence of the legal community – so the legal activity must be aimed at finding ways to ensure its survival<sup>41</sup> – it is possible to identify other indications about consequentialist positions held by this author: “Natural law [consists of] abstract truths without contact with the needs and experiences of life [...]. The first and original source of law is in the heart of every man; the second is the need, the demands of life and the practical knowledge that for the necessary purposes has sought the right means [...]. It is not, from my point of view, what a judge should be, one who does not bother with the outcome of his task and merely shifts the responsibility to the legislator; nor the other who mechanically applies the legislative precept.”<sup>42</sup>

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<sup>39</sup> G.E.M. Anscombe, ‘Modern Moral Philosophy’ (1958) 22 (124) *Philosophy* 124.

<sup>40</sup> R. Posner, ‘Bush v. Gore as a pragmatic adjudication’, in R. Dworkin (ed.), *A Badly Flawed Election* (New Press, New York 2002) 186.

<sup>41</sup> See the ‘Introduzione’ to Jhering, *supra* n. 9.

<sup>42</sup> R. von Jhering, *¿Es el derecho una ciencia?* (Comares, Granada 2002) 62, 67, 68, 85.

Vilhelm Lundstedt and his method of “social utility”<sup>43</sup> is another good example. According to Lundstedt, the role of law should be the preservation of society – what would be achieved by ensuring certain assets to all subjects, so that: “Constructive *juridik* must [...] be determined exclusively by the question, whether the maintenance of a contemplated or already enacted law (or rule of law) can or cannot – after a comprehensive examination of the appertaining circumstances – be anticipated to ensure the greatest benefit to society, or, expressed in another way, to fulfil in the best way a social function. Constructive *juridik* must, regarding interpretation of so-called valid law [...] anticipate to benefit society as much as possible.”<sup>44</sup>

An even clearer case of consequentialism can be found in an author who expressly advocates a reformed utilitarianism, Felix Cohen: “[W]hy should we assume that the value of anything depends upon its consequences? [...] Functionalism exposes the emptiness of this challenge, by showing that the distinction between law and its consequences is purely arbitrary [...]. One cannot evaluate a legal rule or institution intelligently without knowing the action caused which constitutes the human meaning of the rule of institution [...] In the field of legal criticism the functional method may thus be conceived of as essentially a reorientation of utilitarianism to a wider philosophical perspective and to a broader horizon of relevant knowledge in the fields of psychology, economics, criminology, and general sociology.”<sup>45</sup>

The case of Giovanni Tarello is somewhat more complicated because he explicitly rejected the approach to law typical of Pound’s sociological jurisprudence.<sup>46</sup> However, his analysis of the treatment of dogmatic concepts made by American legal realists suggests that, according to Tarello, the creation of dogmatic concepts should be governed by their functionality to achieve states of affairs: “[T]he products of conceptual elaborations of legal dogmatics are functional to the extent that the criteria, which govern the development, are consciously designed in order to make the products become uniquely functional [...] the doctrine be more attentive to regulated matters than to the formal characteristics of normative statements governing social phenomena.”<sup>47</sup>

It is possible to track this kind of position in Benjamin Cardozo as well: “Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or the economic and social needs to which a decision will respond [...] rules, however well established, must be revised when they are found after fair trial to be inconsistent in their workings with an attainment of the ends which law is meant to serve.”<sup>48</sup>

Finally, the programmatic manifesto of American realists – *Some Realism About Realism* – is one of the best examples about the technological method of legal dogmatics: “(2) The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other (3) The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve [...] (8) An insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects.”<sup>49</sup>

## 2. Consequentialist Dogmatics

Following the argument of the best consequences, I will present two further arguments in favour of my thesis. The first is that it renders a better understand some of the iconoclastic statements of the realists on meta-ethical matters. Second, I will claim that, although there is no conceptual connection between reductionist empiricism and consequentialism, it would be consistent for advocates of some variant of reductionist empiricism to adopt consequentialist ethics.

(a) There is little doubt that the different legal realisms maintain a sharply critical tone, and that historically they have developed in reaction to the dominant legal, political and philosophical cultures

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<sup>43</sup> Traditionally translated as “social welfare”. According to T.T. Arvind, Lundstedt used the expression because he wanted to avoid reference to utilitarianism, but Lundstedt was unaware of the connotation of the term in English. See Arvind, *supra* n. 5, 176.

<sup>44</sup> Lundstedt, *supra* n. 7, 133-134.

<sup>45</sup> Cohen, *supra* n. 7, 94.

<sup>46</sup> G. Tarello, ‘Sociological Jurisprudence’, in *Cultura giuridica e politica del diritto*, *supra* n. 8, 387.

<sup>47</sup> G. Tarello, ‘La semantica del neustico’, in *Diritto, enunciati, usi* (Il Mulino, Bologna 1974) 329, 355-356.

<sup>48</sup> Cardozo, *supra* n. 9, 116-117, 120.

<sup>49</sup> Llewellyn, *supra* n. 36, 1236-1237.

of the time and place of their emergence.<sup>50</sup> In this sense, there are many meta-ethical statements made in a markedly polemical tone that would seem to lead to radical practical scepticism: e.g. Posner's claim that most moral theory is futile and thus he does not make moral judgments in his judicial decisions. Posner's case is paradigmatic in this sense: While claiming not to introduce moral assessments, he says that the law is rationally indeterminate: "Moral subjectivism [...] is the view that *there are no criteria of validity for a moral claim*; morality, in this view, is relative to the beliefs of each individual, so that an individual acts immorally only when he acts contrary to whatever morality he has adopted for himself. I am sympathetic to this position [...] I am not a moral sceptic, that is, one who believes that moral truth is unknowable. It is a *moral fact* of our society, and of societies like ours, that infanticide is immoral." These ideas are inconsistent: Even if, which is not the case, Posner would have engaged in applying existing law as done on previous occasions by other courts, it would still have required some kind of practical compromise. Many more examples could be made, such as Guastini's affirmations according to which moral positions are simply matters of taste, Hägerström's thesis about value judgments, Lundstedt's considerations on the legal ideology, Cardozo's statement according to which there is no criteria for moral rightness, or the emotivism of Alf Ross.<sup>51</sup>

The problem is not that these authors hold that there are no ultimate criteria of normative rightness (meta-ethical non-objectivism/external scepticism) while suggesting solutions for hard cases. Instead, the issue is that, if we were to consider the possible legal answers stemming from the very same principles, incompatible solutions could be justified (non-cognitivism/internal scepticism), thus it would make little sense to suggest solutions for hard cases because any such suggestion of the best possible answer would only be an exercise in asserting one's own preferences.

Yet, these authors suggest solutions for hard cases preferring certain answers to others, and their answers seem rational (albeit in a different sense of the word "rational").<sup>52</sup> Now, for their solutions not to appear as the result of purely personal preferences – and thus becoming subject to the same criticism directed against other models of legal dogmatics – these authors must frame the statements qualifying a behaviour as statements, the assertiveness conditions of which do not depend on the preferences of the person who utters them, but on empirical and objectively verifiable conditions. It is not, therefore, that there is no ultimate justification for preferring one set of values (or a state of affairs) but that we do not have a method that allows us, coming from the same principles, to qualify behaviours in a non-subjective way.

Of course, in order to qualify behaviours – both from the consequentialist and the deontological perspectives – it is necessary to assume a conception of the good, and most of these authors argue that we lack the meta-criteria, beyond our own preferences, to justify such conceptions of the good. However, things are very different depending on whether we adopt consequentialist or deontological ethics, beyond which lies the actual conception of the good that is adopted. If consequentialist ethics is adopted, the moral qualification of a behaviour depends exclusively on either its suitability or its ability to contribute to achieve what is considered the best state of affairs. The assertiveness conditions about the statements that qualify behaviours become objective, as they deal with facts and causal relations. If, however, we assume deontological ethics, qualifying behaviour will further depend on the preferences of the individual who qualifies the action because we have no criteria for choosing between different conceptions and rules that may derive from a set of principles, nor do we have methodological rules for resolving such conflicts.

So, if we circumscribe their scepticism (internal scepticism/non-cognitivism) to a thesis about the statements that qualify behaviours on the basis of rules and principles, it is possible to understand the solutions for hard cases suggested by these authors, and their preference for some solutions to the detriment of other legally justifiable responses. Without falling into contradiction, these authors were to remain non-cognitivists in relation to the practical statements that qualify behaviours based on ethics that are, in turn, grounded in norms and values, and cognitivists in relation to the practical statements that qualify behaviours based on consequentialist ethics, proposing justified solutions for hard cases.

(b) The second argument seeks to offer justification of the thesis according to which, although there is no conceptual connection between reductionist empiricism and consequentialism, for those who subscribe to some version of the first, it would be consistent to adopt consequentialist ethics. Put differently, if we naturalize the study of ethics, and if it is considered that scientific knowledge is the

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<sup>50</sup> Scandinavian realism arises against Boströmian idealism, American realism as a reaction to Langdellian formalism and Genovese realism as a reaction to formalist positivism and to the so-called neo-constitutionalism.

<sup>51</sup> R. Guastini, 'Due esercizi di non-cognitivismo' (1999) *Analisi e diritto* 277; Lundstedt, *supra* n. 7, 32ff; Cardozo, *supra* n. 9, 64; Ross, *supra* n. 7, 312ff. Regarding Hägerström's thesis on the meta-ethical field, see Mindus, *supra* n. 5, chapter 3.

<sup>52</sup> See, for example, Douglas, *supra* n. 8; Tarello, *supra* n. 8; Guastini, *supra* n. 8.

only or the best type of knowledge available, it would be consistent to maintain consequentialist ethics at the normative level. There are several reasons for this:

First, if some sort of reductionist empiricism is subscribed to, it would be consistent to adopt consequentialist ethics, because it would place our best knowledge about the world at the core of practical discourse, that is the discourse provided by the disciplines with the highest level of predictive-practical success, *i.e.* empirical sciences. If, moreover, we consider that many of these authors were particularly concerned about the political, social and economic changes taking place in their time (it is well-known that American legal realism was, at least in part, influenced by the need to adapt the law to the new social reality of the 1920's<sup>53</sup>) it would have been plausible to adopt consequentialist ethics because the rightness of actions would then depend on the shaping of the political, economic and social reality, since any given action's correctness would be measured in its capacity of promoting the best state of affairs.

Second, consequentialist ethics need not assume any epistemology other than that of science. To establish which action is necessary, or contributes mostly to achieve the best state of affairs, it is not necessary to presuppose a different epistemology from that of empirical sciences. On the contrary, to establish which answer is the best from the point of view of deontological ethics, it is necessary to presuppose entities whose existence can be doubted from an empiricist-reductionist point of view. The question is not whether we need to affirm that there is some non-natural characteristic that can be asserted concerning actions or states of affairs in order to attribute moral value to behaviours. This question, although interesting, is not relevant here. Rather, if we adopt deontologist ethics, we need to develop an epistemology that acknowledges the existence of values and principles, which is not admitted by the epistemology of empirical sciences, regardless of any thesis about whether we have ultimate criteria available (and independent from our preferences) about the rightness of our moral beliefs.

Third, when evaluating the rightness of a behaviour from the point of view of consequentialism, the same criteria of objectivity can be adopted as in empirical science. To the extent that the statements that qualify behaviours deal with facts and causal relations, their conditions of assertiveness are the same as those we use to consider a statement about cause and effect. Of course, in many cases is not easy to establish which one of two apophantic statements is true (or better justified). However, unlike what happens with the statements that describe behaviours in principled deontological ethics, we have meta-scientific criteria that allow us to establish which assertion is best justified.

Fourth, if we adopt some variant of reductionist empiricism, and we are willing to accept naturalistic explanations in the field of ethics, one of the best hypotheses, as illustrated by Simon Blackburn in *Ruling Passions*, is that ethics ultimately deals with the survival and coordination of human beings. If this is so, consequentialist ethics seem better positioned to achieve these purposes as they can make direct reference to these objectives.

## E. A PROVISIONAL CONCLUSION

Once we have chosen a particular conception of the good (a state of affairs as the best), technological dogmatics provides methodological tools for legal scholars to decide hard cases more rationally, choosing the legal option that leads to the better state of affairs, but the discussion is not limited to establishing whether a particular decision is appropriate for attaining a certain state of affairs.

First, within the framework of technological legal dogmatics there is space for discussion about which state of affairs is considered instrumentally best so as to obtain an intrinsically good state of affairs. Of course, scientific research on how the world is will not tell us what to do. Now, since the best state of affairs does not correspond to an ultimate, intrinsically good state of affairs, it will be possible to question whether this state of affairs is suitable for generating further states of affairs; that is, if it is causally sufficient and/or necessary to achieve what is considered best state of affairs desirable in itself.

Second, technological dogmatics suggests that legal scholars systematically review dogmatic concepts using a methodology in three stages. First, eliminate all dogmatic concepts that lack empirical reference. To say it with Cohen, "our legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow. Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared

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<sup>53</sup> M. White, *Social Thought in America: The Revolt Against Formalism* (Viking, New York 1949); M. Horwitz, *The Transformation of American Law: 1870-1960* (Oxford University Press, Oxford 1992).

bankrupt, and we are to have no further dealings with it.”<sup>54</sup> Secondly, check whether each dogmatic concept is a useful tool to achieve the best possible state of affairs, analysing whether the state of affairs for which this concept was originally developed coincides with the present or, on the contrary, whether it should be revised in light of the new reality. Lastly, develop concepts with a minor scope, that would avoid applying dogmatic concepts to issues for which they were not elaborated.<sup>55</sup>

Finally, this model of legal dogmatics has, at least, four advantages compared to argumentativist models: The first advantage is that, if advocates of technological dogmatics were right, and the instruments that argumentativist dogmatics provide would justify different decisions for any particular case, then the discussion of argumentativist dogmatics would become persuasive. On the contrary, assuming the technological model, suggesting solutions for hard cases becomes a rational discussion in which the same method used to verify the statements of empirical sciences would be applied and in which we would have criteria to establish when a practical statement is justified. The second advantage is that, if legal scholars were to adopt a methodological model such as the one developed and applied by these authors, it would be easier to identify the sources of disagreements about the best possible answer; that is, it would be clearer to know if these disagreements deal with what are considered to be the best state of affairs or about the means to achieve these. The third advantage is that solutions for hard cases, formulated from this point of view, are governed by a means-end rationality and are more prone to pragmatic success, therefore more rational. It lies beyond dispute that a decision that takes into consideration the consequences it generates is more rational than the opposite. The final advantage is that, being obliged to rely on a description of the true reasons that guide legal operators in their decision-making (equivalent to establishing suitable means to achieve what is considered the best state of affairs that would otherwise not have occurred), it is more likely that such a procedure will have a significant impact on the decisions of lawyers. Thus, technological dogmatics gives legal operators the tools to take rational decisions, beyond the actual content of such decisions.

Today, when some of the most important decisions seem to be taken in extremely fluctuating contexts, we should begin to take legal realism more seriously.

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<sup>54</sup> Cohen, *supra* n. 7, 48. However, this statement must be qualified in light of the theory of concepts held by the Scandinavian realists as Lundstedt or Olivecrona.

<sup>55</sup> Llewellyn, *supra* n. 36; Green, *supra* n. 25.

## SOME REALISM ABOUT LEGISLATION

Pierluigi Chiassoni\*

### Abstract

The historical movements we are used to pigeonhole as ‘Legal Realism’ did not give pride of place to legislation in their investigations about the law, being rather interested, either in dealing with adjudication and case-law (American Realists), or in working out a general theory of legal norms and legal sources (Scandinavian Realists). Nonetheless, if considered as a philosophical view maintained also by legal philosophers other than strict ‘historical Realists’ (like, e.g., Jeremy Bentham, Hans Kelsen, and ‘new’ Continental analytical jurists), Legal Realism may be credited with a full-fledged theory of legislation. Such a theory will be accounted for in the present essay, by pointing out and explain what may be considered its basic claims, *i.e.*: 1) the will-of-the-text thesis; 2) the norm-formulation thesis; 3) the no one-to-one correspondence thesis; 4) the structural indeterminacy thesis; 5) the structural mercy thesis.

**Keywords:** Legislation – Legal Realism – Legisprudence – Science of Legislation.

*Here, then, in the very cradle of legislative empire  
grew up another power, in words the instrument of the former,  
in reality continually its censor and not infrequently its successful rival*  
Jeremy Bentham

*The conscientious, intelligent judge will consider  
government a sort of orchestra, in which, in symphonies  
authorized by the people, the courts and  
the legislature each play their parts*  
Jerome Frank

### A. THE NEW SCIENCE OF LEGISLATION

The turn of the century has seen the rise of theories which, taking up one of the key concerns of juridical Enlightenment<sup>1</sup>, claim a new deal for legislation in the realms of jurisprudence and practical philosophy.

Jeremy Waldron set to the task of working out a “jurisprudence of legislation” capable of rescuing the respectability of lawmaking through (democratically elected) parliamentary assemblies in the related domains of political philosophy and analytical jurisprudence:

Legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law [...] I want us to see the process of legislation – at its best – as something like the following: the representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a

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<sup>1</sup> See e.g. J. Bentham, *Introduction to the Principles of Morals and Legislation* (ed. by J.H. Burns and H.L.A. Hart, University of London, The Athlone Press, London 1970); G. Filangieri, *La scienza della legislazione* (Grimaldi, Napoli 2003). On juridical Enlightenment see e.g. G. Tarello, *Storia della cultura giuridica moderna. I. Assolutismo e codificazione del diritto* (Il Mulino, Bologna 1976) chapter 5 ff.; P. Comanducci, ‘Introduzione’ in P. Comanducci (ed.), *L’illuminismo giuridico* (Il Mulino, Bologna 1978) 7-24; G. Postema, *Bentham and the Common Law Tradition* (Clarendon Press, Oxford 1986) parts II and III; D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge University Press, Cambridge 1989) chapter 2, 13.



way that openly acknowledges and respects [...] the inevitable differences of opinion and principle among them.<sup>2</sup>

In the same line of Waldron, Luc Wintgens and others started campaigning for “legisprudence”: “a new theory of legislation” the business of which is identifying (“detect”) and explaining “the principles of legislation” that “underlie the activity of the legislator” in view of promoting rational lawmaking:

Current legal theory is premised on the central role of the judge in contemporary legal systems. Although this evolution has contributed much to a vibrant understanding of law, it has also left the role of the legislator largely ignored and under-theorised. Legal theory routinely takes the law as ‘just there’, and limits its theoretical undertakings to law as a ‘given’. Law, it claims, is the result of political decision-making. But once law comes into force, it can be somehow miraculously separated from politics. And the realm of politics is impure – unlike law’s ‘neutral’ and ‘objective’ methods of reasoning and decision-making.<sup>3</sup>

In a 1950 essay where the term “legisprudence” was apparently coined, Julius Cohen complained legal realists did not pay due attention to legislation, though it was undeniably “one of the prime sources of policy-making,” and advocated, along with “Realism in jurisprudence,” *i.e.*, as to adjudication and case-law, the need for “Realism in legisprudence”: the promotion of “a working arrangement” between social and natural sciences and legislation, as a means for “the pursuit of reason as the *sine qua non* of the democratic way of life.”<sup>4</sup>

American legal realists, as Cohen rightly emphasizes, were indeed primarily concerned with judicial lawmaking and, consequently, did not pursue the project of making legislation a rational, scientifically reputable, enterprise along the lines he fosters. Nonetheless it would be too hasty to conclude, from such a premise, that legal realism does not have a theory of legislation. In fact, it does have one. I will make three claims:

(i) so far as jurisprudence is concerned, the responsibility for legislation’s disrepute is to be ascribed, largely though not entirely, to legal realism;

(ii) legal realism’s theory of legislation, with its cynical critique of the rosy picture heralded by *Gesetzespositivismus* and like views, is, on the whole, sound;

(iii) any vindication of the dignity of legislation as regards to other legal sources (like, e.g., case-law), as well as any advocacy of the rational study of legislation against jurisprudential neglect, must either take the realistic theory seriously, or be doomed to idle utopianism.<sup>5</sup>

The first claim points to legal realism as one of the sources of legislation’s theoretical disrepute. It purports to suggest the present jurisprudential focus on adjudication, which Waldron finds a so disappointing fixation, to be due not only (i) to the ideological orientation for judges, and against legislatures, typical of constitutional states, or (ii) to a legalistic “worry” for preserving the imagery of law’s “neutrality” and “distance from politics,” or even (iii) to a snobbish distaste for parliamentary assemblies,<sup>6</sup> as surely it may be the case, but also (iv) to a widespread awareness among jurists about the structural limits of legislation (even of sophisticated forms of legislation), which represents one of the main contributions of the realistic theory of law to contemporary legal culture. I will not argue anymore for this claim here, being content with its apparent reasonableness on the ground of jurisprudential history.

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<sup>2</sup> J. Waldron, *The Dignity of Legislation* (Oxford University Press, Oxford 1999) 1, 2; see also Id., *Law and Disagreement* (Oxford University Press, Oxford 1999) part I.

<sup>3</sup> See e.g. L. Wintgens (ed.), *Legisprudence: A New Theoretical Approach to Legislation. Proceedings of the Fourth Benelux-Scandinavian Symposium on Legal Theory* (Hart, Oxford 2002) including essays by L. Wintgens, L.D. Eriksson, K. Pietilä, S. Eng, C. Dahlman, H. Tolonen, K. Tuori, A. Verhoeven, W. Voermans, and H. Winter; Id., ‘Legisprudence as a New Theory of Legislation’ (2006) 19 *Ratio Juris* 1-25; Id., *Legisprudence. Practical Reason in Legislation* (Ashgate, Farnham 2012) 7. It goes without saying that legisprudence *à la* Wintgens is a normative enterprise: starting from the Kantian premise of individuals’ moral autonomy and freedom, it purports to establish the right principles of legislation and, on the basis thereof, the duties legislatures ought to fulfil to be legitimate.

<sup>4</sup> J. Cohen, ‘Towards Realism in Legisprudence’ (1949-1950) 59 *Yale Law Journal* 886, 886-897. According to the *Black’s Law Dictionary*, 7<sup>th</sup> ed., ‘Legisprudence’ is “The systematic analysis of statutes within the framework of jurisprudential philosophies about the role and nature of law.”

<sup>5</sup> Waldron and Wintgens seem to be aware of legal realism, so far as statutory interpretation is concerned. See e.g. J. Waldron, *The Dignity of Legislation*, *supra* n. 2, 10; L. Wintgens, ‘Legisprudence as a New Theory of Legislation’, *supra* n. 3, 21 ff. However, as we will see later on (section D), Waldron apparently resists to a full endorsing of realism.

<sup>6</sup> J. Waldron, *The Dignity of Legislation*, *supra* n. 2, chapter 2.

The third claim gets whatever force it might have from the plausibility of the second claim. To support the latter, I will try to present the realistic theory of legislation in its best light.

## B. LEGAL REALISM

The phrase “legal realism” is notoriously ripe with indeterminacy. A few distinctions will perhaps help clearing the way.

(i) “Legal realism” can be used from either an historical or a philosophical perspective. In the first case, it stands for a category in the eye of legal historians, pointing to specific tokens in contemporary legal thinking and legal culture; in the latter, it stands for one of the rarefied, abstract categories in law’s (meta)philosophy, along with such things as “natural law theory,” “legal positivism,” “legal formalism,” “interpretivism,” etc.

(ii) Legal realism as an historical category – historical realism – refers to well-known movements in Western legal culture: American Realism, Scandinavian Realism, and, more recently, even Italian Realism.

(iii) Contrariwise, legal realism as a (meta)philosophical category – philosophical realism – refers to a bunch of claims and attitudes which are usually, but not necessarily, associated with historical realism. Philosophical realism reaches beyond the borders of historical realism: Jeremy Bentham and Hans Kelsen, for instance, may be considered as as many representatives of philosophical realism, though they are usually considered not to belong to the circles of legal philosophers within historical realism.

(iv) Philosophical realism is a set of epistemological, theoretical, and normative claims and attitudes about the law.

(v) From the standpoint of epistemology, realism characterises as an empiricist outlook, according to which: scientific knowledge of the law is viable, provided it is about what, and how, the law is in fact; it must be grounded on experience; it must get rid of any idea of a “metaphysical” law and “metaphysical” ways of thinking about it.

(vi) As a general theory of law, realism is the outcome of a thoroughly empiricist-driven consideration of the phenomena making up “positive law.” Its central point is the critique (“denial”) of “the objectivity of law”: *i.e.*, of the idea according to which the law, any positive “legal system,” is an ordered collection of rules “out there,” waiting to be discovered and applied to real or fancied situations. Theoretical realism regards the objectivity of law as a myth: a piece of metaphysical thinking, originated in natural law theories, and consciously or unconsciously entertained to ideological purposes, needing to be dispelled. This is to be done by bringing to the fore how the law really is and works. This is to be done, for instance, by pointing out the following truths. There are no general rules as full-fledged, ready-to-go legal prescriptions applying to individual cases (rule-scepticism). Legal rules have no true meaning interpretation can simply discover (interpretive-scepticism). Legal concepts do not have true meanings deriving from the very nature of law and legal institutions (concept-scepticism). Positive legal orders are not, in and by themselves, consistent and gapless normative systems (system-scepticism). Legal facts are not hard-and-fast items out there for judicial discovery (fact-scepticism). Legal reasoning does not work as a discovery-device, but, rather, as a justification-device, *i.e.*, as a tool for *ex post* rationalizations (reasoning-scepticism, window-dressing theory). Adjudication is not, and cannot be, tantamount to a sheer combination of logic plus objective knowledge, as it is suggested by mechanical jurisprudence and judges-as-slot-machines theory (adjudication-scepticism). The traditional doctrinal study of law is not, properly speaking, “legal science”: it is legal policy, usually in disguise (legal science-scepticism).

(vii) As a normative outlook, finally, realism amounts to the juristic deontology taking side for the rule of reason upon positive law (*il governo della ragione sul diritto positivo*). Positive legal orders ought to be, as far as possible, rational concerns: inspired and driven by the tenets of formal and means-to-end rationality.<sup>7</sup>

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<sup>7</sup> See *e.g.* O.W. Holmes Jr., ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 457-478; J. Frank, *Law and the Modern Mind* (6<sup>th</sup> printing, Stevens & Sons, London 1949); K.N. Llewellyn, ‘Legal Realism: The Next Step’ (1930) 30 *Columbia Law Review* 431, 431-467; K.N. Llewellyn, ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 *Harvard Law Review* 1222, 1222-1264; H. Kelsen, *General Theory of Law and State* (Harvard University Press, Cambridge Mass. 1945) 123 ff.; A. Ross, *Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law* (Munksgaard, Copenhagen 1946); A. Ross, *On Law and Justice* (Stevens & Sons, London 1958); G. Tarello, *Il realismo giuridico americano* (Giuffrè, Milano 1962); S. Castignone, *La macchina del diritto: Il realismo giuridico in Svezia* (Comunità, Milano 1974); K. Olivecrona, *Law as Fact* (2<sup>nd</sup> ed., Stevens & Sons, London 1971); W. Twining, *Karl Llewellyn and the Realist Movement* (Reprinted with Postscript, Weidenfeld and Nicolson, London 1985); B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, Oxford 2007) Part I; E. Millard, ‘Positivisme logique et réalisme juridique’ (2008) *Analisi e Diritto* 177, 177-189; R. Guastini, ‘Rule-Scepticism

### C. LEGAL REALISM AND LEGISLATION

“Legislation” – taking such a term in its strictest, etymological, meaning<sup>8</sup> – suffers from process-product ambiguity. Legislation-process is the set of operations, performed by people acting as “legislative” organs of a legal order, the outcome of which consists in “enacting” or “passing” such things that are usually known as “laws,” “statutes,” or “acts.” Legislation-product is the discrete set of laws, statutes or acts representing the output of a legislation-process.

Theories of legislation may be, as to their basic function, either descriptive or normative. Normative theories of legislation are about what, and how, legislation ought to be. They apply the principles of some previously selected normative ethics (theory of justice, theory of the state, etc.) to establish the proper way of designing legitimate legislative organs, the proper rules and forms of legislative process, the proper way of gathering “the facts” and getting “witnesses,” the proper forms of legislative drafting, the proper contents for legislative acts, etc. Normative theories of legislation belong to the realm of (Bentham’s) censorial jurisprudence and political philosophy. They may concern legislation in general, or be limited to legislation as a source of law in a given form of legal-political arrangement. Descriptive theories of legislation, in turn, may be sociological, doctrinal, or jurisprudential. Very roughly speaking: sociological theories purport to account for the causes and effects of pieces of legislation in one or more legal orders; doctrinal theories of legislation purport to account for the rules and principles governing legislation in one or more legal orders; jurisprudential theories purport to account for the basic structural and functional features of legislation in general, usually within a general theory of legal sources including case-law (precedent), customs, executive orders, etc.

Philosophical realism copes with legislation in two different ways. On the one hand, it is descriptive realism about legislation. In such a case, it purports to provide a realistic jurisprudential theory of legislation. On the other hand, it is normative realism about legislation. In such a case, it is a normative ethics concerning the way legislation ought to be.

Leaving normative realism aside, in the next section I will provide an outline of (what I take to be) the theory of legislation of descriptive realism at its best. In so doing, as anticipated, I will argue for the second and third claims I made at the outset (see § A above).

### D. THE REALISTIC THEORY OF LEGISLATION

Since the 18<sup>th</sup> Century, it is commonplace considering central jurisprudential problems about legislation to encompass the following: To the purpose of clear and exact legal thinking, what are statutes? In which sense, if any, may we regard statutes as being the outcomes of acts-of-will by a legislature? In which sense, if any, does legislation “make” law? Properly speaking, is legislation “law” or, rather, a “source of law”? How can, and do, statutes work in fact? Is the actual working of statutes really affected by legislative intent? Which is the actual role of legislation (legislature) *vis à vis* adjudication (judges)? Which is the actual position of statutes *vis à vis* case-law? Which role does statutory interpretation play, if any, in the legislature/judges, legislation/adjudication, statutes/case-law relationships? Where is the distinction between legislation (“law-making”) and adjudication (“law-applying”) to be properly drawn?

To these momentous and delicate issues, the realistic theory of legislation answers by upholding five interlocked thesis: the will-of-the-text thesis, the norm-formulations thesis, the no one-to-one correspondence thesis, the structural indeterminacy thesis, the structural mercy thesis.<sup>9</sup>

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Restated’ in L. Green and B. Leiter (eds.), *Oxford Studies in Philosophy of Law* (Oxford University Press, Oxford 2011) 138, 138-161; K.N. Llewellyn, *The Theory of Rules* (Edited and with an Introduction by F. Schauer, The University of Chicago Press, Chicago and London 2011).

<sup>8</sup> In its more encompassing meaning, “legislation” refers to the whole domain of the so-called written law (*ius scriptum*), ie, the law provided with an authoritative, fixed, formulation, as opposed to unwritten law (*ius non scriptum*), like background implicit principles and the *rationes decidendi* making up the reservoir of judicial precedents.

<sup>9</sup> For the present reconstruction of the realistic theory of legislation I considered the following works: J. Bentham, *Of the Limits of the Penal Branch of Jurisprudence* (ed. by P. Schofield, Clarendon Press, Oxford 2010) 161 ff., 169 ff., 174 ff., 227 ff.; Id., *A Comment on the Commentaries*, in Id., *A Comment on the Commentaries and A Fragment on Government* (ed. J.H. Burns and H.L.A. Hart, University of London, The Athlone Press, London 1977) 89 ff., 137 ff.; J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (5<sup>th</sup> ed., Murray, London 1885) 525 ff., 620 ff., 989 ff., 1028 ff.; J.C. Gray, *The Nature and Sources of Law* (Columbia University Press, New York 1909) 145 ff.; J. Frank, *Law and the Modern Mind*, *supra* n. 8, 186 ff., 310-311; M. Radin, ‘Statutory Interpretation’ (1929-1930) 43 *Harvard Law Review* 863, 863-885; F.S. Cohen, *Ethical Systems and Legal Ideals. An Essay on the Foundations of Legal Criticism* (Great Seal Books, Cornell University Press, Ithaca

## 1. The Will-of-the-Text Thesis

Surely, statutes are the outcomes of acts-of-will by the members of the legislature (legislators). Statutes may presuppose knowledge and reasoning on the part of the lawmakers, and they often do so. Nonetheless, the condition *sine qua non* for there being a statute may safely be located with the idea of legislators exercising their faculty of volition: no will, no statute. This view about legislation is, in turn, an instance of the old and widespread view on law in general called “voluntarism.”

Provided it is the case that statutes are related to acts-of-will, it is worthwhile asking *what* precisely is being, or can be, willed by a legislature whenever it passes a statute. According to an influential view dating from modern natural law theory, but also endorsed by eminent “legal positivists” like, e.g., John Austin, the matter of legislatures’ acts of will would consist in some normative meaning-content of the enacted statutes. Legislatures, so the picture goes, first entertain some normative meaning-content in their mind, and then look for the most suitable linguistic formulation thereof.

Now, the realistic theory of legislation claims such a picture is unworkable to any theoretical purpose, and must consequently be abandoned.

The traditional voluntarist view may seem sound whenever one-person (“monocratic”) legislatures – like absolute kings and unbound tyrants directly exercising their powers – are concerned. Even in such cases, however, there seems to be no use for the idea of a meaning-content ‘poured into the statute’ by the legislature, provided we can never know for sure what such a meaning-content is, or would be, in fact. Legislatures might be dead; and if they are alive and well, asking to living legislatures which meaning-content they poured into a given statute would simply elicit a new exercise of their absolute lawmaking power. Indeed, how can we *know* that what the legislature tells us *now* to be the meaning-content she meant to attach to her statute is *in fact* so? Nay, what we would really get out of our inquiry would be just a *new* piece of legislation, endowed with *ex post facto* binding force and, perhaps, needing in turn of a ‘clarifying’ legislative act.

The traditional voluntarist view, by contrast, loses any plausibility whatsoever from the outset, whenever legislatures are collective bodies. Here, the idea of ‘the legislature willing’ a given meaning-content for its statutes is sheer fiction. The legislation process involves many actors (in contemporary democracies, up to several hundreds people); some actors, though voting for, may have conflicting views about the meaning and purpose of a statute; some, having no view at all, may cast their vote out of party’s discipline or for some other reason wholly unrelated to the statutes’ content; some may even not know the text they are approving (for instance, they have been very busy with their far-away constituency and jumped into the House to say “aye” directly after a sleepy night on the plane). In such a situation, whichever claim about the proper ‘location’ of the will-of-the-content of statutes is doomed to belong to normative theory of legislation: it cannot but express, and mirror, some ideology about how legislation *ought to* be conceived and acted-upon. Even where, by hypothesis, we may presume the several individuals making up the legislature did in fact converge on some meaning-content for the statutes they enacted, this may be difficult to ascertain and the outcome may be dubious (remember the ‘ask-to-the-legislature’ predicament we mentioned above as to one-person legislatures). Furthermore, the practical import of the will-of-the-content of statutes, provided there is one and it can be known for sure, is by no

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1959) 230 ff.; H. Kelsen, ‘The Pure Theory of Law and Analytical Jurisprudence’ in Id., *What is Justice? Justice, Law, and Politics in the Mirror of Science*, (The University of California Press, Berkeley and Los Angeles 1957) 266, 271 ff.; Id., *General Theory of Law and State*, *supra* n. 8, 134 ff.; J. Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, Princeton 1949) 290-291, 292 ff.; A. Ross, *On Law and Justice*, *supra* n. 8, chs. III and IV; H. Kelsen, *The Pure Theory of Law* (The University of California Press, Berkeley and Los Angeles 1967) chs. V and VIII; K.N. Llewellyn, *The Common Law Tradition. Deciding Appeals* (Little, Brown & C., Boston-Toronto 1960) 521 ff.; G. Tarello, *L’interpretazione della legge* (Giuffrè, Milano 1980) chs. II and VIII; M. Troper, *La philosophie du droit* (Presses Universitaires de France, Paris 2003) 98-112; R. Dworkin, *Law’s Empire* (The Belknap Press of Harvard University Press, Cambridge 1986) ch. 1-3, 9; W. Eskridge and P. Frickey, *Cases and Materials on Legislation. Statutes and the Creation of Public Policy* (West Publishing, St. Paul Minn. 1988) 240 ff., 569 ff.; P. Chiassoni, ‘L’ineluttabile scetticismo della ‘Scuola genovese’’ in P. Comanducci and R. Guastini (eds.), *Analisi e diritto 1998. Ricerche di giurisprudenza analitica* (Giappichelli, Torino 1999) 21, 21-76; Id., ‘Interpretive Games. Statutory Interpretation through Gricean Eyes’ in P. Comanducci and R. Guastini (eds.), *Analisi e diritto 1999. Ricerche di giurisprudenza analitica* (Giappichelli, Torino 1999) 79, 79-99; Id., ‘A Nice Derangement of Literal-Meaning Freaks: Linguistic Contextualism and the Theory of Legal Interpretation’ in P. Comanducci and R. Guastini (eds.), *Analisi e diritto 2005. Ricerche di giurisprudenza analitica* (Giappichelli, Torino 2006) 115, 115-126; Id., *Tecnica dell’interpretazione giuridica* (Il Mulino, Bologna 2007) ch. 2; R. Dworkin, *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, Cambridge 2011) Part Two; K. N. Llewellyn, *The Theory of Rules*, *supra* n. 8, 119 ff.; R. Guastini, *Interpretare e argomentare* (Giuffrè, 2012) parts I and V.

means a matter of course. Far from being an issue enjoying of a self-evident, ‘natural’, solution, such an import will necessarily depend on the adoption of some normative theory of legislation, granting overcoming practical value to legislature’s convergent will-of-the-content.

All the previous considerations lead legal realism to the following conclusion. Whenever a statute is passed by a legislature, there can be only one sure object of volition to any (sound) theoretical purpose: the statute’s *text*. Any richer claim, any claim going beyond the text, is to be considered as theoretically unwarranted: a piece of fool’s gold in an otherwise tidy texture.

In a careful examination of the legislative intent issue, Jeremy Waldron seems to get to a different conclusion:

Beyond the meaning embodied conventionally in the text of the statute that has been put before the House and voted upon, there is no state or condition corresponding to “the intention of the legislature” to which anything else – such as what particular members or groups of members said or thought or wrote or did – could possibly provide a clue.<sup>10</sup>

Apparently, according to Waldron, what legislators will when they pass a statute is not simply the text of the statute, it is also the meaning conventionally embodied in such text. Surely, Waldron’s claim appears a matter of course, fully in tune with our current intuitions and habitual modes of thinking. Indeed, when we, in our ordinary conversations, do use sentences in a natural language, we are obviously willing they shall be meant according to their conventional meaning. Why legislators, who are people like us, should behave differently? The argument, however, is too simple to be good. To begin with, we cannot grant that, in ordinary conversations, the will of the users of a natural language always is to that effect. Indeed, conversations can be very sophisticated games where conventional meanings happen to be deliberately bypassed and consciously abused. Furthermore, we must pause to reflect upon what the ascription to legislators of (the will-of-the-text plus) the will-of-the-text’s-conventional-meaning does amount to. Now, from a lawyer’s perspective such a will amounts to a will concerning the “proper,” “correct,” “right,” reading of the statutory text. It is, in other words, a will concerning the proper way of interpreting statutes. If that is the case, however, the existence of such a will, far from being a matter of course, raises the same problems we considered while dealing with the will-of-the-content claim. May we assuredly claim such a will to be present in any case in which a statute is being passed? How do we (and Waldron) know that? Is not, perhaps, the case that such a confident claim about legislators’ will-of-the-text’s-conventional-meaning is really a piece of wishful thinking? Is not, after all, such a confident claim suspiciously in tune with the Enlightenment, rationalist ideology about how legislation *should* work and *ought to* be conceived and acted upon? For all these reasons, Waldron’s seemingly plausible claim is to be rejected as deprived of any sound theoretical foundation.

## 2. The Norm-Formulation Thesis

According to common sense, legislatures do make ‘laws’: indeed, what else should a ‘legislature’ do? Such a claim, in turn, is usually deemed to be equivalent to saying, perhaps in a more precise language, that legislatures enact statutory norms, that they ‘produce’ bundles of statutory norms.

Though it is grounded on what appears as plain evidence, such a view – realism claims – is likely to be misleading. Indeed, what legislatures do actually and undoubtedly produce are, as we have just seen, statutory texts. A statutory text is a set of authoritatively fixed strings of words, composed according to the lexicon and the grammar of a natural language. So, properly speaking, what legislatures do produce are norm-formulations: sentences (assumed to be) working as official linguistic expressions of statutory norms. Consequently, the statement ‘legislatures produce statutory norms’ is true if, but only if, ‘norms’ is being used as synonymous with ‘norm-formulations.’

Those who usually make that statement, however, would not be content with the realist’s way of putting things. They would refuse to accept realism’s ostensive argument (‘Look, here is the ‘Prevention of Terrorism Act.’ What do you see beyond signs having all the appearances of strings of words in the language of modern English?’). They would insist that legislatures do actually produce not just norm-formulations, but, as they say, norms. They would charge legal realism with providing an unduly impoverished view of legislation, one dictated, perhaps, by their notorious keen on the judiciary. These objections bring us to the third thesis of the realistic theory of legislation.

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<sup>10</sup> J. Waldron, *The Dignity of Legislation*, *supra* n. 2, 27.

### 3. The No One-to-One Correspondence Thesis

We have seen that the ostensive argument, by itself, is likely not to win the day. Realists however would keep on claiming that what legislatures really ‘produce’, properly speaking, are not norms, but norm-formulations, and they would provide further reasons for their claim. These include, as we shall see in a moment, the no one-to-one correspondence thesis. Here you are the way a realist might argue. (i) Properly speaking, statutory *norms* are the meaning-contents of statutory norm-formulations. (ii) Being meaning-contents, their identification depends on the interpretation of norm-formulations. (iii) Norm-formulations do not interpret themselves, they are not self-interpreting devices. Interpreters – like judges, lawyers, and jurists – are always needed to do the job. (iv) Norm-formulations do not apply themselves to individual or generic cases. On the contrary, their application always requires some law-applying agency, usually a judge. (v) Claiming the contrary would amount to incurring into the *ex opere operato* fallacy: it would be wrongly presuming statutes will work by themselves, as if automatically, upon the social realities they concern. (vi) As a matter of fact, due to the working of several conspiring factors (which I will consider in more detail below), there is no one-to-one correspondence between norm-formulations and norms. Rather, to each norm-formulation there corresponds a *frame of alternative norms*: *i.e.*, each norm-formulation can be translated in alternative ways, each one corresponding to a different norm.

In the light of the preceding remarks, the statement ‘legislatures produce statutory norms’ may be safely asserted if, but only if, one makes clear: (i) that the immediate, direct, outputs of legislation are norm-formulations; (ii) that to each norm-formulation does not correspond one, and only one, norm, but a frame of alternative norms; (iii) that the identification of the frame of norms corresponding to each norm-formulation is a matter of interpretation.

One may claim, accordingly, that legislatures produce norm-formulations *plus* the corresponding frames of norms. The latter, however, can be regarded as an output of legislature’s own work only indirectly: through the necessary meddling of interpreters. Any different picture is likely to be misleading.

### 4. The Structural Indeterminacy Thesis

The no one-to-one correspondence thesis suggests, as we have seen, that, for theory’s sake, we are safer considering that legislatures, properly speaking, do not produce statutory norms, but, rather, statutory norm-formulations needing judicial interpretation in order to be applied.

This is a very far flight from the idea(l) of legislatures’ juridical omnipotence. It is, nonetheless, a claim lying at the very heart of the realistic theory of legislation. Realists believe to have watertight reasons for it. The no one-to-one correspondence thesis depends on the general indeterminacy thesis, which is in turn, as we shall see, a corollary of (what I call) the structural indeterminacy thesis. The general indeterminacy thesis claims indeterminacy to be general all over legislation(-product): it states, under qualifications that will be made clear in a moment, that every statutory norm-formulation is, prior to its application, indeterminate.<sup>11</sup> Why would statutory law be generally indeterminate? Indeterminacy’s measuring rods are manifold and uncertain. So far as statutes are concerned, several different notions of indeterminacy may be singled out. To the present purpose, it seems worthwhile considering three of them which, apparently, roughly correspond to the ones most discussed in legal theory: radical indeterminacy, contingent indeterminacy and structural indeterminacy. They are all, it must be emphasized, notions of indeterminacy from the standpoint of statutory interpretation.

The radical indeterminacy thesis claims statutes to be radically indeterminate: statutory norm-formulations do not have, properly speaking, any meaning *prior* to interpretation. Interpreters create the meaning of statutory norm-formulations. This is notably the case with judicial interpretation: due to the combinations of factors like the dynamic structure of legal orders, the uncertainties of statutory language as a piece of a natural language, the traditional tools of statutory interpretation (like, *e.g.*, the letter/spirit divide), judges may ascribe whatever meaning they wish to statutory norm-formulations, even a meaning outside of the set (in Kelsen’s terms: “the frame”) of the previously recorded or conjecturable ones, and this meaning will be the ground of valid individual norms until their eventual repeal by a higher court, if any.

The contingent indeterminacy thesis claims statutes to be contingently indeterminate. Being made of sentences in a natural language, they share the doom of these linguistic entities. Accordingly, statutory norm-formulations may happen to have a clear and determinate meaning as to the cases at hand, that

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<sup>11</sup> By the way, the thesis is in turn a specification of the more sweeping thesis about the general indeterminacy, in Kelsen’s terms, of any ‘superior norm’ whatsoever. See *e.g.* H. Kelsen, *The Pure Theory of Law*, *supra* n. 9, ch. VIII.

depends on ongoing social and juristic conventions about legislative language. These conventions, however, may run out and, where this happens, the meaning of statutory provisions becomes indeterminate. In the former cases, statutes are determinate: they do have a clear and determinate meaning prior to (judicial) interpretation; this clear and determinate meaning can be discovered by interpreters; hence, one may claim legislatures do not simply produce norm-formulations, but also the norms these formulations express according to established social and juristic conventions. In the latter cases, on the contrary, statutes are indeterminate: they do not have a clear and determinate meaning prior to (judicial) interpretation and liable to discovery; their meaning must instead be created by (judicial) interpretation. In such cases, it appears legislatures have produced norm-formulations but, properly speaking, no statutory norm (where the law is indeterminate, there is no law). Indeterminacy besets statutory norm-formulations as a dispositional property which may show up according to the circumstances.

The structural indeterminacy thesis claims statutes to be always liable to a plurality of alternative interpretations. It is not the case, properly speaking, that statutes do not have any meaning prior to interpretation. It is the case, rather, that they may always be read in several different ways, on a scale ranging from a narrower to a larger meaning. In any case, the identification of the meaning which will be ascribed to a statutory norm-formulation in view of its application will not be a matter of discovery, but a matter of (usually reasoned) choice. From the standpoint of structural indeterminacy, the radical indeterminacy thesis fails because statutes do have meaning before interpretation; the contingent indeterminacy thesis fails too, however, because the meaning by which a statutory provision is applied to cases, also in so-called 'clear' or 'easy' cases, is never a matter of sheer discovery, but always of (reasoned) decision. To support the structural indeterminacy thesis, the following features of statutory language and statutory interpretation are singled out: (i) the natural, 'unintentional', indeterminacy of texts in a natural language, which are typically affected by vagueness and ambiguity; (ii) the fatal indeterminacy of legislative intent, if any (see point 1. above, concerning the will-of-the-text claim), which also depends on the impossibility, even for the most careful and willing legislature, both to have a clear idea of the situations presently falling within the scope of a statute, and to forecast future situations to which the statute may apply; (iii) the 'intentional' indeterminacy resulting from the legislature's use of expressions (interpretable as) referring to vague standards ("fair amount," "just compensation," "due process of laws," "good behaviour," "in restraint of trade or commerce," "cruel punishments" etc.); (iv) the traditional canons of statutory interpretation, forming a disordered set of indeterminate interpretive tools interpreters are called to select, make determinate and put in order, on the basis of their own views about the 'proper' interpretive code to be used, either in general, or on an *ad hoc* basis; (v) juristic constructions, like theories about contracts, torts, property rights, criminal liability, trespass, separation of powers, etc.; (vi) juristic ideologies about law, legal sources, legal norms, justice, democracy, the constitution and constitutional state, etc., which deeply affect the methodological choice of the "proper" interpretive code to be used, and determine the basic normative attitude of each interpreter *vis à vis* legislation, on a scale ranging between full, unconditional, active cooperation, on the one hand, and full, relentless, sabotage, on the other. The structural indeterminacy thesis – it is worthwhile emphasizing – insists that norm-formulations always are ambiguous, liable to more than one interpretation, from the standpoint of juristic methodology and theories of interpretation. This does not rule out that norm-formulations may be applied, in a given time-range, in one and the same enduring meaning. Certainty and easy cases, however, are the outcomes, according to the circumstances, of moral persuasion, wilful cooperation, conformism, opportunism, prudence and even cowardice.

The realistic theory of legislation is liable to be regarded as oscillating between the radical indeterminacy and the structural indeterminacy thesis, both of which point to the general indeterminacy of statutory texts. From a meta-theoretical point of view, the structural indeterminacy thesis seems preferable. It has the advantage of being more in tune with established and useful ways of thinking, while preserving at the same time a full 'anti-formalist' orientation. On the one hand, unlike the radical indeterminacy thesis, it avoids the queerness of denying statutes to have meaning prior to interpretation; furthermore, it preserves the conceptual distinction between 'law-interpretation proper' (any ascription of meaning to a norm-formulation, justifiable on the basis of ongoing interpretive tools and theories of interpretation) and 'law-creation' (any ascription of meaning to a norm-formulation, not so justifiable, or by pure fiat). On the other hand, unlike the contingent indeterminacy thesis, it maintains that statutory interpretation can never be an act of knowledge, discovering the clear and determinate conventional meaning of norm-formulations. Indeed, so the realistic argument goes, such a presumed 'discovery' really depends on, and presupposes, a previous methodological option: *i.e.*, the decision of considering the clear and determinate conventional meaning of norm-formulations as their legally correct meaning to all practical purpose. The contingent indeterminacy thesis, its theoretical pretence notwithstanding, does actually dwell on a deep normative commitment in favour of conventional meanings.

### 5. The Structural Mercy Thesis

All the previous four thesis anticipate, and prelude to, what may be regarded as the last, momentous, piece of the realistic theory of legislation: the structural mercy thesis. According to it, statutes, far from being controlling over their judicial applications, far from providing society with hard-and-fast rules ready to be complied with and applied, are at the mercy of their authoritative interpreters, like judges and other law-applying officials. The thesis, it must be noted, insists that statutes are in a condition of *structural* mercy: a situation of dependence resulting from the way statutes are and cannot but be; a situation of dependence resulting, as we have seen, from their being not-self-interpreting, not-self-applying, structurally indeterminate, strings of words. This feature does not necessarily result, and in fact rarely results, in judicial (and officials') anarchy. But, as we all (should) know, whatever influence statutes may have in a society cannot depend but on practical factors ranging, so to speak, from Right to Might.



## LAWMAKING FOR LEGAL REALISTS

Hanoch Dagan<sup>1\*</sup>

### Abstract

This article provides a concise analysis of lawmaking, inspired by what I perceive to be the realist conception of law. Legal realism, as I reconstruct it, stands for the proposition that law is a going institution (or set of institutions) distinguished by the difficult accommodation of three constitutive, yet irresolvable, tensions between power and reason, science and craft, and tradition and progress. Unlike some caricatures of legal realism, this understanding of legal realism explains why the original legal realists invested time and energy in various arenas of lawmaking, shaping and reshaping the various rules and standards that are to govern society. This sustained effort reflects a mature position regarding the rule of law whereby, notwithstanding the malleability of legal doctrine as such, the social practice of law implies stable expectations as to the content of the law at any given time and place. Redrawing the line between promulgation and application along these conventionalist lines paves the way for a realist account of lawmaking. This account is likely to rely on contextual and pragmatic analyses of the pertinent issues at hand. Thus, it implies that, rather than opting for either bright-line rules or vague standards, legal realists would recommend using both precise rules and informative standards founded on the regulative principles of the doctrines at hand, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Legal realists would likewise avoid binary institutional choices and, in many contexts, appreciate the comparative advantages of both legislatures and courts – in terms of both expected performance and legitimacy – as potential contributors to the development of the law.

**Keywords:** Legal Realism – Lawmaking – Legal Form – Case-by-case Adjudication – (In)determinacy – Power and Reason – Science and Craft – Tradition and Progress – Rules – Standards – Llewellyn – Institutional choice

### A. INTRODUCTION

Although much, indeed most, of what the original American legal realists said about law focused on adjudication, an important part of their contribution to American law was through their participation in other forms of lawmaking, both in legislative work, such as Karl Llewellyn's role in the drafting of the Uniform Commercial Code and their participation in various New Deal regulatory agencies.<sup>2</sup> One way of reconstructing the realist conception of lawmaking is thus to explore the characteristics of their products in these capacities, or their scattered scholarly treatments of these matters.<sup>3</sup> The approach in this article is different. My account is not intended as a piece of intellectual history but as an attempt to provide a concise analysis of lawmaking that is inspired by what I perceive to be the realist conception of law. For better or for worse, this approach means that the realist account of lawmaking offered in these pages may diverge from some realist pronouncements on legislation or from some features of the legal realists' legislative products (or possibly even from both).

In my understanding of legal realism, its core claim is that law is a going institution (or set of institutions) distinguished by the difficult accommodation of three constitutive, yet irresolvable, tensions between power and reason, science and craft, and tradition and progress. This conception of

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<sup>2</sup> R. Kreitner, 'Biographing Legal Realism' (2010) 35 *Law & Social Inquiry* 765.

<sup>3</sup> See, e.g., respectively, Z.B. Wiseman, 'The Limits of Vision: Karl Llewellyn and the Merchant Rules' (1987) 100 *Harvard Law Review* 465; K.N. Llewellyn, 'Why We Need the Uniform Commercial Code' (1957) 10 *University of Florida Law Review* 367.

law, which is articulated in some detail in my book *Realism Renewed*,<sup>4</sup> and summarized in section B below, raises three important questions for a corresponding account of lawmaking. The first and most fundamental question – *what?* – challenges the intelligibility of a realist account of lawmaking. The realist conception of law relies on a radical critique of doctrinal determinacy. On its face, then, it is unclear whether legal realists can offer the reliable distinction between promulgation and application that seems to be a precondition for a viable account of lawmaking. Assuming, as I maintain in section C below, that legal realists can overcome this challenge without domesticating their claim of doctrinal indeterminacy, I hope to show in sections D and E that the realist conception of law helps to provide quite compelling and subtle answers to two further significant questions: (i) *How?* – should legal norms take the form of bright line rules or of vague standards? (ii) *Who?* – should lawmaking be the domain of legislatures, of courts, or of both? Section F consolidates the answers to these three questions – *what? how? who?* – offering a preliminary statement of the realist account of lawmaking.

## B. LEGAL REALISM

The starting point of the realist conception of law<sup>5</sup> is its non-positivism. Although H. L. A. Hart's response to the realist claim of doctrinal indeterminacy is frequently presented as decisive, it is rather beside the point. Through his distinction between core and penumbra in any given norm, Hart effectively addressed the problem of rule indeterminacy,<sup>6</sup> but the realist claim that pure doctrinalism is a conceptual impossibility is not based on the indeterminacy of discrete rules. For legal realists, the profound and inescapable reason for doctrinal indeterminacy is the availability of multiple and potentially applicable doctrinal sources. More precisely, the irreducible choice among rules competing to control the case (all of which can be expanded or contracted), together with the many potential ways of interpreting or elaborating any legal concept, imply that legal doctrine is always open to multiple readings and the judicial task is not one of static application.

The realist claim concerning an inevitable gap between doctrinal materials and judicial outcomes evokes two major concerns. First, what can explain past judicial behavior and predict its future course? Second, and even more significantly, how can law constrain judgments made by unelected judges? How, in other words, can the distinction between law and politics be maintained despite the collapse of law's autonomy in its positivist rendition? The legitimacy prong of the realist challenge is particularly formidable because, as legal realists show, it is bolstered by the insidious tendency of legal doctrinalism to obscure contestable value judgments made by judges and entrench lawyers' claim to an impenetrable professionalism.

Legal realists answer this challenge by insisting on a view of law as a set of ongoing institutions distinguished by the difficult accommodation of three constitutive yet irresolvable tensions: between power and reason, science and craft, and tradition and progress. (I deliberately chose a softer term such as "tension" rather than stronger ones such as contradiction. The relationships I discuss are not contradictory. But although the terms in these pairs are not antonyms, they do refer to alternative allegiances and to competing states of mind and perspectives. The difficulty of accommodating them is thus similar to that of reconciling incommensurable goods or obligations).

Although the realist conception of law finds room for both power and reason, it appreciates the difficulties of their coexistence. The realists' preoccupation with coercion is justified not only by the obvious fact that, unlike other judgments, those prescribed by law's carriers can recruit the state's monopolized power to back up their enforcement. It is also premised on the institutional and discursive means that tend to downplay some dimensions of law's power. These built-in features of law – notably the institutional division of labor between "interpretation specialists" and the actual executors of their judgments, together with our tendency to "thingify" legal constructs and accord them an aura of obviousness and acceptability – render the danger of obscuring law's coerciveness particularly troubling. They explain the realists' wariness of the trap entailed by the romantization of law.

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<sup>4</sup> H. Dagan, *Realism Renewed: Essays on American Legal Realism and Private Law Theory* (Oxford University Press, New York 2013).

<sup>5</sup> The following paragraphs rely on chapter 2 of Dagan, *Realism Renewed*, *supra* n. 4. This chapter uses texts by legal realists in order to demonstrate how major claims attributed to legal realism fit a particular understanding of law. My claim, however, is not the discovery of legal realism's true essence. My reading of legal realist literature is unashamedly influenced by my own convictions about law, though I do not pretend to have invented the ideas I present.

<sup>6</sup> H.L.A. Hart, *The Concept of Law* (Clarendon Press, Oxford 1961) 123, 141-42, 144.

But realists also reject as equally reductive the mirror image of law, which portrays it as sheer power (or interest, or politics). They insist that law is also a forum of reason, and that reason imposes real, albeit elusive, constraints on the choices of legal decision-makers, and thus on the subsequent implementation of state power. Law is never *only* about interest or power politics; it is also an exercise in reason-giving. Furthermore, because so much is at stake when reasoning about law, legal reasoning becomes particularly urgent and rich, attentive, careful, and serious. Reasons can justify law's coercion only if properly grounded in human values. Realists are thus impatient with attempts to equate normative reasoning with parochial interests or arbitrary power. They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshaling the law for morally required social change.

And yet, realists are also wary of the idea that reason can displace interest, or that law can exclude all force except that of the better argument. Because reasoning about law is reasoning about power and interest, the reasons given by law's carriers should always be treated with suspicion. This caution accounts for the realists' endorsement of value pluralism, as well as for their understanding of law's quest for justification as a perennial process that constantly invites criticism of law's means, ends, and other (particularly distributive) consequences.

Legal realists do not pretend they have solved the mystery of reason or demonstrated how reason can survive in law's coercive environment. Their recognition that coerciveness and reason are doomed to coexist in any credible account of the law is nonetheless significant. Making this tension an inherent characteristic of law means that reductionist theories employing an overly romantic or too cynical conception of law must be rejected. This approach also steers us toward a continuous critical awareness of the complex interaction between reason and power. It thereby seeks to accentuate the distinct responsibility incumbent on the reasoning of and about power, minimizing the corrupting potential of the self-interested pursuit of power and the perpetuation of what could end up as merely group preferences and interests.

I turn now to the type of reasons realists invite into the legal discourse and thus introduce law's second constitutive tension.

Realists argue that the forward-looking aspect of legal reasoning relies on both **science and craft**. Realists recognize the profound differences between, on the one hand, lawyers as social engineers who dispassionately combine empirical knowledge with normative insights, and, on the other, lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication. They nonetheless insist on preserving the difficulty of accommodating science and craft as yet another tension constitutive of law.

Realists insist on the importance of empirical inquiries, such as investigating the hidden regularities of legal doctrine in order to restore law's predictability, or studying the practical consequences of law in order to better direct the evolution of law and further its legitimacy. But my prototype realists reject any pretense that knowledge of these important social facts can be a substitute for political morality. They realize that value judgments are indispensable, not only when evaluating empirical research but also when simply choosing the facts to be investigated. Moreover, they are always careful not to accept existing normative preferences uncritically. Legal realists insist that neither science nor an ethics that ignores the data of science offers a valid test of law's merits. Legal analysis needs both empirical data and normative judgments.

Because law dramatically affects people's lives, these social facts and human values must always inform the direction of legal evolution. But while legal reasoning necessarily shares this feature with other forms of practical reasoning, the realist conception of law also highlights that legal reasoning is, to some extent, a distinct mode of argumentation and analysis. Hence, realists pay attention to the distinctive institutional characteristics of law and study their potential virtues, while still aware of their possible abuse. The procedural characteristics of the adversary process, as well as the professional norms that bind judicial opinions – notably the requirement of a universalizable justification – provide a unique social setting for adjudication. The procedural characteristics establish the accountability of law's carriers to law's subjects, and encourage judges to develop what Felix Cohen terms “a many-perspectived view of the world” or a “synoptic vision” that “can relieve us of the endless anarchy of one-eyed vision.”<sup>7</sup> Moreover, because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments facilitates lawyers' unique skill in capturing the subtleties of various types of cases and in adjusting the legal treatment to the distinct characteristics of each category.

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<sup>7</sup> F.S. Cohen, ‘Field Theory and Judicial Logic’ in L.K. Cohen (ed.) *The Legal Conscience: Selected Papers of Felix S. Cohen* (Yale University Press, New Haven 1960) 121, 125-26.

The extended realist treatment of science and craft derives from the conviction that law is profoundly dynamic, hence my third constitutive tension. Law's inherent dynamism implies that the legal positivist attempt to understand law statically by sheer reference to verifiable facts such as the authoritative commands of a political superior, or the rules identified by a rule of recognition, is hopeless. In the realist conception, law is "a going institution" or, in John Dewey's words, "a social process, not something that can be done or happen at a certain date." As a going institution, law is structured to be an "endless process of testing and retesting"; thus understood, law is a great human laboratory continuously seeking improvement.<sup>8</sup>

This quest "for justice and adjustment" in the legal discourse is invariably constrained by legal tradition. Law's past serves as the starting point for contemporary analysis, and not only because it is an anchor of intelligibility and predictability. Legal realists begin with the existing doctrinal landscape because it may (and often does) incorporate valuable normative choices, even when implicit and sometimes imperfectly executed. In other words, since the adjudicatory process so uniquely combines scientific and normative insights within a legal professionalism premised on institutional constraints and practical wisdom, its past yield of accumulated judicial experience and judgment deserves respect. Although legal realists do not accord every existing rule overwhelming normative authority, they obey Llewellyn's "law of fitness and flavor," in which new cases and new rules cohere with the case law system as a whole. Realists celebrate common law's Grand Style, described by Llewellyn as "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need," mediating between "the seeming commands of the authorities and the felt demands of justice."<sup>9</sup>

Integrating power into their conception of law, however, pushes realists to be wary of implying that the pace of legal change should always be restrained or that legal normativity is exhausted by the subset of moral principles that are embedded in past legal, political, and particularly adjudicative practices. Although realists, like many legal theorists, pay particular attention to adjudication, they opt for a "style of jurisprudence" that goes beyond adjudication to consider the numerous other arenas "replete with lawmaking, law applying, law interpreting, and law developing functions."<sup>10</sup>

Insofar as most descendants of legal realism are concerned, then, the statement "we are all realists now" is a seriously misleading cliché because, rather than carrying the realist legacy forward, they have torn it apart. The disintegration of legal theory has robbed the realist conception of law of its most promising lessons. Contemporary accounts of law do enhance our understanding of law's characteristics, but the current debates between law-as-power and law-as-reason, law-as-science and law-as-craft, or law-as-tradition and law-as-progress are futile and harmful. From the perspective of legal realism, all these one-dimensional accounts of law are hopelessly deficient. Law can properly be understood only if we regain the realist appreciation of law's most distinctive feature: the uneasy but inevitable accommodation of power and reason, science and craft, and tradition and progress.

### C. WHAT? BETWEEN PROMULGATION AND APPLICATION

While legal realists were involved in all forms of lawmaking, as noted, a realist account of lawmaking must face a preliminary challenge of intelligibility, given the prevalent identification of legal realism with nominalism.<sup>11</sup> If legal realism indeed stands for an ad hoc approach of case-by-case adjudication, then lawmaking seems meaningless, turning a realist account of lawmaking into an oxymoron. This putative conclusion is particularly unfortunate because obscuring the distinction between promulgation and application is not only intellectually disappointing but also normatively devastating, since it presents legal realism as opposed to both aspects of the rule of law: the requirement that law be capable of guiding its subjects' behavior, and the prescription that law not confer on officials the right to

<sup>8</sup> J. Dewey, 'My Philosophy of Law' in *My Philosophy of Law: Credos of Sixteen American Scholars* (F.B. Rothman, Littleton 1987) 73, 77.

<sup>9</sup> K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, Boston 1960) 36, 38, 190-91, 217, 222-23; K.N. Llewellyn, M. Alsandi (tr.) and P. Gewirtz (ed.), *The Case Law System in America* (University of Chicago Press, Chicago 1989) 25, 77; K.N. Llewellyn, 'Law and the Social Sciences' in *Jurisprudence: Realism in Theory and in Practice* (University of Chicago Press, Chicago 1962) 357, 361-62; K.N. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355, 1385.

<sup>10</sup> Kreitner, 'Biographing,' *supra* n. 2, 580.

<sup>11</sup> See, e.g., R. Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) 15-16; M. Horwitz, *The Transformation of American Law, 1870-1960* (Harvard University Press, Cambridge MA 1992) 202.

exercise unconstrained power.<sup>12</sup> By contravening the injunction to prescribe fixed and pre-announced legal norms ad hocism defies law's ability to provide effective guidance and undermines its predictability, thereby infringing on people's ability to form reliable expectations and autonomously plan for the future.<sup>13</sup> Case-by-case adjudication similarly threatens the conception of the rule of law as constraint because it implies that adjudicators face no restricting framework of public norms, thereby paving the way for judges' preferences, ideology, or individual sense of right and wrong.<sup>14</sup> Such unrestrained power is objectionable both because of its potential devastating impositions and because it renders us mere objects, dominated by the power-wielder.<sup>15</sup>

On its face, this harsh conclusion seems inevitable. To be sure, the realist claim of doctrinal indeterminacy has often been domesticated. Even Frederick Schauer, who recently elaborated on the consequences of taking the realist distinction between real rules and paper rules seriously, ends up concluding that the significance of this claim can only be evaluated empirically.<sup>16</sup> But Schauer fails to address the main source of doctrinal indeterminacy as per the legal realists, namely, that legal doctrine is always open to multiple readings given the irreducible choice among the many potentially applicable doctrinal sources competing to control any given case, all of which can be expanded, contracted, or variously interpreted or elaborated. Thus, Llewellyn claims that "all legal systems" are patchworks of contradictory premises covered by "ill-disguised inconsistency," because we find in all of them that "a variety of strands, only partly consistent with one another, exist side by side."<sup>17</sup> Any given legal doctrine, including the one guiding the lawyers' interpretative activity (the canons of interpretation),<sup>18</sup> suggests "at least two opposite tendencies" at every point. In (almost) every case, then, opposite doctrinal sources need to be accommodated: a rule and a (frequently vague) exception, or a seemingly precise rule and a vague standard (such as good faith or reasonableness) that is also potentially applicable. The availability of such a multiplicity of sources on any given legal question results in profound and irreducible doctrinal indeterminacy.<sup>19</sup> Similarly, the idea of inevitable entailments from legal concepts is also false because, as shown by comparative law and legal history, the formalist quest for conceptual essentialism is doomed to fail: the elaboration of any legal concept can choose from a broad menu of possible alternatives.<sup>20</sup>

Fortunately, although a small minority among realists endorses case-by-case adjudication,<sup>21</sup> most realists take a very different position.<sup>22</sup> They realize that law's use of categories, concepts, and rules is unavoidable, even desirable,<sup>23</sup> and that many legal reasoners should in most cases simply follow rules, which is why realists took pains to improve legal rules.<sup>24</sup> Indeed, unlike their image in some caricatures of legal realism, most realists did not challenge the felt predictability of the doctrine at a given time and place. While persuasively insisting that legal doctrine, *qua* doctrine, cannot constrain decision makers, they recognized that the convergence of lawyers' background understandings generates a significant measure of stability. Hence, rather than threatening the rule of law, legal realism merely insists that law's stability and predictability do not inhere in the doctrine as such and rest

<sup>12</sup> My account of the rule of law in sections C and D below draws on H. Dagan, 'Private Law Pluralism and the Rule of Law.'

<sup>13</sup> J. Raz, 'The Rule of Law and Its Virtues' in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) 210, 213, 218, 220, 222.

<sup>14</sup> J. Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 6, 31.

<sup>15</sup> M. Krygier, 'Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares?' in J.E. Fleming (ed.), *NOMOS L: Getting to the Rule of Law* (New York University Press, New York 2011) 64, 79-80.

<sup>16</sup> F. Schauer, 'Legal Realism Untamed' <<http://ssrn.com/abstract=2064837>> accessed 6 July 2012.

<sup>17</sup> Llewellyn, *Case Law*, *supra* n. 9, 45.

<sup>18</sup> K.N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 *Vanderbilt Law Review* 395.

<sup>19</sup> Llewellyn, *Case Law*, *supra* n. 9, 51.

<sup>20</sup> F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809, 820-21, 827-29. See also H. Dagan, *The Law and Ethics of Restitution* (Cambridge University Press, Cambridge 2004) 221-24, 315-16; H. Dagan, *Property: Values and Institutions* (Oxford University Press, New York 2011) Part One.

<sup>21</sup> See, e.g., F. Rodell, *Woe Unto You, Lawyers!* (Reynold & Hitchcock, New York 1940) 169-74, 201-202.

<sup>22</sup> See, e.g., A. Altman, 'The Legacy of Legal Realism' (1986) 10 *Legal Studies Forum* 167, 171-72; T.D. Rakoff, 'The Implied Terms of Contract: Of "Default Rules" and "Situation Sense,"' in J. Beatson, D. Friedmann (eds.) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford 1995) 191, 216.

<sup>23</sup> See, e.g., Llewellyn, 'A Realistic Jurisprudence,' *supra* n. 9, 3, 27. See also, e.g., W.W. Cook, 'Scientific Method and the Law', in W.W. Fisher III *et al.* (eds.) *American Legal Realism* (Oxford University Press, New York 1993) 242, 246.

<sup>24</sup> A. Schwartz, 'Karl Llewellyn and the Origins of Contracts Theory,' in J.S. Kraus, S.D. Walt (eds.), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, New York 2000) 12, 17, 22-25.

instead on the broader social practice of law.<sup>25</sup> They argue, as Schauer succinctly summarizes, that “to locate the real core of legal rules we need to look beyond the propositional form to what the relevant legal actors and institutions are doing in actual practice.”<sup>26</sup>

Llewellyn thus claimed that, although adjudication is necessarily creative, cases are decided with “a desire to move in accordance with the material as well as within it . . . to reveal the latent rather than to impose new form, much less to obtrude an outside will.” The case law *system* imposes “a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration.” The instant outcome and rule must “fit the flavor of the whole”; it must “think with the feel of the body of our law” and “go with the grain rather than across or against it.” Legal realists begin with the existing doctrinal landscape because it may and often does incorporate valuable normative choices, even if implicit and sometimes imperfectly executed. They nonetheless recognize that the existing doctrinal environment always leaves interpretive leeway. Furthermore, they believe that law’s potential dynamism, as long as properly cautious and not too frequent, is laudable because it represents our perennial quest “for better and best law” and, therefore, our judges’ “duty to justice and adjustment,” thus implying an “on-going production and improvement of rules.”<sup>27</sup>

Legal realism, then, stands for a restatement of the distinction between promulgation and application in a way that shifts the focus from legal doctrine to the social practice of law and to the prevalent understandings of the legal community. The realist claim of radical doctrinal indeterminacy implies a wide breadth of *potential* judicial choice but does not – and indeed should not – mean that judges use, should use, or should even consider using this potential in every case. Quite the contrary. Legal realists, as noted, are aware of the fallibility of law bearers, as well as committed to the use of law for the furtherance of human values. Hence, they must respect and further the two faces of the rule of law as, respectively, constraint and guidance. They therefore can, and indeed should, distance themselves from the dubious nominalist approach of open-ended discretionary decision-making. Legal realism neither endorses, nor should it imply, focusing on the equities of the particular case or the particular parties. Rather, given that the values underlying our legal doctrines are indeed the normative infrastructure of law, legal realism requires that *some* legal actors, notably legislators and judges of appellate courts, *occasionally* use new social developments and new cases as, respectively, triggers for an ongoing refinement of the law, namely: as opportunities for revisiting the normative viability of existing doctrines *qua* doctrines and re-examining the adequacy of the legal categorization that organizes these doctrines.

#### D. HOW? BETWEEN RULES AND STANDARDS

Having dealt with the challenge of intelligibility, I turn now to the question of form: does a realist account of lawmaking support bright-line rules or vague standards? Consider Llewellyn’s Uniform Commercial Code and its attendant celebration of “the round-edged statutes prevalent in the common law world” (in private law matters) as “a necessary accommodation to a complex and unpredictable world.”<sup>28</sup> Students of the U.C.C. may be tempted to provide a quick and ready answer to our question, stating that legal realists will invariably prefer standards to rules. And yet, this answer would be mistaken because the form of the U.C.C. seems to reflect Llewellyn’s conviction that a commercial code should use vague language in order to induce judges, who should be the prime authors of our private law, to develop and adapt its rules to the changing circumstances.<sup>29</sup> Hence, even if we accept this sweeping division of labor – a topic that is at the focus of section E – the choice between rules and standards insofar as the ultimate lawmakers are concerned remains open.

A realist position on this question need not yield the same answer throughout the legal terrain. As on many other issues, realists tend to opt for answers that focus on narrow categories in order to examine more closely the implications of the pertinent normative concerns. Two major classes of such concerns are relevant to the issue of legal form. One class of considerations relates to the consequences

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<sup>25</sup> F. Schauer, ‘Editor’s Introduction’ in F. Schauer (ed.), K.N. Llewellyn, *The Theory of Rules* (University of Chicago Press, Chicago 2011) 1, 5, 7-8, 18, 20-24. See also, e.g., L. Alexander, E. Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Duke University Press, Durham NC 2001) 32-34; M.J. Radin, ‘Reconsidering the Rule of Law’ (1989) 69 *Boston University Law Review* 781, 803.

<sup>26</sup> Schauer, ‘Editor’s Introduction,’ *supra* n. 25, 8.

<sup>27</sup> Llewellyn, *Common Law*, *supra* n. 9, 36, 38, 190-91, 217, 222-23; Llewellyn, ‘The Normative,’ *supra* n. 9, 1385.

<sup>28</sup> Schauer, ‘Editor’s Introduction,’ *supra* n. 25, 7-8.

<sup>29</sup> K.N. Llewellyn, ‘The Needed Federal Sales Act’ (1940) 26 *Virginia Law Review* 558, 561-64; Schwartz, *Origins of Contract Theory*, *supra* n. 24, 17-18.

of using a clearer or vaguer norm concerning the values substantively implicated in the issue at hand, a line of analysis that exceeds the scope of this article. Note, however, that the leading utility-oriented account abides by the contextualist approach of legal realism. This approach states that, in order to minimize the aggregate costs of promulgation and application, the more frequently a norm is likely to be applied, the more we should tilt towards its entrenchment by way of a clear rule, and vice-versa.<sup>30</sup>

In addition to such substantive concerns, legal realists who appreciate the importance of both the guidance and the constraint aspects of the rule of law are likely to make the rule of law a significant consideration of their account of the proper form of law. Thus, they would hesitate to adopt open-ended standards allowing judges to consult law's underlying commitments in each case they must settle. Instead, they would often appreciate that, by translating "the implications of normative values into concrete prescriptions," rules become "sufficiently determinate" so as to be followed by their appliers "without first resolving the very normative questions [they] are designed to settle" or "considering whether the local outcome of the rule conforms to the values [they are] supposed to advance."<sup>31</sup> This virtue of "the rule of rules"<sup>32</sup> makes rules responsive to the constraint aspect of the rule of law.<sup>33</sup> It also implies that the law provides "a clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes," thus affording people "maximally effective guides to behavior."<sup>34</sup>

The fact that legal realism often conforms to the prescriptions of rule-based decision-making should not be surprising, given the affinity of legal realism and the common law tradition.<sup>35</sup> As Michael Loban concluded after surveying the codification debate in England, while common law rules were shown to be different from legislated ones – "[t]hey were more flexible and had to be interpreted not according to a verbal formula, but according to the broader case law context from which they had emerged" – advocates of codification had successfully demonstrated that "the common law was not a mass of undigested chaos but that it contained rules which could be identified and articulated."<sup>36</sup> By the same token, because legal realism rejects nominalism and merely insists that law's underlying values should be engaged in a few deliberative moments, it can be, to a significant extent, rule-based. This reason also explains why legal realism does not imply rule-sensitive particularism, allowing judges to depart from rules whenever the outcome of a particular case so requires, while taking into account both substantive values and the value of preserving the rule's integrity.<sup>37</sup> Furthermore, given legal realism's appreciation of the rule of law, it is not only capable of setting (conventional) bright-line rules but is in fact, if properly interpreted, inclined to do so whenever using such rules is indeed justified.

But the rule of law does not always prescribe the use of bright-line rules. Justice Antonin Scalia's announcement of the putative marriage between rules and the rule of law was slightly hasty.<sup>38</sup> At times, commitment to the rule of law implies allowing, or even preferring the social practice of a legal topic to be formed around a vague but informative standard. There are two sides to this proposition. On the one hand, a complex set of rules may not serve as an adequate guide for action, especially where its niceties are detached from any reasonable understanding of the regulative principle that can plausibly govern the pertinent area of the law. Because regulating a wide range of conduct is complex, technical non-intuitive complexity may undermine the guidance value of rules and may not necessarily constrain the discretion of law-appliers.<sup>39</sup> On the other hand, if properly calibrated, standards may in fact generate predictable outcomes and thus serve as both a guide and a constraint. Standards may be action-guiding insofar as their addressees (or their lawyers) can take them on board, make for themselves the evaluative judgment that they require, and thus monitor and modify their behavior accordingly.<sup>40</sup> Standards can thus be guidance-friendly and constraining-friendly where broad

<sup>30</sup> L. Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557.

<sup>31</sup> E. Sherwin, 'Rule-Oriented Realism' (2005) 103 *Michigan Law Review* 1578, 1589-91.

<sup>32</sup> Alexander, Sherwin, *Rule of Rules*, *supra* n. 25.

<sup>33</sup> F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, Oxford 1991).

<sup>34</sup> R.H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 *Columbia Law Review* 1, 14-15.

<sup>35</sup> Llewellyn, *Common Law*, *supra* n. 9.

<sup>36</sup> M. Lobban, 'Legal Theory and Judge Made Law in England, 1850-1920' (2011) 40 *Quaderni Fiorentini* 553, 580.

<sup>37</sup> Sherwin, 'Rule-Oriented Realism' *supra* n. 31, 1591-94.

<sup>38</sup> A. Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175.

<sup>39</sup> R.A. Posner, *The Problems of Jurisprudence* (Harvard University Press, Cambridge MA 1990) 48; T. Endicott, 'The Value of Vagueness,' in A. Marmor, S. Soames (eds.) *Philosophical Foundations of Language in the Law* (Oxford University Press, New York 2011) 14, 23, 28, 30.

<sup>40</sup> J. Waldron, 'Vagueness and the Guidance of Action', in Marmor, Soames, *Philosophical Foundations of Language in the Law*, *supra* n. 39, 58, 65-66, 69.

social agreement prevails on the pertinent issue.<sup>41</sup> Even in those cases lacking such normative consensus, which are probably more prevalent in contemporary society, standards as appeals to people's practical reasoning would not lose their guidance and constraining capacity if, but only if, their addressees can figure out the intended content of the pertinent legal doctrine and thus predict its future unfolding and realm of application. Realist lawmakers announcing standards, then, should articulate them with an eye to their possible use as a source of predictability. Standards that refine the regulative principle that actually governs a specific area of law and point to its intended content and realm of application are generally unobjectionable, and may well be welcomed.<sup>42</sup> By contrast, open-ended references to justice, fairness, good faith, or reasonableness, as they are interpreted by the presiding law-applier given the specific circumstances of the case at hand, cannot provide proper predictability and should be criticized as an invitation to discretionary ad hoc adjudication, which is an affront to the rule of law.<sup>43</sup>

#### E. WHO? BETWEEN LEGISLATURES AND COURTS

The various aspects of the realist conception of law can be restated as a proposition that law is a set of coercive normative institutions. This condensed restatement emphasizes the inherent tension between power and reason. It likewise highlights the fact that, in law, this tension is always situated institutionally. This institutional perspective implies that realists should expand their view to the whole range of institutions through which law is created, applied, or otherwise becomes effective. It also means that legal realists must always be attentive to the question of institutional choice, since the drama of law's dynamism can (and does) occur through these different institutions, which provide different mechanisms of legal evolution with differing mixtures of science and craft. Here, as elsewhere, legal realists tend to distance themselves from binary choices and opt instead for a more careful and pragmatic *comparative* analysis of the pertinent institutions. I cannot offer in this brief article a full account along these lines. Yet, I hope that an outline of one such institutional choice – the choice between legislatures and courts in private law matters, which was also particularly important to the original realists – can help to illustrate the legal realist approach to this quandary. Given the realists' persistent commitment to improve the law so that it serves society better, as well as their concern with the inherent coercive nature of law, a legal realist institutional inquiry should look at the relevant features of the judiciary vis-à-vis those of the legislature in terms of both expected performance and legitimacy.<sup>44</sup>

Focusing on the functional perspective that investigates the expected performance of lawmaking by these two different institutions, we can easily see why legal realists reach contextual conclusions that justify, even within the limited realm of private law, differing degrees of judicial deference to the legislative prerogative of lawmaking according to the distinct features of the issue at hand.

To begin with, consider the following types of cases in which judicial caution is particularly in place given three familiar limitations of judicial competence:

(i) At least in its conventional rendition, adjudication does not involve the creation of complex and elaborate regulatory schemes, which may at times be required in order to create or modify a private law institution (as, for example, in the formal registration of property rights or the creation of complicated insurance schemes).<sup>45</sup>

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<sup>41</sup> L.L. Fuller, *The Morality of Law* (Revised edn., New York University Press, New York 1964) 50, 92; Fallon, *The Rule of Law*, *supra* n. 34, 49-50; J. Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 *Cambridge Law Journal* 502, 513, 515-17.

<sup>42</sup> Llewellyn, *Common Law*, *supra* n. 29, 368-69, 378-79; Dagan, *Rule of Law*, *supra* n. 12.

<sup>43</sup> Dagan, *Law and Ethics*, *supra* n. 20, 12-18.

<sup>44</sup> The following pages draw on H. Dagan, 'Judges and Property' in S. Balganesch (ed.) *Intellectual Property and the Common Law* (Cambridge University Press, New York 2013). My analysis is admittedly partial, since it is not informed by any empirical (and thus necessarily contingent) information on either institution. See A. Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, Cambridge MA 2006) 10. But the idealized pictures of lawmaking I refer to are nonetheless important because they serve as benchmarks, which enter the actors' utility function both directly and *via* the impact of the social and professional groups they seek to please. See, respectively, R.A. Posner, *How Judges Think* (Harvard University Press, Cambridge MA 2008) 11-12, 60-61, 371; L. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, Princeton 2006) 16-21, 90, 106.

<sup>45</sup> T.W. Merrill, 'Faithful Agent, Integrative, and Welfarist Interpretation' (2011) 14 *Lewis & Clark Law Review* 1565, 1578.



(ii) Contexts requiring specialized knowledge and expertise, such as innovative technologies or complex market ramifications, may justify judicial deference to governmental agencies equipped with such technical expertise.<sup>46</sup>

(iii) Some private law developments, such as the annulment of an existing property institution, generate widespread excessive redistribution so that their retroactive application, as common law is usually applied, is inappropriate.<sup>47</sup> Certain cases are obviously exceptions, as when people's reliance on the pre-existing distribution was illegitimate (think of slave-owners) and thus unworthy of legal protection.<sup>48</sup> In others, however, the fact that legislatures can and typically do apply their norms prospectively, and can moreover provide explicit or implicit compensation or set up other ameliorating means for the transition period, such as grandfather clauses, may count as significant reasons for judicial caution.

Cases that fall within these categories (or parallel ones I may have failed to mention) typically justify judicial passivity. But in other contexts there are usually conflicting concerns that point to the comparative advantages of both legislatures and courts, and may thus explain and justify the fact that much of our private law is in fact shaped and developed through both legislation and adjudication.

Consider the claim that, because legislatures tend to deal with any given private law issue less frequently than courts, their product tends to be more stable, economizing in the citizens' gathering of needed information.<sup>49</sup> Stability is indeed an important concern that, as noted, is also conducive to the rule of law. Like legislators, realist judges should respect the legal tradition and be attentive to the importance of stable expectations, appreciating virtues of forbearance and temperateness in the development of the law. But restraint is not synonymous with stagnation: expectations can be stable even if the legal doctrine is not frozen in time, as long as it is not revisited too frequently;<sup>50</sup> indeed, to avoid the risk of romanticizing the law, we must not be overly deferential to existing doctrine. It is hard to generalize concerning the proper frequency of change pertinent to the relevant private law institution, which must also be affected by the pace of other developments, for instance in technology. Given the contingency concerning the optimal frequency of change and the applicability of the injunction to respect legal tradition to legislatures as well as to courts, the virtues of legal stability can hardly yield a conclusive choice for our institutional analysis.

Another important virtue of legislative lawmaking is worth mentioning: whereas decisional rules evolve incrementally, resolving questions regarding such issues as their scope and precise effects as they arise in the adjudicated cases, legislation tends to deal comprehensively with the multiple questions evoked by any innovation.<sup>51</sup> At times, comprehensiveness may indeed be crucial for a proper rethinking of private law, which (often implicitly) participates in shaping and reshaping the core categories of interpersonal relationships in our society. And yet, this fact can hardly justify excluding judges from private lawmaking in all contexts. The reason is that the creation and modification of our private law institutions is, or at least should be, triggered by challenges bearing on the desirability of these institutions' normative underpinnings, their responsiveness to their social context, or their effectiveness in promoting their contextually examined normative goals. These challenges can definitely originate in the legislature, but it is possible and perhaps even desirable for them to emerge also via the adjudicatory process. At least in the Grand Style version celebrated by legal realists, adjudication is a perfectly appropriate forum for developing private law along these lines. Indeed, one of the virtues of adjudication mentioned in section B above is the flip-side of legislative comprehensiveness. Rather than a dialogue about principles of abstract justice, a judicial drama is situated in a given human context, which is significant because it leads judges to develop the law while "testing it against life-wisdom," benefitting from "the sense and reason of some significantly seen *type* of life-situation."<sup>52</sup> This daily and unmediated access to actual human situations and problems in

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<sup>46</sup> N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, Chicago 1991) 139-40.

<sup>47</sup> T.W. Merrill, H.E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Journal* 1, 64-66.

<sup>48</sup> H. Dagan, 'Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions' (2004) 84 *Boston University Law Review* 1139, 1164-74.

<sup>49</sup> Merrill, Smith, *Optimal Standardization*, *supra* n. 47, 63-64.

<sup>50</sup> T.A.O. Endicott, 'The Impossibility of the Rule of Law' in *Vagueness in Law* (Oxford University Press, New York 2000) 185, 193.

<sup>51</sup> Merrill, Smith, *Optimal Standardization*, *supra* n. 47, 62-63.

<sup>52</sup> Llewellyn, 'The Current Recapture of the Grand Tradition' in *Jurisprudence*, *supra* n. 9, 215, 217, 219-220. See also G.J. Postema, 'Classical Common Law Jurisprudence (Part I)' (2002) 2 *Oxford University Commonwealth Law Journal* 155, 167, 175, 177-80. Raz's analysis of the phenomenon of distinguishing cases brings home a similar point. See Raz, 'Law and Value in Adjudication' in *The Authority of Law*, *supra* n. 13, 180, 183-97.

contemporary life serves, as Herman Oliphant observed, as an “alert sense of actuality” that “checks our reveries in theory.” It provides judges with “the illumination which only immediacy affords and the judiciousness which reality alone can induce,” and it properly encourages them to shape law “close and contemporary” to the human problems with which they deal.<sup>53</sup>

The sheer fact that judges, unlike legislators, are often unelected, ostensibly suffices to condemn their significant impact on our private law as illegitimate. Like the question of performance, however, legitimacy should be examined in more nuanced and comparative terms. To be sure, I do not challenge the legitimacy of legislatures taking part in the development of our private law. This simple proposition requires, for example, significant judicial deference in contexts of newly enacted legislation,<sup>54</sup> and renders legislative responses to judicial activism in other contexts obviously legitimate. But to figure out the proper domain of judicial creation and modification of private law institutions in other contexts, we need to examine potential bases for the legitimacy of judicial lawmaking in private law matters. Without purporting to adequately address legitimacy in a liberal democracy, the following remarks should suffice to support the claim that the legitimate scope of judicial lawmaking in private law is in fact rather broad.<sup>55</sup>

Consider first the notion that state power can be legitimate only if it is a product co-authored by the citizens. To be meaningful, the ideal of co-authoring the normative commitments that (necessarily) serve as the foundation of our private law entitlements must not be axiomatically attached solely to the legislative process.<sup>56</sup> A commitment to co-authorship requires a more careful comparative account of meaningful participation and deliberation in legislation and in adjudication. This account can look at the participation of citizens (directly or via elected representatives), or focus on the participation of the subset of citizens likely to be affected by the private law development at hand.

In general, participation and deliberation will more likely be found in legislation than in adjudication because lawmaking is legislation’s only task, whereas in adjudication it emerges as part of the resolution of discrete disputes.<sup>57</sup> But the broad or representative participation that might significantly foster collective co-authorship does not seem typical of legislation on many private law matters. Take property: some property doctrines, such as the law of common interest communities, may seem too mundane as a subject for robust public deliberation.<sup>58</sup> By contrast, when the creation or modification of property institutions provides significant opportunities for rent seeking, as in the repeated extensions of the term and scope of copyright, the legislative process tends to be dominated by interest groups promoting narrow distributive goals,<sup>59</sup> and thus cannot meaningfully count as collective co-authorship.

The ideal of participation by parties affected by the proposed development of property law is a more realistic expectation. But insofar as this participatory ideal is concerned, adjudication fares quite well and, in some contexts, probably better than legislation. The adjudicatory adversarial process fares well because it invites disagreements on questions of facts, opinion, and law. It thereby creates a forum where the judges’ normative and empirical horizons are constantly challenged by the participating parties’ conflicting perspectives, which present a microcosm of the social dilemma at hand.<sup>60</sup> As Neil

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<sup>53</sup> H. Oliphant, ‘A Return to Stare Decisis’ (1928) 14 *American Bar Association Journal* 71, 73-74, 159. Schauer has argued that the concrete examples that judges face distort rather than illuminate their judgment because they systematically trigger certain cognitive biases. See F. Schauer, ‘Do Cases Make Bad Law?’ (2006) 73 *University of Chicago Law Review* 883; see also L. Alexander, E. Sherwin, *Demystifying Legal Reasoning* (Cambridge University Press, New York 2008) 111-14. But as Jeffrey Rachlinski shows, alongside the cognitive weaknesses of adjudication, courts have several cognitive advantages over legislatures that might facilitate superior lawmaking. See J.J. Rachlinski, ‘Bottom-Up versus Top-Down Lawmaking’ (2006) 73 *University of Chicago Law Review* 933, 950-61.

<sup>54</sup> A. Marmor, ‘Legislative Intent and the Authority of Law’ in *Interpretation and Legal Theory* (Oxford University Press, New York 1992) 155. See also W.N. Eskridge Jr., *Dynamic Statutory Interpretation* (Harvard University Press, Cambridge MA 1994).

<sup>55</sup> Note that I do not make a claim for judicial supremacy, as in judicial review. My sole focus is on the legitimacy of judicial lawmaking where legislatures are silent.

<sup>56</sup> Even if one insists that such an axiom is justified in the discussion of democracy-based legitimacy, it is out of place in the discussion of legitimacy in a democracy. As the text implies, the latter, broader type of legitimacy that concerns me here accommodates differing types of citizens’ participation and of decision-makers’ accountability.

<sup>57</sup> Another reason relates to comparative costs: voters “often face a far less expensive road [than litigants] to registering their needs... in the political process.” Komesar, *Imperfect Alternatives*, *supra* n. 46, 127.

<sup>58</sup> To pre-empt a possible objection, I may add that the notion that judicial passivity can upset the marginality of these topics within our public discourse does not seem particularly plausible.

<sup>59</sup> See, generally, J. Litman, *Digital Copyright* (Prometheus Books, Amherst 2001).

<sup>60</sup> See *supra* text accompanying n. 7; M. Steilen, ‘The Democratic Common Law’ (2011) *The Journal of Jurisprudence* 437.

Komesar shows regarding tort law, adjudication sometimes even provides a qualitatively better forum for the participation of affected parties. One instance are cases showing sharp “distinction between *ex ante* and *ex post* stakes,” so that the low *ex ante* probability of harm may obscure an important perspective rendered vivid in the *ex post* litigation triggered by the unfortunate realization of such harm.<sup>61</sup>

But legitimacy should perhaps require only accountability by decision makers rather than citizens’ participation. Accountability is a more modest standard: it requires neither active participation nor deliberation, and merely insists that decision makers be responsive to citizens’ values and preferences. As with participation, the accountability requirement may, in the abstract, appear as the trump card of elected legislators vis-à-vis unelected judges, given that reelection is a powerful guarantee of responsiveness. But my previous observations regarding skewed participation in private law matters immediately, and detrimentally, affects legislators’ responsiveness as well. If most or many private law matters are either politically marginal or dominated by interest groups, the legislators’ expected responsiveness is likely to be limited. Likewise, an outright dismissal of judges’ responsiveness seems exaggerated. As Llewellyn insisted, judges need to “account to the public, to the general law-consumer” in their opinions, on a regular basis and in detail. They must persuade not only their brethren but also the legal community, including losing counsel, “that outcome, underpinning, and workmanship are worthy” and that their judgment was formed “in terms of the Whole, *seen whole*.”<sup>62</sup> While real-life adjudication surely falls short of these ideals, having these standards in place is nonetheless significant because it affects the judges’ utility function and thus informs judicial behavior, as even the tough-minded portrayals of judges as maximizers of their utility function admit.<sup>63</sup>

#### F. A REALIST STATEMENT ON LAWMAKING

It is no wonder that the original legal realists invested time and energy in various arenas of lawmaking, shaping and reshaping the various rules and standards that are to govern society. This sustained effort reflects a mature position regarding the rule of law whereby, notwithstanding the malleability of the doctrine as such, the social practice of law implies stable expectations as to the content of the law at any given time and place. Redrawing the line between promulgation and application along these conventionalist lines paves the way for a realist account of lawmaking. This account, which I hope I have begun to articulate in this article, is likely to rely on contextual and pragmatic analyses of the pertinent issues at hand. Rather than opting for either bright-line rules or vague standards, then, legal realists would recommend using both precise rules and informative standards founded on the regulative principles of the doctrines at hand, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Legal realists would likewise avoid binary institutional choices and, in many contexts, appreciate the comparative advantages of legislatures as well as courts in terms of both expected performance and legitimacy, as potential contributors to the development of the law.

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<sup>61</sup> Komesar, *Imperfect Alternatives*, *supra* n. 46, 135-36.

<sup>62</sup> Llewellyn, *Common Law*, *supra* n. 9, 48, 132; Llewellyn, ‘American Common Law Tradition,’ *supra* n. 9, 309-10.

<sup>63</sup> Posner, *How Judges Think*, *supra* n. 44, 11-12, 60-61, 371; Baum, *Judges and Their Audiences*, *supra* n. 44, 16-21, 90, 106.