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Special Issue on Theory and Practice in Jurisprudence: A False Dichotomy

Introduction by George Pavlakos

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SPECIAL ISSUE

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Guest Editor: George Pavlakos

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BOOK REVIEW

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THEORY AND PRACTICE IN JURISPRUDENCE: A FALSE DICHOTOMY

Radical shifts of paradigm in legal theory have, with surprising frequency, claimed for themselves to form refreshing alternatives to some obsolete theoretical account that preceded them. Indeed legal philosophers as diverse as von Jhering, Hart, Dworkin and the Legal Realists launched their influential accounts by accusing their predecessors of being entangled in futile *abstract theory* while putting forward their own conception as a healthy *practical account* of legal phenomena. This coincidence has cultivated the belief that theory and practice correspond to two ways of doing legal philosophy that are mutually exclusive. So much so, that most lawyers (be they academics or practitioners) are keen on dismissing any theoretical discussion with regard to law while endorsing whatever happens to convey (usually just by carrying the appropriate label) the impression of a practical account. At the same time it seems to be rather difficult to pin down with precision what it is that makes an account of law an instance of theory rather than practice, for the two concepts have for the most part been subjected to rhetorical or even polemical use instead of serious analysis. Be that as it may, it is possible to associate a number of general features with each of the two styles of thinking, features that have emerged from the various uses the two terms have been subjected to.

Abstract theory in jurisprudence has been thought of as being synonymous with abstract philosophical analysis that aims at demonstrating that all legal phenomena possess certain universal characteristics corresponding to a number of epistemic criteria or formulas that may be applied to the analysis of any type of legal system. What is more, such criteria are conceived of as being neutral *vis-à-vis* any context-dependent features of legal systems, not least substantive values that reside within them. Along these lines, jurisprudence lawyers who uphold this ideal of analysis have been accused of subscribing to a sterile form of analysis of legal phenomena, one that relies on a set of general criteria that form an infallible body of knowledge that is exempted from our experience with respect to particular legal institutions (*i.e.* it functions as an example of *a priori* knowledge). As a result of their reliance on such an axiomatic point of view, the accusation continues, those legal philosophers end up neglecting a lot of what is essential to legal phenomena, most importantly their practical character or their ability to form normative standards for action and agency in general.

Contrapositively, *practical accounts* in jurisprudence have been praised as pursuing an understanding of legal phenomena deriving from the study of concrete legal practices. Instead of looking for general, context-independent criteria and formulas that can work irrespective of any context and are isolated from the substantive values of particular legal systems, this second type of analysis suggests that we 'discover' law in the particular instantiations of a legal practice, instantiations that materialise through the responses of the practice to specific practical problems (and – in most cases – can be read off from the practice of adjudication). Such responses help us disclose the 'internal rationale' of the practice, a rationale that refers to a set

of values or purposes that present themselves as a coherent body at any given time, albeit undergo continuous change when studied diachronically.

The issue of NILQ at hand is set out to demonstrate that there is less than meets the eye in the sharp juxtaposition of theory with practice. Despite the fact that the individual authors do not explicitly address the relation between theory and practice, a common theme that runs through all four papers is the conviction that any sharp distinction between theory and practice is doomed to fail, for there is no single legal philosophy that constitutes a pure instance of either theory or practice. It is not difficult to see why: any jurisprudential account of law necessarily commits itself to a number of philosophical assumptions regarding the nature of law and the possibility of legal knowledge. Thus, any so-called *practical account* must first explain why context and substantive values should become part of law's nature. In doing so, however, it shall make use of the language of necessity, the *a priori*, and a handful of other concepts that supposedly mark the domain of heavy-handed theory. Likewise, a strong *theoretical approach* that favours generalisations and context-independent conclusions will have to face the challenge of explaining law's institutional and normative character, a challenge that cannot be met successfully until a careful account of adjacent institutions and substantive values has been given.

To that extent, the dilemma 'theory or practice?' is a false one. Instead, what is the case are more and less successful accounts of legal phenomena, their success or failure depending on the quality of the arguments employed on either the levels of theory and practice not, however, on which of the two levels obtains. Along these lines, it is far more fruitful to make explicit the theoretical commitments of any account of law and investigate whether they manage to meet the practical claims raised by the normative and institutional character of legal phenomena[1]. It is in this vein that the authors of this issue attempt to tackle a number of key jurisprudential issues.

Sean Coyle undertakes an investigation into the nature of legal rationality by discussing the notorious Jörgensen dilemma, named after its author the Danish logician Jorgen Jörgensen, whose intuitive appeal questions law's rational character. The first horn of the dilemma is the proposition that normative (legal and moral) arguments resist logical analysis, for their

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[1] In recent years there has been an increase in publications that combine a serious theoretical analysis without loosing sight of the practical aspects of legal phenomena. Instead of others see: N. Stavropoulos, *Objectivity in Law* (1996), Oxford: OUP; C. Heidemann, *die Norm als Tatsache* (1997), Baden-Baden: Nomos; T. Endicott, *Vagueness in Law* (2000), Oxford: OUP; J. Dickson, *Evaluation and Legal Theory* (2001), Oxford and Portland, Oregon: Hart Publishing; S. Coyle and K. Morrow, *The Philosophical Foundations of Environmental Law* (2004), Oxford and Portland, Oregon: Hart Publishing; V. Rodriguez-Blanco, *Meta-Ethics, Moral Objectivity and Law* (2004), Paderborn: Mentis. See also the following edited works: J. Coleman (ed), *Hart's Postscript* (2001), Oxford: OUP; B. Leiter (ed.), *Objectivity in Law and Morality* (1999), Cambridge: CUP; W. A. Edmundson (ed): *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2004), Oxford, Blackwell Press; J. Coleman, and S. Sapiro, (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 2002, Oxford: OUP; S. Coyle and G. Pavlakos (eds), *Jurisprudence or Legal Science?* (Forthcoming in 2005), Oxford and Portland, Oregon: Hart Publishing.

premises are not truth-evaluable (*i.e.* they can not be asserted as true or false as, conversely, can the premises of a theoretical argument). The second horn comprises the thought that in spite of the failure of logical analysis normative arguments still seem to be rationally comprehensible. When combined the two propositions require on pain of contradiction that either rationality or comprehensibility of the law be given up. The author submits the philosophical assumptions underlying the two horns to careful scrutiny concluding that in normative contexts logical validity is not a precondition of rationality, for in such contexts it is possible to disagree rationally with an argument or position without impugning it as false. Once this strong assumption has been undermined, normative reasoning begins to appear rationally comprehensible independently of logical validity rather than in spite of it and Jörgensen's dilemma looses a great deal of its edge.

Carsten Heidemann's analysis of Kelsen's transcendental method rests somewhat contrapuntally to the first paper. While Coyle argues that law's rationality does not necessarily go hand in hand with logical validity, this author refers to Kelsen's methodology with a view to developing conditions for legal knowledge. Faithful to his Neo-Kantian background Kelsen thought that the subject matter of legal science, legal norms, do not stand for any autonomous entities but are instead 'constructed' by means of the cognitive activity legal science engages in. This activity is conditioned or regulated by a conceptual presupposition, the so-called *Grundnorm* or basic norm whose function is to enable normative knowledge by setting apart the realm of normativity (in other words the realm of 'Ought') from all other kinds of empirical entities (or the realm of 'Is'). What is more, besides enabling the cognition of legal norms, the basic norm is the ultimate source of legal validity, for it stands at the apex of a normative pyramid from which all legal norms flow. It follows that by connecting the knowledge of legal norms with the basic norm the truth and falsity of legal propositions becomes synonymous with their validity: what exists in the realm of norms is what legal science pronounces valid. An interesting question arising in this context is whether the explication of legal truth via legal validity manages, in pointing at a kind of rationality that is special to law, to avoid Jörgensen's dilemma along the lines suggested by Coyle. In concluding, let it be noted that Heidemann's paper is one of the few available discussions of the Neo-Kantian foundation of Kelsen's jurisprudence and is expected to provoke animated discussions within circles of the Kelsen scholarship.

Emmanuel Melissaris integrates the topics of law's rationality and knowledge in the context of a discussion of Max Weber's England problem. Max Weber, in applying his elaborate theory of rationality to the classification of legal systems, concluded that the English legal system suffered from a deficit in rationality. This conclusion contradicted sharply his project of establishing a necessary link between capitalism on the one hand and the idea of the formal-rational legal system on the other, for England had actually been the cradle of the industrial revolution and the capitalist mode of production. The author attempts to disentangle the resulting puzzle by arguing that rationality in the legal context encapsulates far more than Weber had assumed, for law embodies an instance of communicative or discursive reason wherein participants purport to establish the correctness (justice) of legal propositions. This escapes Weber's narrow formal-sociological analysis and points at a more substantive notion of

rationality, one that is interested in just outcomes. No sooner, however, rationality has been explicated in the light of communicative reason than the English law ceases to be irrational and, instead, emerges as an example of a substantive notion of legal rationality. Melissaris' discussions of Weber's Neo-Kantian background and the different conceptions of rationality can be used for making illuminating cross-references to the previous two papers.

The last paper, by Stefano Bertea, is perhaps the most straightforward demonstration of the need to integrate theoretical reasoning with practical considerations within legal philosophy. The author illustrates with admirable clarity how theory construction regarding law's nature should be responsive to the normative claims raised by law in any of its instantiations. He sets out to do so by taking on board the relatively uncontested concept of authority. All three major schools of legal thought, *i.e.* realism, positivism and natural law theory, accept authority as a conceptual component of the concept of law, albeit by advancing very different understandings thereof. Bertea rejects the individual understandings not because they are flawed but because they are incomplete or partial. In their place he advances a hybrid understanding that integrates elements from all three theories. What holds these elements together is the argumentative structure of law. This, Bertea argues, is a necessary element of law's authority if law is to make sense as a social practice that creates reasons for action. On this explication there is no ultimate formula or perfect definition for capturing the essence of law. Instead an appropriate understanding thereof would require that we combine empirical, practical and evaluative elements into a matrix that is constantly redefined and reshaped by an argumentative process of practical reasoning. Bertea submits that the transformation of law's traditional understanding that emerges from the argumentative explication of law "opens up a completely new research programme for legal theorists, calling on them to redirect the focus of jurisprudence . . . [in order to] arrive at a comprehensive theory with which to understand current legal systems and attack the problems attendant on them". One couldn't agree more!

In selecting the contents of the volume I hope to have managed to make a strong case for a more creative way of practicing legal theory, one that is not inhibited to take on board calm philosophical reasoning in order to identify the actual problems pertinent to law's nature rather than sticking to any perceived labels, residues of old ideological wars. In preparing the issue I was very lucky to have been the recipient of excellent support and advice from a number of colleagues and friends. My thanks go to all four authors for being extremely efficient in responding to deadlines and taking on board my often less than coherent comments. Gordon Anthony, Emmanuel Melissaris and Sally Wheeler offered fresh ideas and encouragement throughout the planning and execution of the project. Last but not least I would like to express my gratitude to the previous editor of NILQ, David Capper, for inviting me to edit a special jurisprudence issue.

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FACING JÖRGENSEN'S DILEMMA

Dr Sean Coyle, Lecturer in Law, University College London

"*Old experience teaches*

The thread of consequence cannot be broken"

Ted Hughes, *Tales From Ovid*

As lawyers we take it for granted that legal argumentation is a rational form of argumentation. Though it differs in obvious ways from mathematical reasoning, being persuasive in nature rather than strictly logical, that persuasive force (where it is present) depends upon the rational properties of juridical argument rather than its emotive force. Our ability to engage in legal reasoning, or to assess the effectiveness of legal arguments, does not ordinarily depend upon a firm understanding of what these 'rational properties' are: the standards of rationality involved are, instead, part of the background of unarticulated assumptions and shared standards against which legal arguments are formulated and pursued. The fact that those involved with the law broadly *agree* on what makes a legal argument a sound one, or a controversial, or an insightful, or a misconceived, one is thus more important than their ability to give precise, univocal expression to the criteria which underpin those assessments.

It is, as a philosophical matter, nevertheless important that there actually *be* rational criteria which govern the coherence of legal argumentation. In certain branches of legal philosophy, these rational criteria are the subject of sustained analysis. On occasion, this is motivated by a desire to develop a clear picture of the structure of legal justification, and to reach a precise understanding of the principles which supply the grounds of the coherence of legal argumentation. The quest for a 'rational science of law' is, in all probability, a perennial one; but even in the absence of a complete theoretical picture of legal argumentation, many philosophers have sought principled confirmation that our intuitive judgments about the validity of certain inferences are indeed sound, and that the justificationary force of legal arguments is in the end truly rational rather than emotive, or arbitrary. One persistent source of doubt about the rational credentials of legal reasoning comes in the form of a problem known as 'Jörgensen's Dilemma'. Roughly stated, Jörgensen's Dilemma poses the following problem: whilst there is a generally accepted basis for logical inference, the explanations which establish logical validity in the case of arguments involving descriptive propositions do not appear to hold when the arguments depend partly or wholly upon normative propositions. Thus, whilst arguments involving the application of norms certainly appear to be governed by intelligible principles, there is in fact no readily available basis on which to distinguish genuinely valid normative inferences from purely arbitrary ones.

In this essay I intend to lay this question to rest, and to suggest that Jörgensen's Dilemma presents no real problem for our intuitive understandings of legal reasoning and justification. My discussion will initially centre on two established but opposing ways of looking at the dilemma, before proceeding to a more general discussion of how it might be resolved. These two parts of the discussion are relatively autonomous, and

may be read independently of one another. (Indeed, those who have little interest in technical issues about the analysis of legal reasoning can safely proceed to the second section.)

Part I: Two "Solutions"

Jörgensen's Dilemma describes a problem faced by us in relation to the proper way to regard sentences in the imperative mood:

> "According to a generally accepted definition of logical inference only sentences which are capable of being true or false can function as premises or conclusions in an inference; nevertheless it seems evident that a conclusion in the imperative mood may be drawn from two premises one or both of which are in the imperative mood."[1]

One recent attempt to tackle this problem is that of Robert Walter.[2] Walter develops this statement of the dilemma with two examples, adapted from Jörgensen. He asks us to contrast the syllogism

(I) All human beings will die one day.
Socrates is a human being.
Therefore Socrates will die one day.

with the following, "normative" syllogism:

(II) Love your neighbour as yourself!
X is one of your neighbours.
Therefore love *X* as yourself.

In the case of (I), Walter states that the conclusion is true if both antecedents are true, since "The *truth* is in a manner of speaking *carried* from the premises into the conclusion".[3] On the other hand, the conclusion in (II) – though it appears to follow from the premises in the same way – cannot do so by our current understanding since it, like the major premise, is in the imperative mood and as such is incapable of being true or false. Therefore, truth is not transmitted across the consequence relation. This intuitively agreeable set of propositions is traditionally seen as providing a rather attractive, if frustrating, explanation of the asymmetry between (I) and (II).

Walter indeed appears to concur with the view that truth, and the ability of propositions to bear truth-value, are at the heart of the problem of the "inference" in (II): "The conclusion is, of course, subject to an important precondition. The premises must be *true*."[4] Walter's way out of this fix is to show how, contrary to received opinion, all the propositions in (II) can be viewed as true, or at least truth-relevant. To do this, we must examine the way in which propositions are assessed as true or false in the first place. In the case of indicative sentences, the propositions they embody are valued on

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[1] J. Jörgensen, "Imperative and Logic" (1937-8) 7 *Erkenntnis* 288-96.
[2] R. Walter, "Jörgensen's Dilemma and How to Face it" (1996) 9 *Ratio Juris* 168-71. (Hereinafter, 'Dilemma'.)
[3] Walter, Dilemma, 169.
[4] Id.

the basis of their relationship to the world: roughly speaking, a proposition is true iff (if and only if) it accurately describes the reality to which it is addressed, so that "Snow is white" is true if snow is white, and false otherwise.[5] So, to overcome Jörgensen's Dilemma, one must accept that imperatives are likewise valued on the basis of their depiction of reality, this time of a "world of ought" consisting of "norms-in-themselves".[6] Normative syllogisms may then be seen to transmit truth in essentially the same way as factual syllogisms.

Ota Weinberger takes issue with Walter's approach, on the basis of what he refers to as Walter's "ontologization" of logic:

> "Walter seems to believe that the validity of an inference [even in relation to indicative sentences] is ontologically grounded, namely, on the real facts the propositions are about . . . If I refer to the view that the validity of inferences is founded on the ontological relation between the objects being described by the phrase "the ontologization of logic," then we can say that ontologization misinterprets logic theory and destroys essential functions of inferences for methodology."[7]

Vis-à-vis the classical conception of logical consequence, Weinberger is certainly right. According to the classical definition of logical implication,[8] false propositions imply all propositions and true propositions are implied by all propositions; what matters for validity is, as Weinberger notes, "not the actual structure of the world the propositions are about, but the structure of the relevant linguistic expressions and their interrelations".[9] Walter's conception of logic, by contrast, is "ontological" in that he requires a (true) conclusion – whether of fact or of value – to be validly inferred only from premises which are themselves true.

Weinberger's is not the only point which can be raised against Walter's approach: one may, quite reasonably, take exception to Walter's postulation of a "world of ought" alongside the "world of is," the latter being that with which indicative sentences are concerned, and both of which are said, by

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[5] This conception of truth is *not*, of course, Tarski's (See A. Tarski, "The Concept of Truth in Formalised Languages", reprinted in Alfred Tarski, *Logic, Semantics, Metamathematics*. (Hackett, 1933) pp 152-78.) Whereas Tarski was concerned with the relationship between a truth-predicate in an object-language and a corresponding property of the meta-language, Walter here advances a *disquotational* theory of truth with a more direct and overt ontological motivation. The philosophical controversies surrounding such a theory need not detain us; however, on the differences between such a conception and Tarski's, see W.V. Quine, *Philosophy of Logic* (Harvard, 1986) 40ff.

[6] Walter, Dilemma, 169-70.

[7] O. Weinberger, "Against the Ontologization of Logic: a Critical Comment on Robert Walter's Tackling Jörgensen's Dilemma" (1999) 12 *Ratio Juris* 96. (Hereinafter, 'Ontologization'.)

[8] The classical definition of implication is derivable straightforwardly from the classical conception of consequence – see below for details.

[9] Weinberger, Ontologization, 97.

Walter, to be in some sense "constructed out of sense-data".[10] Nevertheless I shall restrict discussion to Weinberger's objection for two very good reasons. In the first place, even if the rather fanciful talk in terms of "worlds" is translated into something more intuitively graspable – such as talk of distinct intellectual domains – the question which still wants answering is why we should assume that the different "worlds" (or domains, or whatever they are) are related to one another in such a way as to render norms useful as guides to everyday life: there is no *a priori* reason for supposing that any connection between Walter's "worlds" exists, beyond the fact that norms are supposed to assess behaviour. However, the latter assertion was supposed to be the outcome of Walter's explanation, not an unanalysed assumption on which the whole explanatory edifice rests. In the second place, it is exceedingly difficult to get a handle on what, exactly, the disputed points are, save by addressing the *logical* disputes to which they give rise. This does not involve a reduction of those disputes to disputes about logic; but if an assumption can be shown to be unable to get off the ground, logically speaking, then any further, metaphysical, debate is forestalled.

I. Walter and Weinberger

I shall try to be brief about Walter's argument and Weinberger's response to it. By ordinary lights, I think Weinberger's objection is well made. I also think that (by extraordinary lights) Weinberger's objection can be met, at least to some extent. I do not, however, believe that this remedy does Walter any good – in that it does not deliver us from the horns of Jörgensen's Dilemma – but I briefly explore it here as an interesting point in itself.

More precisely, two things need to be established: first, can Walter find an answer to Weinberger's challenge; and secondly, if an answer is available, will it enable Walter to provide a convincing explanation of why we should regard syllogism (II), above, as valid? I will attempt to show that Walter does have an answer, of sorts – albeit one which requires a very charitable interpretation of his antecedent remarks on logical consequence – but that such an answer fails to establish anything startling about the putative validity of (II).[11]

The charitable interpretation of Walter's comments is this. Given the ordinary, classical concept of logical (material and strict) implication, and any two propositions *A* and *B*, it is hard to see why $A \Rightarrow B$ should be true simply because *A* is false or *B* true. In particular (so the argument may go) it is especially hard to see why this should be so when *A*,*B* are *imperative*

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[10] See Walter, Dilemma, 171; also Walter, "A Response to Stewart" (1997) 10 *Ratio* Juris) 403. Some of these problems are explored by Bruce Anderson, "A Comment on Walter" (1999) 12 *Ratio Juris* 100-7, at 102.

[11] Weinberger, by contrast, is rather *un*charitable in his reading of Walter: Weinberger quotes Walter as stating "The conclusion is subject to an important precondition. The premises must be *true*" – the locus of the logical error exposed by Weinberger. However, Weinberger's ellipsis does not capture fully Walter's intention, the full sentence reading, "The premises must be *true*; they must be – as the phrase goes – capable of being true" – which is rather different. I am aware that my "charitable" reading is quite liberal; this is because it seems to me that Walter's remarks taken at face value do not issue in a coherent position. (In fact it is not clear to me what Walter's intended position is at all.)

propositions, assuming that such propositions bear truth-values: one would like to think of moral, legal and other types of value-laden argument as expressing relationships between propositions which are more closely defined than mere combinations of arbitrary truth-functions. According to the classical conception, such a closer association between premises is not entertained, since *B* follows from *A* in every situation except that in which *A* is true and *B* false. On the classical conception of consequence, *A* and *B* need enjoy no intrinsic relationship with one another: *A* might stand for "Water is H_2SO_4" and *B* for "Dogs are quadrupeds", in which case $A \Rightarrow B$ would be true. Walter's point, therefore, might be that this conception of consequence does not capture the intuitive notion of consequence (as employed in chains of reasoning such as (II) above) that the premises and conclusion of an argument must be somehow *linked*: in other words, that the impossibility of inferring a false conclusion from true premises does not suffice for validity. On the other hand, the impossibility of true premises and a false conclusion is clearly a *necessary* condition of validity, so what is needed (Walter may argue) is some stronger condition of sufficiency.

If this charitable interpretation *is* Walter's position, then he would enjoy some good company, for in recent times the classical conception of logical consequence has undergone challenge on two fronts. According to the first sort of challenge, the classical conception of consequence, which is based essentially on Tarski's axiomatisation of consequence, is simply the wrong one; that is, it fails to capture our intuitive notion of consequence. Such an attack has been levelled, for instance, by John Etchemendy.[12] Its roots lie in an asymmetry in our attitude to the soundness and completeness proofs for first-order logic.[13] We normally regard the pair:

(*) If $\Sigma \models S$ then $\Sigma \vdash S$ (Completeness)
If $\Sigma \vdash S$ then $\Sigma \models S$ (Soundness)

as being of more significance than proofs of:

(**) If $\Sigma \vdash_1 S$ then $\Sigma \vdash_2 S$
If $\Sigma \vdash_2 S$ then $\Sigma \vdash_1 S$

where "$\models$" and "$\vdash$" are generalised versions of (respectively) the semantic and syntactic turnstiles. This is because the most we can claim for the notions in (**) is that they are coextensive; we cannot tell whether they are sound or complete as consequence relations on a language unless we have a semantic proof of either $\vdash_1$ or $\vdash_2$.[14] The belief attendant on this attitude is that we *know* that our semantic notion of consequence (*i.e.* Tarski's) is the right one – that it declares all logically valid arguments valid, and all invalid ones invalid. One who advances this first sort of attack is in effect suggesting that such a belief is unjustified or untenable.

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[12] See J. Etchemendy, *The Concept of Logical Consequence* (1990).

[13] For appropriate elucidations see, *e.g.* W Hodges, "Elementary Predicate Logic" in *The Handbook of Philosophical Logic* (Gabbay and Guenthner eds., 2nd ed., 2001), Vol. 1, 1-131.

[14] This argument is roughly that of Etchemendy: see *The Concept of Logical Consequence*, 3-4.

The second sort of attack on the classical conception is, though rather different in terms of motivation, essentially a particular instance of the first sort of attack. It attacks the classical account of validity because of its allegedly unintuitive consequences – for instance that all propositions are implied by inconsistent premises. This attack locates the problem in the truth-functionality of the material conditional, the idea that $A \Rightarrow B$ can be asserted simply because A is false or B is true. In place of such a conception, it is argued, we need an intensional (*i.e.* non-truth-functional) account of the conditional corresponding to "If . . . then . . .", one in which the premises are somehow *relevant* to the conclusion. The result, of course, would be a form of *intensional logic*.

Both sorts of challenge are compatible with Walter's remarks (the first only implicitly), but it is the second which, I believe, offers Walter the most credible stance and the best chance of riposte. Furthermore, it seems to accord well with Walter's remarks that he rejects a simple truth-functional account of "if" in favour of some firmer connection between formulae. In Walter's own case, this connection is clearly seen as some kind of *metaphysical* connection between the corresponding objects. As many have pointed out, non-truth-functional accounts of "if" are nonetheless capable of being captured by a formal theory (modal logic supplying one example).[15] The starting point for such a theory is, as we have already seen, that the impossibility of inferring a false conclusion from true premises is a necessary but not sufficient condition for logical validity.[16] In order to see how one might formulate a sufficient condition, it is necessary to re-examine the basis on which logical connectives are founded in the first place. For a start, we need to consider only structures which satisfy a generalised version of the deduction theorem, that:

$$\text{(GDT)} \qquad \Sigma \bullet A \vdash B \equiv \Sigma \vdash A \Rightarrow B$$

which states that Σ entails $A \Rightarrow B$ iff we can deduce B from Σ taken together with A, where "taken together" is a wider notion than just set-union. By varying the properties of "$\bullet$" we can formulate varying conceptions of the conditional.[17] In our case, we want to restrict the behaviour of "$\bullet$" so that from a proof of $\Sigma \vdash A$ you cannot infer $\Sigma \bullet B \vdash A$, where B is not in Σ. There is no unique combination of properties for "$\bullet$" which yield exactly these conditions, but it is obvious that any candidate combination cannot mirror the classical rules for &I and &E, for this would yield us a truth-functional account of the consequence relation. For present purposes, we can begin by defining a connective "$\otimes$" at the level of formulae (rather than of structures) with the following two rules:

$$(\otimes\text{I}) \quad \frac{\Sigma \vdash A \quad \Sigma \vdash B}{\Sigma \bullet \Pi \vdash A \otimes B} \qquad (\otimes\text{E}) \quad \frac{\Sigma \vdash A \otimes B \qquad \Pi(A \bullet B) \vdash C}{\Pi(\Sigma) \vdash C}$$

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[15] See, *e.g.* S. Reid, *Relevant Logic* (Blackwell 1988), 28.

[16] In what follows, for the sake of generality and simplicity, I will conduct the argument so far as is possible from the level substructural logic, as developed in G. Restall, *An Introduction to Substructural Logics* (Routledge, 2000).

[17] Restall, *Substructural Logics*, 10.

This connective, commonly called *fusion*, mirrors directly the behaviour of "•" for structures. So, if "•" is associative, then so is "⊗", and so on. In our case, we need to define "⊗" so that we cannot accept a proof of $A \otimes B$ from X and Y where $X \vdash A$ and $Y \vdash B$, but can accept such a proof from X alone (*i.e.* where $X \vdash A$ and $X \vdash B$).[18] The sense of this connective is captured by Reid:

> "There is a familiar truth-functional conjunction, expressed by "*A* and *B*," which entails each of *A* and *B*, and so for the falsity of which the falsity of either conjunct suffices, and the truth of both for the truth of the whole. But there is also a non-truth-functional conjunction, a sense of "*A* and *B*" whose falsity supports the inference from *A* to "not-*B*." These senses cannot be the same, for if the ground for asserting "not-(*A* and *B*)" is simply that *A* is false, then to learn that *A* is true, far from enabling one to proceed to "not-*B*," undercuts the warrant for asserting "not-(*A* and *B*)" in the first place. In this sense, "not-(*A* and *B*)" is weaker than both "not-*A*" and "not-*B*," and does not, even with the addition of *A*, entail "not-*B*," even though one possible ground for asserting "not-(*A* and *B*)," namely "not-*B*," clearly does."[19]

In this sense, "$\neg(A \otimes B)$" is equivalent to "$A \Rightarrow \neg B$," where "$\Rightarrow$" is non-truth-functional. (We can likewise define an intensional disjunction, "$A \oplus B$," equivalent with "$A \Rightarrow B$.")

We are now in a position to see how the "if" connective is related to fusion. Because fusion mirrors the behaviour of "•," the fusion connective is parent to the other connectives, such that "$\Rightarrow$" and "$\Leftarrow$" are, respectively, left- and right-residuals of "⊗." For example, by allowing Weak Commutativity as a structural inference rule, we can have "$A \Rightarrow B$" as equivalent to "$B \Leftarrow A$."[20] Clearly, by making "⊗" intensional, we make the conditional intensional also. How, then, does this relate to the notion of logical consequence, and in particular to Walter's argument?

Basically, Walter's argument could be this. Following Gentzen, we can distinguish *generic* properties of the consequence relation, which are set by structural inference rules intent on capturing properties present in *any* consequence relation, from *specific* properties (set by operational inference rules) which are specific to deductive systems.[21] (In the example above, Weak Commutativity was introduced as an operational rule, laying down rules for operations on formulae.) But, in our generalised framework of operations on structures satisfying GDT, we can vary *any* of the rules on premise combination. By varying the set of structural rules in this way, we arrive at differing relations of consequence; furthermore, our structural rules

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[18] A. Anderson & N. Belnap, *Entailment: The Logic of Relevance and Necessity* (Princeton 1975).

[19] Reid, *Relevant Logic* 38.

[20] Weak Commutativity: $X \bullet Y \leftarrow Y \bullet X$. On the definition of a structural rule, see below.

[21] G. Gentzen, "Investigations into Logical Deduction" in *The Collected Papers of Gerhard Gentzen* (M. Szabo ed, Amsterdam, 1969), 68ff.

can be made to "drop out" of the nature of the structures we wish to combine. For example, taking sets as the terms of the consequence relation (as in classical logic), we can naturally admit the following among our structural rules:

Reflexivity:	$X \leftarrow X$
Mingle:	$X \leftarrow X \bullet X$
Weakening:	$X \leftarrow X \bullet Y$
Associativity:	$X \bullet (Y \bullet Z) \leftarrow (X \bullet Y) \bullet Z$
Permutation:	$X \bullet Y \bullet Z \leftarrow X \bullet Z \bullet Y$
Contraction:	$(X \bullet Y) \bullet Y \leftarrow X \bullet Y$

Together these properties deliver up a truth-functional connective-set at the level of formulae. By replacing sets with other kinds of structures, various generic properties naturally disappear or become modified (or else require explicit introduction): for example, sequences are sensitive to repetition and order; firesets are (like ordinary sets) insensitive to order but, as with sequences, sensitive to repetition of elements.[22] For Walter, clearly, not all of the above rules would be acceptable. Weakening and Mingle, for a start, must be dismissed from any account of consequence to which Walter could subscribe. It is clear from this is that Walter has some room in which to avoid Weinberger's challenge that he has simply misunderstood logical consequence. Rather, Walter can (now) claim, Weinberger's remarks hold true only of the *classical* conception of consequence, which Walter plainly rejects: it is not the case, on our conception, that logical consequence is a straightforward product of the truth-values of constituent premises and conclusion. Some firmer (ontologically-based?) relationship is necessary.

It is *unclear*, however, which particular combination of rules *would* satisfy Walter's requirements for a consequence relation. Associativity and Contraction, for example, are not always admissible intensionally (though the relevant logic R admits them). What Walter would seem to require, on the face of it, is a logic weaker than R but stronger than DW, a system in which the only theorems in its implicational fragment are identity statements of the form "$A \rightarrow A$." I will not here speculate on which combination of structural rules would satisfy Walter's demands. (In particular, Walter's demand that a necessary condition of validity for entailments is that "[t]he premises must be *true*" is, as Weinberger notes, clearly unacceptable: if mathematicians discovered a necessary connection between the truth of an untested hypothesis X and Goldbach's Conjecture, the inference "$X \rightarrow$ Goldbach's Conjecture is true" would still be valid even if X turned out to be false.) Moreover, it is highly unclear what the metaphysical (and ontological) ramifications of quantifier-endowed substructural- and relevant logics are;[23] conversely, Walter's peculiar ontological motivations are very hard to incorporate systematically any particular theory of deduction. I shall not speculate upon ways in which Walter might develop such a logic.

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[22] See Reid, *Relevant Logic*, 42; Anderson & Belnap, *op. cit.*

[23] K. Fine, "Semantics for Quantified Relevance Logic" (1988) 17 *Journal of Philosophical Logic* 27-69.

What I *shall* do in the remainder of this section is briefly outline what acceptance of a non-classical notion of inference could do for Walter, in terms of an analysis of our opening syllogisms (I) and (II). I will then show why even such an austere notion of logical consequence as Walter would admit does nothing to dispel the perceived asymmetry between (I) and (II), that is, between the so-called factual- and normative-syllogistic forms.

II. Walter and Jörgensen

The argument so far is this. Weinberger's challenge to Walter that the latter has misunderstood logical consequence holds if by "logical consequence" is meant the *classical* conception of logical consequence. Walter can avoid this charge only by arguing that the classical conception is wrong; if he does not do this, I see no way in which Walter can deflect Weinberger's challenge.[24] There is, however, a considerable price to be paid for this manoeuvre. By denying that the classical conception of consequence is the right one, Walter places himself in the position of having to provide alternative explanations of *both* syllogisms outlined at the beginning of this article, that is, both the normative and the factual forms of the syllogism. He must do this because, if the classical conception is *wrong* (in pronouncing some valid arguments invalid or some invalid arguments valid), the ground on which the argument in syllogism (I) goes through – as Walter agrees it does – must be different from the one we normally think of as allowing such an inference. The resulting complexity of explanation does not, of course, entail error; it merely involves Walter in a much more intricate and difficult argument than he appears to envisage: it is apparent from Walter's pursuit of the notion of normative truth that he believes some fairly straightforward account of normative consequence to follow once such a notion has been isolated.

There seem to me to be two main problems with proceeding in this fashion. The first is that, at the present time, the semantics of quantifier-rich substructural logic are not clearly understood. Therefore, any analysis Walter can provide of the normative syllogism (or the factual one, come to that) will be a long way from the metaphysical position he adopts with respect to normative entities in "the world of ought": that is, it is entirely unclear how the one ties in with the other. This is patently very far from Walter's own belief that his ontological solution dissolves the problem of normative inference at a stroke. The second problem is in a sense far more serious, though I shall not explore it in much detail here.[25] It is the problem that the radical differences between the semantic structures of syllogisms (I) and (II) above seem not to admit of a *single* analysis at all. Even if we reject (as Walter must, on the present line of argument) the established rules of inference governing syllogism (I), the semantic structure of the premises remains clearly understandable; that is, we are still able to say in just what way a quantified sentence is built up from a singular sentence or open sentence, and which circumstances govern the attachment of a predicate

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[24] Even the most charitable of interpretations of Walter's remarks rules out the possibility of attributing to Walter a doctrine of pluralism with respect to consequence relations, that is, admitting various forms of intensional consequence relations *alongside* that of the classical conception.

[25] I have covered some of the ground in Coyle, "The Meanings of the Logical Constants in Deontic Logic" (1999) 12 *Ratio Juris* 39-58.

expression to a subject term. Fregean semantics remains a formally adequate and intuitively acceptable way of comprehending linguistic structures where those structures are descriptions, alethic modalities, and so on. All we are unsure of, if we reject the classical conception of consequence, are the precise rules for ∀I and ∀E in a deductive context – in other words, whether a particular mode of reasoning from a given universal expression to a particular conclusion is valid.

In the case of syllogism (II), the normative syllogism, our problems are much more acute. For it is not at all clear what the correct semantic analysis of the premises is: we are simply not able to say what the semantic contribution of the normative expressions is, in formal terms, to the semantic value of the whole sentence. It is, in other words, not yet a problem of specifying which modes of reasoning are *valid* for normative syllogisms, but, more fundamentally, of working out a semantic theory for the component sentences. The problem of mapping out of new semantic territory (how normative sub-clauses affect semantic value) is not well understood; certainly, Walter's rudimentary reflections on the ontology of norms and allegedly descriptive sentences about norms, are a long way from providing such a theory. Walter's only available evasive manoeuvre, therefore, tells us no more about the semantic structure and inference rules of the normative form of the syllogism than does the classical conception of consequence. This does not mean that that manoeuvre is not worth making: for Walter, it clearly is if he wants his remarks on logical consequence to escape Weinberger's challenge. The moral is simply that the manoeuvre does not succeed in establishing the formal validity of the normative syllogism; its respectability continues to rest on our intuitive willingness to regard it as a valid piece of reasoning without the means to specify in what, precisely, this notion of "validity" consists. In other words, the gap between the two horns of Jörgensen's Dilemma remains as wide as ever: neither the classical conception of consequence nor the substructural variants provide a ready solution to the dilemma.

Having reviewed Walter's solution to the dilemma, albeit briefly, and found it wanting, I shall now turn to a consideration of the dilemma itself. My argument will be rather different to most existing attempts to explain the mechanics of the dilemma, and therefore probably controversial. Rather than suggesting any particular "solution," I will suggest that Jörgensen's Dilemma is, in the end, no real dilemma at all.

Part II: Dissolving Jörgensen's Dilemma

Most discussions of Jörgensen's Dilemma proceed from two assumptions. These assumptions, and their variants, are both crucial to the conduct of arguments about the dilemma and, within those arguments, unreflective and unarticulated. The first assumption is, in short, that Jörgensen's Dilemma has something of the character of a *paradox*; that two incompatible propositions (that normative reasoning is intuitively valid and that the logical rules which guide our intuitive grasp of validity cannot be applied to normative reasoning) are apparently true simultaneously. The dilemma, on this assumption, forces us to confront an inconsistency in our beliefs in roughly the same way as other paradoxes, such as Russell's, force us to revise our intuitive beliefs about, *e.g.*, mathematics: Russell's paradox, which generates a set that cannot possibly exist, shows us that our naïve

views about set-theory, in particular that every non-empty concept has an extension, are wrong. As such it forces us to make a choice between a continued belief in a particular (and at the time universally and unreflectively accepted) view of logic, and an alternative view which looks, on the face of it, to be highly counter-intuitive. Likewise, Jörgensen's Dilemma imposes upon us a choice between a particular (and widely accepted) view of logical validity – one which cannot be applied to normative reasoning – and our deeply held belief that our normative arguments are, in some way, rationally assessable.

Further implicit in this widespread approach to the dilemma is a mute acceptance of its two "horns." In other words, if we accept that the dilemma presents us with an inescapable choice between two competing, and apparently exhaustive, possibilities, then we have in effect already assumed the credentials of the two propositions which compose the dilemma: we implicitly affirm that they are, until further notice, worthy of serious respect. My response to Jörgensen's Dilemma begins by inspecting this second assumption, for without it, the character of the dilemma as a paradox, demanding an apparently impossible (or unpalatable) choice, simply dissolves. When looked at closely, the assumption that the two horns of the dilemma are heavyweight truths doing battle with one another, seems to me simply bizarre. The following argument is designed to show why.

Horn 1

The first horn of Jörgensen's Dilemma is the proposition that imperative sentences cannot be valued as true or false and that, therefore, they are not capable of standing as premises in logical inferences. As it stands (and as Jörgensen, somewhat more carefully than his later commentators, characterised it), there is little to quarrel with in this statement. Even for those writers who believe in the possibility of a logic of imperative sentences, it is straightforward that by our commonly accepted notion of logical validity, no argument exists to establish that arguments containing imperative sentences are valid in *that* sense. Moreover, no alternative conception of logical validity has been successfully devised which shows beyond doubt that arguments of that sort can be pronounced logically valid in some other way. Were this the extent of the problem, there would be no great issue about the character of normative reasoning; for Horn 1 is, as so far characterised, a marginal problem affecting a tiny range of normative propositions.

Two observations will help to put things in perspective. The first is that Jörgensen's Dilemma concerns only *imperative* sentences, which form a rather small subclass of the entirety of normative expressions used in everyday normative (moral, legal and political) reasoning. Roughly speaking, imperative sentences are the ones we utter in order to provoke an action, rather than as, say, the justification for performing an action or wanting an action performed. They will ordinarily reflect, therefore, the outcome of a process of reasoning rather than the basis of further deductions. (It is worth noting in passing that the syllogistic treatment of Jörgensen's candidate sentence, "Love your neighbour as yourself," (see syllogism (II) above) is not all that convincing if the conclusion is indeed supposed to represent a logical entailment.) Let us call this sentence, for brevity, "the Jörgensen sentence."

The Jörgensen sentence (which does not in the ordinary sense express a *proposition*), and others such as "Keep your promises," are highly characteristic of the kinds of sentences studied by deontic logicians and those otherwise concerned with the implications of Jörgensen's Dilemma. Deontic logic, of course, explores genuine propositions (*e.g.* "Promises ought to be kept" rather than "Keep your promises"), but those familiar with the literature on deontic logic and its offshoots will be all too familiar with the parallel problems faced when dealing logically with those sentence-forms. The following point, which forms the second observation flagged above, concerns them no less than their imperatival cousins. The kinds of sentence studied by deontic logicians and other theorists are typically very highly refined statements which have two important properties. First, one never sees them in *actual* contexts of normative argumentation, except perhaps rarely as very basic starting points for consideration (in the case of deontic expressions) or as the "executive" expressions by which one provokes action (in the case of imperatives.)[26] Moral, legal and political arguments deal exclusively with decidedly practical (even if non-realised) normative contexts which have little in common with the type of infinitely abstract situation pondered by deontic logicians (if indeed what deontic logicians consider can be dubbed "situations" at all.) Moreover, normative reasoning occurs in such arguments in an idiosyncratically practical form even where the debate about which course of action to take (or which course of action is or was the more justifiable) takes the form of a debate over general principles.

Moral arguments about promising, for example, concern practical contexts of promising rather than the concrete application of a principle which in any way resembles a deontic rendering of the Jörgensen sentence "Keep your promises." Nor are such arguments debates about principles such as "One ought to keep one's promises *all things being equal*," since no principle of equality can be transferred into any situation of promising where moral guidance is required to direct action. Precisely because there is a moral issue at stake, factors do not stand in such a way as to offer comparison with the deontic logician's ideal case. That case is, in fact, no "case" at all. In other words, one should not suppose that any readily identifiable *paradigm* case of promising (such as where *A* promises *B* the loan of his car next week, and nothing later interferes with his ability, or ordinary willingness to deliver on the promise) corresponds to the deontic logician's *ideal* case. The features which make the case a paradigm case – say, the car being in working order, *A* not requiring the car at the time when the promise stands due for delivery, perhaps to drive his wife to the emergency ward – do not aid in the construction (by abstraction) of a principle of *ceteris paribus* of the sort required for deontic logic. Rather, they are precisely the sort of feature which enable us to put meat on the bones of such notions as "ability" and "ordinary willingness" – notions which often form the central focus of arguments concerning promise-keeping: the reason that, in the paradigm

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[26] In case there is some confusion over this point, it is worth remembering that "Love your neighbour," "You may leave now," etc. are action-provoking statements which should not be mistaken for genuine normative propositions within arguments, such as "All human beings must love their neighbour", "All promises should be kept," etc.

case, *A*'s ordinary willingness to oblige (his wife is not ill, and so forth) is of relevance is just because we have developed, in various real and readily imaginable situations, a well-worked out notion of what "ordinary willingness" is, and in what ways it is important to the practice of promising.

The second feature of the normative "principles" cognate with their Jörgensen sentences, is that they are false, rather than genuinely arrived-at, abstractions. That is, by the same token as before, it is impossible to refine or distil practical contexts of normative argumentation and reasoning such as the one exemplified above, in order to establish universal general principles of the kind required for deontic logic.[27] In a great many contexts, moreover, discussion may not be based on any serious disagreement over moral principles or their respective ranges; they tend to focus simply upon which action should be performed (or whether it is right or wrong) in the circumstances, not on whether the action in question conforms to, or falls within the range of application of, some normative principle. To summarise: actual contexts of normative argumentation and reasoning are not merely far more complex than the rudimentary derivations performed in deontic logic and like systems; they in fact bear *no relation* to one another at all.

Why should Horn 1 of Jörgensen's Dilemma therefore hold such importance for us? If, as I have suggested, the apparent unavailability of a logical treatment of normative principles has negligible effect (or no effect) on actual occurrences of normative reasoning, why should we regard Horn 1 as an important truth which anyone concerned with practical reasoning must confront (and find painful)? The reason, I believe, lies in the perceived relationship between Horn 1 and Horn 2. Horn 2, it will be recalled, states that our everyday normative arguments seem to make sense to us notwithstanding the apparent fact that we lack a logical means of assessing their validity. (If my foregoing argument is accepted, the answer seems plain enough: that Horn 1 has nothing essentially to do with Horn 2.)[28] The proximity of these two propositions – their formation into a dilemma – has a curiously strong impact on the mind; for it encourages us to believe, without a great deal of difficulty, that if normative arguments cannot be pronounced *logically* valid, then they cannot be seen as *rational* arguments at all. Is such an assumption justified? Let us examine Horn 2 more closely.

Horn 2

Giving some firm content to the intuitive feeling about normative arguments identified by Horn 2 – that our normative arguments seem in some sense valid – is precisely what Jörgensen's Dilemma invites us to do. The implicit assumption lying beneath the surface of Horn 2, that a notion of validity which does not (and cannot) appeal to logical validity is deeply troublesome (and perhaps bizarre) is one explored by Stanley Cavell in his excellent

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[27] In the specific case of "Love your neighbour" (or "All human beings must love their neighbour") there is an implicit appeal to authority (the Bible), not a performed abstraction from practical contexts of neighbour-loving.

[28] The idea that Horns 1 and 2 enjoy a very close relationship is, of course, precisely the content of the first assumption about Jörgensen's Dilemma which I was keen to spell out earlier; namely, that it has the character of a paradox.

discussion of normative reasoning.[29] Cavell's argument begins with the observation that questions about the nature of moral judgments are usually approached via questions about the "faculty" by which they are "known".[30] This, in turn, commonly takes the form of an inquiry into the differences in our assessment of ordinary claims to knowledge and those of moral claims.[31] Behind both sorts of claim is the idea that our claims to knowledge are somehow grounded in authority: in the case of ordinary knowledge claims, this might take the form of appeal to sense-data, or to scientific principles and so on; moral philosophers likewise search for the foundations of moral authority.

It is held to be in the nature of appeals to authority that ordinary knowledge claims differ from moral- or other normative claims. In the former case, the purpose of the appeal to authority is to procure rational agreement, or rather to show that agreement on ordinary matters is epistemologically possible (that the reasoning process can be brought to a definitive end). This ability to procure agreement though argumentation is precisely why (according to many) normative arguments are not rational, *i.e.*, are incapable of rational settlement. But, says Cavell:

> "such an implication rests upon two assumptions, one about the nature of rationality and one about the nature of moral argument. The first is the assumption that the rationality of an argument depends upon its leading from premises all parties accept, in steps that all can follow, to an agreement upon a conclusion which all must accept. The second assumption is that the goal of a moral argument is agreement upon some conclusion, in particular, a conclusion concerning what ought to be done."[32]

The idea behind the first of these assumptions is that where two people cannot be brought to agreement on a particular matter, their disagreement can be ultimately (or objectively) resolved by a proof that one of them is either incompetent in a particular mode of reasoning (*i.e.* has not understood the steps), or is otherwise irrational. This standard, according to Cavell, is clearly inappropriate to normative arguments, for it is ludicrous to suggest that in such arguments the rationality of two antagonists is dependent upon an agreement emerging between them: where two people disagree about what is to be done, it is nonsense to suggest that their disagreement is the product of either incompetence in reasoning or irrationality *tout court*. This is precisely because no "proof" of such incompetence or irrationality can be forthcoming. If we accept the possibility of *rational disagreement* about a conclusion, therefore, we must accept a notion of (moral, legal or political) rationality which is manifest through argumentation without the possibility

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[29] S. Cavell, *The Claim of Reason* (Oxford, 1979), 247-326. The argument to follow is essentially Cavell's, except insofar as it addresses Jörgensen's Dilemma.

[30] *The Claim of Reason*, 248. The only other commonly pursued avenue into this issue, according to Cavell, is via a concern with the logical form of normative sentences and a preoccupation with the logical properties of moral arguments. Since I have already explored this in some detail above there is no need to re-cover the ground now. (Hereinafter, *Claim*.)

[31] *Claim*, 251.

[32] *Claim*, 254.

of agreement to supervene. That is, although the *hope* is that the argument will lead eventually to agreement (for without this hope there is little reason for having the argument in the first place), the eventuality of agreement is not a prerequisite for the rationality of the argument.[33]

According to Cavell, therefore, moral arguments are made to look irrational next to scientific reasoning because science and logic are taken as providing the models for rationality of argument; and the aspect of logic and science which has most struck philosophers in this respect is "the fact of agreement which can be achieved in [such] argument."[34] However, Cavell warns, whilst it may be the source of the rationality of logical and scientific reasoning, agreement "may not be necessary to the idea of rationality generally". That is, in following the models of logic and science, we are presupposing that the goal of all moral argument is agreement (rather than, say, justification for action).

An objection may be interjected here that Jörgensen's Dilemma is not concerned with our ability to agree on substantive moral truths, and only very indirectly with our ability to agree at all. What the dilemma emphasises, the objection may run, is merely certain logical and semantic properties of imperative sentences and their impact on our perceptions of validity. I do not think that this objection has any force, however. In the first place, it implicitly affirms the criticism I made of Horn 1 earlier; namely that it has no visible relation to ordinary moral (legal, political) reasoning. In the second place, it is precisely the assumption implicit in Horn 2, and its particular relationship with Horn 1, that our inability to articulate logical principles for normative arguments leaves us with no means of adjudicating, rationally, upon disagreements of principle.

To bring out this important distinction between ordinary knowledge claims and moral ones, consider this further point by Cavell. He asks us to contrast cases in which moral arguments break down (*i.e.* fail to produce agreement) with the following argument between two competent speakers about a bird that they have spotted in a nearby tree. The first speaker claims that the bird is a goldfinch, on the basis that it has a read head. Speaker two regards this as insufficient for a positive identification since goldcrests also have red heads. At this point, Cavell says, if the argument stops then it is because Speaker one's claim to know that it is a goldfinch has lost its significance: it *may* be what Speaker one says it is, but the claim has been insufficiently supported; or, in other words, "the opening exposed by the ground for doubt has not been closed".[35] Therefore, for the argument to continue, "the ground for doubt must itself be impugned ("The shape of the goldcrest's head is different") or a new basis proposed ("I know not just from the head but from the eye-markings.")"[36] In such cases, Cavell argues,

> "It is not up to the protagonists to assign their own significance to bases and grounds for doubt; what will count as an adequate basis and sufficient ground for doubt is determined by the

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[33] *Claim*, 254-5.
[34] *Claim*, 260-1
[35] *Claim*, 267.
[36] *Ibid.*

> setting of the assessment itself. When I counter a basis by saying "But that's not enough," there is no room for you to say, "For me it is enough." "[37]

But in moral contexts of argument, says Cavell, what is "enough" is itself part of the content of the argument. In other words, in ordinary epistemological contexts, the relevance of a ground of doubt is itself enough to impugn the basis of the claim as it stands; and also therefore the claim to knowledge itself. But in moral argument, it is possible to refuse to accept a ground of doubt *without* impugning it as false. The only thing a competent speaker cannot do (on pain of irrationality/incompetence in reasoning) is deny its *relevance*. This seems to form an adequate gap quite generally in normative contexts between the availability of *agreement* and the rationality of the discourse and protagonists as such. Moreover, if it does not, then it is difficult to see what moral argument can possibly be about in the first place; that is, hard to see what would motivate the belief, properly identified by Horn 2, that normative arguments *appear* to be genuine cases of argument.

Relationship Between Horns 1 and 2

Where does all of this leave us? The foregoing argument was intended to question the validity of two common assumptions about Jörgensen's Dilemma: The first is that its two Horns represent important and possibly awkward truths about the nature of moral reasoning, with which moral philosophers and those concerned with practical reasoning in general must grapple. The second is that those propositions, neither of which can apparently be rejected, cannot be simultaneously true. I have argued, conversely, that neither proposition is a "heavyweight" truth about our normative discourse, and that there is nothing in the character of either proposition that philosophers should find troublesome. More importantly, I have tried to show how the juxtaposition of these two constituent propositions in the formulation of the dilemma has led to a particular view of the relationship between them, especially in encouraging the erroneous belief that the truth of Horn 1 entails the hollowness of the intuition about normative reasoning expressed in Horn 2.

On close inspection, Horn 1 – the proposition that imperatival arguments resist logical analysis – far from posing a very serious threat to our warrant for drawing conclusions of a moral nature from other premises, affects a range of arguments that do not belong to moral or legal reasoning, or indeed any form of practical reasoning in which human beings participate. Horn 2 (the proposition that normative reasoning seems to be rationally comprehensible in spite of our inability to pronounce normative arguments logically valid), in its turn, sets up a puzzle about normative reasoning only granted its implicit endorsement of the idea that the logical validity of an argument is a precondition for its rationality. As such it blinds us to an obvious truth: normative reasoning does not "seem" to be rationally comprehensible "in spite of" its non-logical character; as any human agent could attest, such reasoning *is* rationally comprehensible in the contexts in which it is employed. If it were not, our moral and legal reasoning would make no sense *at all*. Our willingness to believe in the existence of a

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[37] *Ibid*, emphasis suppressed.

dilemma therefore rests on uncritical but widespread acceptance of a naïve interpretation of its two component propositions.

CONCLUDING REMARKS

I have argued that the correct strategy for dealing with Jörgensen's Dilemma is not to try to "resolve" it, but simply to realise that there is no genuine dilemma at all. Such a move requires us to reassess our attitudes to both horns of the dilemma, which upon reflection stand in no close relationship to one another. The appearance of a close relationship depends upon an unreflective acceptance of several crucial (though attractive) assumptions concerning norms and rationality which, far from representing primitive, compulsory truths about our normative practices are in fact the outcome of highly refined positions on various matters touching on the nature of norms and of rationality. The attractiveness of these assumptions, gives rise to a particular view of the significance of the two horns of the dilemma, a view strengthened significantly when those propositions are uttered in close proximity to one another. It is this proximity which, in turn, gives rise to a particularly potent illusion of a dilemma. I hope the course I have taken in the foregoing argument dissolves that illusion and, with it, Jörgensen's Dilemma.

HANS KELSEN AND THE TRANSCENDENTAL METHOD

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The concept of a "transcendental method" is met quite often in the writings of neo-Kantian philosophers, and it can be found in several publications of legal theorist Hans Kelsen from his neo-Kantian period as well. In what follows, this concept and the way Kelsen makes use of it in his legal theory will be examined.

FIRST PART: KANT, COHEN, AND KELSEN

1. Kant, Cohen, and the transcendental method

The term "neo-Kantianism" denotes a large number of different philosophical theories that around 1900, were setting the tone in German academic philosophy. The common denominator of neo-Kantian theories is that they were produced in the period between 1870 and 1930 (approximately), and that they aim at reviving and developing Kant's transcendental philosophy. But in constructing theories on this rather vague basis, neo-Kantian philosophers diverge. It is common to distinguish two main trends of neo-Kantianism: the Heidelberg School, led by Wilhelm Windelband and Heinrich Rickert, and the Marburg School, led by Hermann Cohen. The Heidelberg School is famous for its central concept of "value" and for employing it in establishing the autonomy of the cultural sciences; the Marburg School is famous for its "logicist-but-dynamicist" theory of knowledge and for reconstructing transcendental philosophy as a (meta) theory of science.

The transcendental method is at the core of a number of neo-Kantian theories, being the method of discovering non-empirical necessary conditions for any knowledge. As far as I can see, the term *"transzendentale Methode"* was not used by Kant himself. Something to which this term might be applied can be found in Kant's writings, though. Kant takes the main task of his theoretical philosophy to be reconstructing the universal conditions of the possibility of objective empirical knowledge, and he tries to achieve this aim principally by a method he calls "transcendental deduction": To prove the objective validity of the categories, taken as fundamental concepts of understanding, and thus of the scientific judgements employing these categories, Kant's transcendental deduction starts from an indubitable premise: the transcendental unity of self-awareness (*transzendentale Einheit der Apperzeption*), which is necessarily presupposed in any act that might be called "cognition of objects". Kant then goes on to investigate into what is necessarily "implied" by this indubitable premise. As is well known, the

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conclusion is that in any piece of empirical knowledge the categories, which can be identified by the corresponding functions of judgements, are necessarily employed. The central importance of the transcendental deduction is that Kant, in spite of his concept of a "thing-in-itself", is an idealist: For him, knowledge does not just "reflect" a given objective world, rather, the objective world is constituted by cognition itself. Accordingly, epistemology and ontology merge, and the categories are not only the basic concepts of understanding, they are the basic elements of objective reality, as well.[1]

Cum grano salis, this method of transcendental deduction might be called Kant's "transcendental method". However, Hermann Cohen, who introduced the term into neo-Kantian philosophy, explains it in different terms. He maintains that

> "if knowledge [*Erkenntnis*] is taken not as a form of consciousness, but as a factum which has constituted itself in science and continues to constitute itself on a given basis, then the object of our examination is not any subjective reality but a fact that, though still changing and increasing, is objectively given and grounded in principles, it is not our cognitive apparatus or the process of cognition, but science as its result. At this point an apparent question arises: Which are the presuppositions responsible for the certainty of the scientific fact?"[2]

And to answer this question is, according to Cohen, the task of the transcendental method. It is not difficult to see the difference between Cohen's and Kant's conceptions. While Kant's indubitable starting-point is the transcendental unity of self-awareness – the necessity that the thought "I think" might accompany all our ideas – Cohen starts by presupposing what actually has to be proven: the objectivity of the results of the institutionalised sciences.

In fact, Kant himself anticipated the difference between these two methods. In the *Prolegomena to any Future Metaphysics*, which are meant to be an easily understandable introduction and summary to the *Critique of Pure Reason*, he distinguishes an analytic or regressive method of theorising from a synthetic or progressive method and claims to have employed the latter in the *Critique* and the former in the *Prolegomena*:

> "[Employing the synthetic method means] inquiring within pure reason itself, and seeking to determine within this source both the elements and the laws of its pure use, according to principles. This work is difficult and requires a resolute reader to think himself little by little into a system that takes no foundation as given except reason itself, and that therefore

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[1] For the transcendental deduction see I. Kant, *Kritik der reinen Vernunft* (ed. by W. Weischedel, Frankfurt/M. 1974), §§ 13-27. There are significant differences in the presentation of the deduction in the first and second editions of the Critique, which I will neglect in this context.

[2] H. Cohen, *Das Prinzip der Infinitesimal-Methode und seine Geschichte* (ed. by W. Flach, Frankfurt/M. 1968), 47-8 (translation C.H.).

> tries to develop cognition out of its original seeds without relying on any fact whatever. [Prolegomena, on the other hand, must] rely on something already known to be dependable, from which we can go forward with confidence and ascend to the sources, which are not yet known. [. . .] The methodological procedure of prolegomena, and especially of those that are to prepare for a future metaphysics, will therefore be analytic. Fortunately, [. . .] we can confidently say that some pure synthetic cognition a priori is actual and given, namely, pure mathematics and pure natural science."[3]

Though in secondary literature concerning Kant's writings it is not settled how far this distinction between the analytic/regressive and the synthetic/progressive method reaches, it seems obvious that what Cohen has in mind is something akin to Kant's regressive method. And the reason why he does not want to adopt the progressive method is evident as well: On the one hand, Cohen, like most neo-Kantians, was an opponent of "psychologism", *i.e.* of the project to reduce epistemology or cognitive philosophy to psychology. But to search into "reason itself" as a starting-point to discover self-awareness as necessarily accompanying all our ideas smacks of introspective psychology - even though Kant points out that the transcendental unity of self-awareness must be distinguished from any empirical form of consciousness. On the other hand, the rapid development of mathematics and natural sciences at the end of the nineteenth century made it doubtful that there really were any universal principles valid independent of what was taken for granted according to the best standards of institutionalised science at a given time. Hence, Cohen combines the regressive method with a rather peculiar dynamic theory of universal principles of cognition.[4]

The transcendental method almost came to be part of the common lore of neo-Kantianism; for other prominent neo-Kantian philosophers, like Heinrich Rickert, borrowed the conception, if not the terminology, from Cohen and used it in a similar way.[5]

To summarise: The conception of the "transcendental method" as the characteristic method of transcendental philosophy leading to a priori valid non-empirical conditions for knowledge is an invention of the neo-Kantian Hermann Cohen. Unlike Kant's transcendental deduction of the categories, the transcendental method does not take the unity of self-awareness, located in pure reason itself, as its starting-point, but it is based on the results of the established sciences. It follows that transcendental philosophy no longer has the character of a "critique of pure reason" but rather the character of an

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[3] I. Kant, *Prolegomena zu einer jeden künftigen Metaphysik, die als Wissenschaft wird auftreten können* (ed. by W. Weischedel, Frankfurt/M. 1988), 274-5 (A 38-9; translation from *Prolegomena to any future metaphysics that will be able to come forward as science* (translated by G. C. Hartfield; Cambridge 1997), 25-6).

[4] See esp. his *Logik der reinen Erkenntniss. System der Philosophie, Erster Teil* (Berlin 1902).

[5] *Cf.* H. Rickert, "Zwei Wege der Erkenntnistheorie", in: *Kant-Studien* 14 (1909), 169-228, at 174, 193, 226.

analysis of the necessary presuppositions of the "results of the best sciences in existence".

2. Kelsen's conception of the transcendental method

In his first major publication from 1911 called *Main Problems of Public Law Theory*, which already contains many of the major tenets of his later Pure Theory of Law, Kelsen does not consciously make use of neo-Kantian theories. In fact, the theory of law developed in this book as yet lacks a systematic epistemological basis. In the preface to the second edition of the *Main Problems* (published in 1923), Kelsen avows that his attention was first drawn towards the theory of Hermann Cohen by a review of his book in 1912, which pointed out certain similarities between the works of both authors.[6] It induced Kelsen to borrow from neo-Kantian conceptions to construct an epistemological basis for his legal theory. Still, throughout his neo-Kantian phase, lasting approximately from 1916 to 1934,[7] Kelsen had a rather ambivalent position towards Cohen's philosophy. On the one hand, Cohen's explanation of the transcendental method offered an ingenious way for Kelsen to solve several fundamental problems of his legal theory. Furthermore, Cohen – in his *Ethics of Pure Will* – had paved the way towards extending the transcendental method of Kant's theoretical philosophy to the region of practical or normative thinking.[8] On the other hand, Kelsen did not appreciate Cohen's approach towards legal science. For legal science was taken by Cohen to be the "scientific fact" that served as the starting point for analysing *ethical* principles. This was not acceptable for Kelsen's legal positivist approach, which aimed at strictly separating law and morality. Besides, Cohen's style was notoriously obscure, so that Kelsen - who was not philosophically trained - had explicit misgivings about getting things right.[9]

But the capacity of neo-Kantian epistemology to deal with some problems created by the basic theses of Kelsen's theory can be shown by fitting together the main tenets of the Pure Theory and those neo-Kantian elements that Kelsen appropriated.

2.1 The main tenets of Kelsen's theory

The core of Kelsen's theory concerning the law and legal cognition throughout all its phases from about 1920 onward is formed more or less by the following eight theses:[10]

(1) The Pure Theory is a theory of institutionalised legal science (understood as legal dogmatics).[11]

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[6] *Cf.* H. Kelsen, *Hauptprobleme der Staatsrechtslehre* (2nd ed., Tübingen 1923), XVII.

[7] Arguably, the genesis of Kelsen's theory can be divided into four phases: a "constructivist" phase lasting until about 1916; a "neo-Kantian" phase lasting approximately until 1934, a "realist" phase lasting approximately until 1960, and a "linguo-analytic" phase lasting until Kelsen's death in 1973.

[8] *Cf.* H. Cohen, *Ethik des reinen Willens* (2nd ed., Berlin 1907).

[9] H. Kelsen, "Rechtswissenschaft und Recht", in: *ZöR 3* (1922), 103-235, at 199.

[10] For further references see my *Die Norm als Tatsache* (Baden-Baden 1997), 217-220.

(2) The spheres of "is" and "ought" have to be strictly separated; therefore, it is not possible to deduce a normative sentence from a set of empirical sentences.[12]

(3) A norm is purely an element of the sphere of ought; "norm" means that something ought to be done.[13]

(4) The validity of a norm is identical with its existence or objectivity.[14]

(5) Only positive norms are the objects of legal cognition.[15]

(6) There is no necessary connection between the validity of norms and their content.[16]

(7) The norms of a legal system form an hierarchy; the validity of "lower" norms is established by "higher" norms which state the empirical conditions that have to be satisfied for the lower norms to exist (the *Stufenbautheorie*).[17]

(8) At the apex of the hierarchy of norms there is a presupposed "basic norm" establishing the validity of the highest positive norms.[18]

2.2 Kelsen's employment of neo-Kantian epistemology

Given these central theses, it is easy to see why Kelsen should be attracted to neo-Kantianism and specifically to Cohen's theory of the transcendental method in his search for a philosophical basis. His neo-Kantian epistemology – which Kelsen never laid down in a systematic way – is characterised by the following theses:[19]

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[11] *Cf.* H. Kelsen, *Reine Rechtslehre* (1st ed., Leipzig/Vienna 1934), preface IX. There is an English translation by B. Litschewski Paulson and S. L. Paulson under the title *Introduction to the Problems of Legal Theory* (Oxford 1992).

[12] *Cf.* H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen 1920), 33, 89.

[13] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 20-2.

[14] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 6-7; Rechtswissenschaft und Recht (n.19), 205-7.

[15] H. Kelsen, *Reine Rechtslehre* (n.11), 64.

[16] H. Kelsen, *Reine Rechtslehre* (n.11), 24.

[17] H. Kelsen, *Reine Rechtslehre* (n.11), 62-6. If one wants to preserve the ought of the "higher" norms, which usually are empowering norms, even in their formulation, they have to be formulated somewhat like "*If the legislator wants x to do y, then x ought to do y*".

[18] H. Kelsen, *Reine Rechtslehre* (n.11), 65-6.

[19] The most important sources for Kelsen's neo-Kantian epistemology are *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (Berlin 1928), esp. at p.62, and the lengthy paper dealing with Fritz Sander's attacks against the Pure Theory, "Rechtswissenschaft und Recht", in: *ZöR 3* (1922), 103-235. A readable shorthand version of Kelsen's neo-Kantian conception can be found in the preface to the 2nd ed. of *Hauptprobleme der Staatsrechtslehre* (Tübingen 1923). There is no English translation of *Rechtswissenschaft und Recht*. A translation of the preface of *Hauptprobleme der Staatsrechtslehre* is included in the volume *Normativity and Norms* (ed. by S. L. Paulson and B. Litschewski Paulson (Oxford 1998), 3-22. A translation of *Die*

(1) Cognition does not deal with "things-in-themselves", rather, it constitutes its own objects.[20]

(2) This constitution of objects is performed by applying concepts of understanding (the categories) to an "alogical" material and thus forming synthetic judgements.[21]

The latter thesis is specified by three further claims concerning the nature of judgements (in a logical sense):

(a) A judgement is an objective meaning-content that must be distinguished from the psychological act of judging.[22]

(b) The existence of a judgement is its validity or objectivity.[23]

(c) The judgement is identical with the cognitive object.[24]

Two further theses of Kelsen's neo-Kantian epistemology concern the relation between legal science and law and the role of the Pure Theory on the basis of these assumptions:

(3) Natural and legal science, understood as systems of judgements, are identical with their respective cognitive objects. Nature consists of hypothetical judgements in which the category of causality is employed. Law consists of hypothetical judgements in which the category of normative imputation is employed, following the scheme "*If x, then coercive act y ought to be executed*".[25]

(4) The Pure Theory does not deal with the law as a "given" object; rather, it plays the part of a transcendental philosophy of law by exploring the necessary conditions of legal science.[26]

The last thesis, of course, is Kelsen's version of the transcendental method. The advantages of this neo-Kantian epistemology in accounting for the basic elements of the Pure Theory are obvious:

First, it offers the best possible explanation of the status of the Pure Theory. Conceiving his theory as a transcendental philosophy of legal knowledge, Kelsen accepts the "*factum* of legal science" as embodied in academic teaching and in legal practice, and he delimits the task of the Pure Theory to exploring the conditions that make this "*factum*" possible and to setting constraints for legal science to prevent its methods and results from not being

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philosophischen Grundlagen can be found in the appendix of Kelsen's *General Theory of Law and State* (Cambridge/Mass. 1945).

[20] H. Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (n.19), 62.

[21] H. Kelsen, Rechtswissenschaft und Recht (n.19), 181-2.

[22] H. Kelsen, *Der soziologische und der juristische Staatsbegriff* (Tübingen 1922), 81.

[23] See esp. H. Kelsen, Rechtswissenschaft und Recht (n.19), 206-9.

[24] H. Kelsen, Rechtswissenschaft und Recht (n.19), 182.

[25] H. Kelsen, Rechtswissenschaft und Recht (n.19), 181-2.

[26] H. Kelsen, *Reine Rechtslehre* (n.11), 36-7.

in accordance with those presuppositions. This project is reflected in quite a number of Kelsen's writings; an example is the following crucial passage from the first edition of the *Pure Theory of Law*:

> "The Pure Theory of Law is well aware that the specifically normative meaning of certain material facts, the meaning characterized as 'law', is the result not of a necessary interpretation, but of a possible interpretation [. . .]. However, the Pure Theory of Law does not consider it necessary to dispense therefore with the category designated by 'ought' altogether and so to dispense with a normative theory of law. [. . .] The possibility and the necessity of a normative theory of law is shown by the very existence of legal science over millennia [*das jahrtausendalte Faktum der Rechtswissenschaft*], which, in the guise of dogmatic jurisprudence, serves – so long as there is law at all – the intellectual requirements of those who concern themselves with the law. There is no reason to leave these thoroughly legitimate requirements unsatisfied and to dispense with such legal science. [. . .] So long as there is religion, there must be dogmatic theology, [. . .] and, similarly, so long as there is law, there will be a normative legal science. [. . .] What is called for is not the abandonment of this legal science along with the category of norm, the category designated by 'ought', but the restriction of legal science to its object of cognition and the critical clarification of its methods."[27]

Second, Kelsen's neo-Kantian epistemology can account for the distinction between "is" and "ought", which can be traced back to the difference between the categories of causality and normative imputation - which in turn accounts for and is derived from the difference between natural sciences and legal science.

Third, the conception explains the status of the legal norm, which is identical with the judgement of legal science. Assimilating the status of normative and natural sciences, Kelsen claims that both legal norms and laws of nature are constituted in and identical with the judgements of legal and natural sciences, respectively. Together with the fact that there are exact criteria for ascertaining the validity of legal norms, this suffices to put legal science on a level with natural science as far as the objectivity and exactness of their results are concerned. At the same time, the character of the "validity" of a norm is elucidated: It is the validity of a judgement in a logical sense.

Fourth, the neo-Kantian conception explains how Kelsen can be a cognitivist, a relativist, and a positivist, all together. He is a cognitivist insofar as he takes norms to be judgements in a logical sense that are objectively valid. He is a relativist and a positivist insofar as for him the validity of these judgements is dependent not on their corresponding to a knowledge-independent normative reality, but on their meeting the special criteria of validity laid down in the system they are part of – these point to

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[27] H. Kelsen, *Reine Rechtslehre* (n.11), 36-7 (translation from *Introduction to the Problems of Legal Theory* (n.19), 34-5 - translation slightly altered).

factual acts that may vary and allow for very different and mutually incompatible normative content. Besides, legal knowledge is based, for Kelsen, on a basic norm, which can but need not be presupposed and thus – in a different sense – contributes to the relative character of the law.

Fifth, the neo-Kantian conception helps to account for the hierarchical structure of the legal system. For the *Stufenbautheorie* requires some logic of norms; and the neo-Kantian epistemology offers a plausible basis for such a logic by taking norms to be judgements - after all, judgements are the classical elements that are subject to logical relations. Finally, the basic norm seems to be a direct result of an application of the transcendental method; Kelsen explicitly calls it a "transcendental-logical condition" for legal knowledge.[28]

SECOND PART: SYSTEMATIC APPROACH

1. The transcendental method and transcendental arguments

Although the term "transcendental method" has by no means perished with neo-Kantianism – it has been used by Karl Popper, among others – since the notorious debate between Peter Strawson and Barry Stroud has taken place,[29] using the term "transcendental argument" for the procedure of justifying cognitive universals is far more popular nowadays. Therefore, in appraising Kelsen's employment of the transcendental method, a short survey of the concept of a transcendental argument might be helpful.

A classical definition of a transcendental argument is that of Stroud, who characterises transcendental arguments by maintaining that:

(1) their premises have to be justified independently of any experience about the external world,

(2) the premises cannot be rejected by the sceptic,

(3) the argument uncovers necessary conditions for thought and experience,

(4) the conclusion of the argument entails truths about the external world.[30]

I will rely on Stroud's definition – with the reservation that, seen in the light of neo-Kantian argumentation, Stroud's characterisation of the premises of the argument is too demanding; a neo-Kantian would think it sufficient to base the argument on the "results of the best cognitive or scientific methods available to us".

If a transcendental argument follows the Kantian or neo-Kantian tradition, it must have something to do with the "conditions for the possibility of knowledge". If knowledge is made up of true propositions about objects, then a Kantian transcendental argument aims at establishing the necessary

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[28] H. Kelsen, *Reine Rechtslehre* (n.11), 67.

[29] P. F. Strawson, *Individuals* (New York 1959), ch.1; B. Stroud, "Transcendental Arguments", in: *The Journal of Philosophy 65* (1968), 241-56.

[30] B. Stroud, "Kantian Argument, Conceptual Capacities and Invulnerability", in: *Kant and Contemporary Epistemology* (ed. by P. Parrini, Dordrecht 1994, 231-251), 231.

conditions for (the possibility of) true propositions about objects, starting from indubitable premises.

Such transcendental arguments normally have an anti-sceptical tendency. For, as the Strawson-Stroud-debate has shown, the sceptical standpoint usually presupposes a realist point of view, whereas the significance of a transcendental argument may arguably be seen only from a non-realist point of view. So transcendental arguments *might* need an additional argument for the truth of non-realism (if they do not contain such an argument from the beginning).

In fact, the debate between Stroud and Strawson seems partly to be fired by the tacit assumption of both parties that *realism* is correct. Else it is scarcely conceivable that Stroud, by way of an attack, should point to the verification principle underlying Strawson's original argument, that Strawson should submit to the assault, and that both parties should finally agree that only a reconstruction of the argument in terms of belief might be possible.[31] For an average non-realist would take the terms "exists" and "must be believed to exist" to be more or less equivalent, and he would accept the verification principle. It is possible, of course, and has been attempted by some philosophers, to produce yet another fundamental argument for non-realism - Hilary Putnam's famous brains-in-a-vat-argument[32] from his rather (neo-)Kantian phase of internal realism offers an example. But such a proof, if valid, would still be slightly flawed; for it would just follow that knowledge or cognition were able to constitute their own foundations - the proof would be circular. Yet, a successful argument for *realism* would in a way be "self-refuting": The assumption of a knowledge-independent reality would have been implicitly shown to be necessitated by the structure of our knowledge itself. Confronted with these alternatives, circularity seems to be the lesser evil. But this is no matter to be settled in a shorthand way.

The literature concerning transcendental arguments is vast. Most transcendental arguments that try to live up to Stroud's definition cannot overcome the difficulty of finding a premise that on the one hand is

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[31] *Cf.* P. F. Strawson, *Skepticism and Naturalism: Some Varieties* (New York 1985), 21-3. Stroud maintains that Strawson's argument – without saying so – relies on a special version of the verification principle, and that if this hidden and unfounded premise of his argument were made explicit, it would answer the sceptic directly, so that the argument would, in a way, be superfluous, unless it were reconstructed in terms of belief.

[32] H. Putnam, *Reason, Truth, and History* (Cambridge/Mass. 1982), ch.1, 1-21. The argument resembles Descartes' construction of an evil demon: Imagine that there are some people who have been dissected by night by an evil scientist and whose brains have been put into a vat with some nourishing fluid which is at the same time responsible for absolutely everything that these people experience; and this "experience" is the same that they had before they were dissected. Can these people correctly refer to their position by thinking "*We are brains in a vat*"? Putnam claims that this is impossible, and I tend to think that he is right because reference to anything that we cannot come into "contact" with is impossible. In the context of Putnam's example, this is basically - and perhaps contrary to Putnam's intention - a non-realist argument: the brains in a vat cannot refer to the unknowable "fact-in-itself" that they are brains in a vat, but they refer to a world of objects that "in-itself" is made up just of artificial stimuli of the brain.

indubitable and on the other hand is non-trivial – and to find a way of either justifying this premise or of justifying why it need not be justified. In what follows, I will just try to sketch the structure of four Kantian and neo-Kantian transcendental arguments of different strength. They employ three rules from modal logic, which run:

- Whatever is real, is possible: $p > Mp$ (">" being a kind of necessary implication).
- Whatever is possible, is necessarily possible: $Mp > N(Mp)$; the characteristic axiom of S5.[33]
- If *q* necessarily follows from *p*, and *p* is necessary, then *q* is necessary as well: $((p > q) \& Np) > Nq$.

Actually, it is not at all settled whether these rules – stemming from alethic modal logic – can be applied to arguments in "transcendental" logic; but, for the purposes of this paper, this will just be presupposed.

Let us first consider transcendental arguments in a Kantian vein, which aim at establishing the necessary conditions for true judgements at large. The first starting point is that of a genuine Kantian progressive transcendental argument; it relies on the thesis that the (indubitable) unity of self-awareness and propositionality are "equiprimordial".[34] A fundamental version of the argument establishing the validity of cognitive universals might - very roughly, and somewhat shortened - run as follows.

TA1:

(1) Necessarily, there is the unity of self-awareness.

(2) The unity of self-awareness presupposes a capacity for forming objective judgements, *i.e.* of thinking true (empirical) propositions.[35]

(3) Therefore, it is possible to think true (empirical) propositions.

(4) Thinking true (empirical) propositions presupposes that *c* (*c* standing for apriorical conditions for empirical knowledge).

(5) Therefore, necessarily, *c.*

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[33] S5 is one of the most prominent systems of alethic modal logic; see G.E. Hughes and M.J. Cresswell, *A New Introduction to Modal Logic* (London 1996), 344.

[34] "Equiprimordial" (*gleichursprünglich*) is a rather artificial term, stemming from Heidegger and having been taken up by Habermas. It is used here as a partly relational term: two elements are equiprimordial if you "can't have one without the other" and if neither is derivable from the other or from anything else. That is, the unity of self-awareness entails propositionality, and propositionality entails the unity of self-awareness, even though the concepts are not reducible to each other.

[35] An objection suggesting itself is that it would not be necessary for the unity of self-awareness to exist that we are able to think "true" judgements; it would suffice that our thoughts take the form of judgements at all, be they true or false. But this objection on the one hand disregards the close connection between judgements, at least as far as they are – for philosophy in a Kantian vein – constitutive of reality, and truth according to Kant; on the other hand there is strong evidence even apart from Kantian philosophy that the possibility of judging depends on most of our judgements really being true. See infra the discussion of the first premise of TA2.

Premise (1) is the indubitable starting-point; premise (4) is the "transcendental" premise concerning the "conditions-for-the-possibility-of-cognition". There are a lot of problems with this argument, especially as regards the validity of the second premise. Nevertheless, it is rather a "minimalist" version of a synthetic or progressive transcendental argument. A more elaborate version would point out that the unity of self-awareness necessitates certain features of propositions as characterised by the Kantian categories, so that *c* does not just denominate necessary conditions for all true empirical propositions but only for those necessarily correlated to the possibility of self-awareness.

The second starting-point is that of a less ambitious but - I think - rather attractive argument in the Kantian vein; it is the thesis that there are at least some true propositions. The argument runs as follows.

TA2:

(1) There are some knowable true propositions.

(2) The possibility of there being knowable true propositions entails *c*.

(3) Therefore, necessarily, *c*.

This sounds like a regressive argument, but it is certainly stronger than a neo-Kantian argument simply based on the fact of science. Whether it is regressive or progressive in character depends on the nature of the first premise. On the one hand, the premise is pretty unassailable because it does not presuppose any concrete knowledge, on the other hand, it is not quite immune to a radical sceptic's attack – even though Donald Davidson has attempted to give another indubitable argument for the similar thesis that we cannot be wrong in all our opinions and that, in fact, most of our opinions have to be true.[36]

If the first premise were just factually true, the argument would have the charm of arriving at a necessary conclusion from a factual first premise. The conclusion, however, would not amount to much – as a conjecture: it might comprise the rules of propositional logic, Tarski's *Convention T*, and something like the principle of verification.[37]

So much for transcendental arguments in a Kantian vein. *Neo*-Kantian arguments representing the transcendental method are less ambitious, relying completely on a first premise that is not necessarily valid. They might be reconstructed in two different ways, depending on what the first premise is

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[36] *Cf.* D. Davidson, "A Coherence Theory of Truth and Knowledge", in: *Kant oder Hegel* (ed. by D. Henrich, Stuttgart 1983, 423-38). In fact, Davidson has given another rather convincing argument for the thesis that there cannot be incomparable conceptual schemes; *cf.* D. Davidson, *Inquiries into Truth and Interpretation* (Oxford 1984), at ch.13. Taken together, the conclusions of these arguments and the conclusion of Putnam's brains-in-a-vat argument constitute a rather attractive basis for the possibility of objectively valid knowledge from a non-realist perspective.

[37] To be sure, Kant himself would have regarded neither the rules of formal logic nor Tarski's *Convention T* as transcendental-logical conditions, because they do not concern the special case of cognition of *objects*, but apply to *any* judgement.

taken to be. On the one hand, Cohen's argument might be formulated using a meta-theoretical statement as its starting-point:

TA3:

(1) Those sentences that are taken to be true according to the best methods applied in our established sciences are true.

(2) The possibility of the sentences of our established sciences being true entails *c*.

(3) Therefore, necessarily, *c*.

The main problem with this argument, of course, *is* the first premise. Though it is just a modification of the first premise of TA2, it is neither factually nor necessarily true. It is just laid down for pragmatic reasons. An argument for the first premise might run somewhat like "*Science is a fact, and what sentences could be called true if not those made out to be true by our best scientific methods?*" Hence there is a conclusion according to which the presuppositions of the possibility of science necessarily are true, but this conclusion is dependent on a first premise that is neither necessarily nor factually true, but was just laid down.

On the other hand, the first premise of the argument might be formulated in a simpler way not as a meta-theoretical statement that those sentences that are made out to be true by science are true, but just as a variable for any such sentence; the argument would run:

(1) *p* [*p* being any sentence that is true according to established science].

(2) The possibility of *p* entails *c*.

(3) Therefore, necessarily, *c*.

Note that to shake this argument it is not enough to show that *p* is false; instead, it is necessary to show that *p* cannot sensibly be called either true or false.[38]

Locating Kelsen's argument in these theoretical surroundings is not difficult. His Cohen-like transcendental argument for the necessary conditions for legal science would run as follows:

TA4:

(1) Those normative legal propositions that are taken to be true according to the established methods of institutionalised legal science are true.

(2) The possibility of the normative propositions of legal science being true entails *c*.

(3) Therefore, necessarily, *c*.

Or, if the first premise is taken to be not a metatheoretical sentence about the set of true normative propositions but (any) such legal proposition itself:

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[38] This is so because even if *p* is contingently false, *p* is possible, nevertheless. The argument does not work only in case *p* is impossible.

(1) Op [Op being a normative sentence that is true according to the methods of institutionalised legal science].

(2) The possibility of Op being true entails C.

(3) Therefore, necessarily, C.

Thus, Kelsen is at the same time more specific and more careless about his starting-point than Cohen. While Cohen presupposes the relatively uncontested results and methods of natural sciences and mathematics, Kelsen presupposes the methods of existing legal science and their alleged results: true normative legal propositions. On the one hand, this means that Kelsen's argument just concerns a small and special branch of knowledge. On the other hand, he more or less "brackets" the problem of whether normative legal science, whose status is *prima facie* a lot more doubtful than the status of the established natural sciences, is a science at all.

So the most problematic part of the argument is the first premise. Though Kelsen backs it by the fact that there is an age-old legal science, he acknowledges that there is an important difference between the natural sciences based on the principle of causality and legal science, in that the existence of natural facts can be proven, whereas the existence of legal norms cannot be demonstrated. Or, to put it in a paradoxical way, though the institution of legal science is a provable fact, law is not.[39] An anarchist or sceptic, Kelsen admits, need not share the legal perspective;[40] he might deny seeing anything in legal procedures but brute facts.

But perhaps Kelsen is too pessimistic regarding this problem. First, on the basis of his interpretation of the transcendental method, he might have answered the sceptic arrogantly as follows: "*I'm not interested in your doubts. You cannot deny there is a dogmatic legal science purporting to deal with legal norms, and all I'm telling you is what you have to pay if you want to share its perspective. You can do so or refrain from it, I don't care!*" Second, even though the existence of law in a normative sense is not immune to a sceptic's attack, the thesis that it is (almost) as certain as the existence of a natural fact might possibly be defended. Kelsen himself offers an argument that can be sketched as follows: In any society, law and legal procedures are part of an existing social practice. This, at least, is a fact. But the factual procedures that might be classified as "legal" can only be determined by taking the meaning-content of certain utterances, which purport to enact law, to be valid norms, *i.e.* by sharing the perspective of legal science. Any other criterion either is unfit to delimit the extension of the term "law", or it presupposes this basic standard.[41] Thus, even a

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[39] Note, by the way, the equivocation resulting from the double meaning of the expression "fact of science": on the one hand, the fact of science is the fact that there is a science, on the other hand, it is the fact as established by science. Kelsen is seldom clear about which interpretation he prefers; most often, he seems to mean both of them.

[40] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 36.

[41] Note that this is not the same as to say *"Law in a normative sense is an ideology at work in the minds of those engaged in legal procedures"*; rather, it means that a conception of law as a normative system is a necessary condition for any sociological or factual conception of law.

seemingly purely sociological concept of law presupposes the normative perspective of legal science.[42] Accordingly, if the sceptic denies that there are any legal norms and that the sentence "*Legally, thieves ought to be punished*" is meaningful and has a truth-value, so that legal science "makes sense", he must at the same time deny that law is a social fact – which is possibly as difficult to deny as the existence of a natural fact.

This is not the place to check the soundness of the argument. For there is something deeper behind Kelsen's reservations about the status of legal cognition. Though he usually claims that the legal ought is a purely formal category that simply serves to delimit the object of legal science and to establish its autonomy,[43] at times he suggests that there can be only one material ought that unconditionally determines the ways in which we should act, so that something that ought to be done according to a legal norm ought to be done "absolutely" as well. This is shown, *e.g*, in formulations of the basic norm that do not restrict it to the law, like "*Coercion should be exerted according to the conditions laid down by the fathers of the historically first constitution and by the authorities delegated by them*"[44] (instead of "*Legally, coercion should be exerted etc.*"). Of course, it is easy to be a sceptic concerning the truth of such a sentence, which amounts to the claim that the law should be obeyed.

A trivial solution to this problem of separating the idea of a legal ought from the idea of an absolute ought consists, as suggested just now, in adding the adverb "legally" to the formulation of each legal norm to indicate that it is valid just inside the legal language-game. A more sophisticated solution can be found in a quasi "subterranean" tendency of Kelsen's writings throughout all phases of the Pure Theory: the tendency to regard the law simply as a huge semantic complex determining the meaning of the expression "legal act".[45] According to this conception, the legal rule is no "action" norm saying, "*If x, then coercive act y ought to be executed*" but just a kind of Searlian constitutive rule saying, "*If x, then coercive act y counts as a legal act*"; and all legal phenomena could be reduced to rules of this kind. Relying on this conception would not only remove doubts about the "validity" of the legal perspective, it would also deactivate the conflict between law and morality. Besides, it would give a basis to Kelsen's numerous explanations of the legal norm as a "scheme of interpretation" for reality.[46] The price to be paid, though, would be rather high: The action-orientated normativity contained in legal language has to be neglected, and Kelsen's claim that the Pure Theory tries to capture the meaning of "all those thousands of

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[42] In fact, the whole first part of *Der soziologische und der juristische Staatsbegriff* (n.22) is devoted to expounding this argument.

[43] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 21.

[44] H. Kelsen, *Reine Rechtslehre* (n.11), 21.

[45] This conception is prominent even in the first ed. of *Hauptprobleme der Staatsrechtslehre* (Tübingen 1911), 254-5, where Kelsen defines the legal rule as a hypothetical judgement serving to impute acts to the State – and thus interpreting them as legal acts. For a later version see H. Kelsen, *Reine Rechtslehre* (n.11), 4-5.

[46] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 4-5.

[normative] utterances that make up our everyday legal life"[47] would be somewhat spurious.

Anyway, what would be the consequence if we take Kelsen's concessions regarding the "avoidability" of the perspective of legal dogmatics seriously or just stick to the "arrogant" answer to the sceptic given above? The transcendental argument would still be valid as such, for the validity of an argument is not impaired if the premises cannot be established as true. But, as the possibility of O*p* is contestable, the conclusion that *c* necessarily obtains cannot be inferred, even if the transcendental premise (M(O*p)* > *c*) can be shown to be true. It is questionable whether an argument of this purely hypothetical kind might still be called "transcendental". It certainly does not live up to the criteria named by Stroud. Still, the argument concerns necessary conditions for a special branch of knowledge, even if this knowledge should be disputable or hypothetical; and Kelsen is right in maintaining that there is an age-old institutionalised normative legal science following certain methods and asserting its results with a claim to truth. In my eyes, this should be enough to term Kelsen's argument a "transcendental-argument-in-a-neo-Kantian-sense".[48]

2. Necessary presuppositions of legal science as conceived by the Pure Theory

So far it was shown that Kelsen, in his neo-Kantian phase, takes his own legal theory to be employing the transcendental method developed by Hermann Cohen. He proffers a hypothetical transcendental argument that starts with the problematic fact of institutionalised legal science and then points out what the legal normative propositions, uttered by legal dogmatists with a claim to truth, universally presuppose. The question remains: What *are* the universal presuppositions of institutionalised legal science, according to Kelsen? – Roughly, Kelsen names ten "basics" of legal cognition (which,

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[47] H. Kelsen, *Reine Rechtslehre* (n.11), 65-6.

[48] Stanley L. Paulson has repeatedly and correctly pointed out that Kelsen, in his neo-Kantian conception, tries to construct a transcendental argument of the "regressive" type (see esp. his paper "On Transcendental Arguments, their Recasting in Terms of Belief, and the Ensuing Transformation of Kelsen's Pure Theory of Law", in: *Notre Dame Law Review* 75 (2000), 1775-95); see further "The neo-Kantian Dimension of Kelsen's Pure Theory of Law", in: *Oxford Journal of Legal Studies* 12 (1992), 318-25). Paulson claims that Kelsen's project has failed, but the reasons he gives are not cogent. Paulson reconstructs Kelsen's transcendental argument as follows: "*1. One has cognition of legal norms. 2. Cognition of legal norms is possible only if the category of 'ought' or 'Sollen' is presupposed. 3. Therefore, the category of 'ought' or 'Sollen' is presupposed*" (1790-1). He then maintains that the second premise is not tenable because there always are alternative ways of accounting for the "legal data". But this is not convincing, because Kelsen's starting-point are not any "data" (whatever this might be) given to legal cognition, but the propositions of institutionalised legal dogmatics, which he takes to be normative from the beginning. Therefore, the way to attack Kelsen's argument would not be to say that he has got the second premise wrong, because there are other ways of approaching law as a social practice than that of legal dogmatics, but to say that he gives a mistaken phenomenology of legal dogmatics. This is – mainly – a matter of the first premise.

inevitably, overlap with the basic theses of the Pure Theory and its neo-Kantian epistemology of norms listed above):

2.1 General presuppositions of legal and natural science

On the one hand, there are conditions that Kelsen thinks to be necessary for *any* piece of knowledge co-ordinated to either natural or legal science:

(1) It takes the form of a hypothetical judgement.[49]

(2) It is consistent with all other judgements deemed valid.[50]

(3) It is verifiable by exact (empirical) criteria.[51]

It is difficult to say whether these conditions might be called "transcendental". The demand of consistency, on the one hand, applies to any true judgement and is part of formal logic, so it is no special feature of science's constituting its object. The demand that scientific knowledge has to take the form of an hypothetical judgement, on the other hand, and the demand that there has to be an exact way of verifying a scientific judgement are characteristic for natural and legal sciences, so they might be called "transcendental" conditions of these sciences (if we disregard that the first condition does not concern the *meaning* but the *structure* of scientific knowledge). The problem with these conditions is, however, that they stem from a rather peculiar neo-Kantian-cum-positivist conception of science. They are expressive of Kelsen's tendency to assimilate the method of legal science to the method of natural science, and it is doubtful whether the large majority of legal dogmatists even at Kelsen's times would subscribe to them – at least when this conception of science is coupled with normativism. Condition (3), by the way, is mainly responsible for Kelsen's thesis that law and morality must be separated.

2.2 Presuppositions of legal science

On the other hand, there are conditions that Kelsen takes to be necessary just for legal science and that serve to distinguish legal science from natural sciences. Arguably, they are the following:

(4) The hypothetical judgement of legal science is structured as a legal rule, *i.e.* it connects a legal consequence, which is an act of coercion, to a legal condition.[52]

(5) The meaning of the "connector" between legal condition and legal consequence is that of normative imputation.[53]

(6) Any legal norm, with the exception of norms at the highest level, fulfils the criteria of validity laid down in a norm at a meta-level.[54]

(7) Any norm at the "highest" level is valid.[55]

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[49] *Cf.* H. Kelsen, *Hauptprobleme der Staatsrechtslehre* (2nd ed., n.19), preface VI.
[50] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 136.
[51] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), preface IX, 64.
[52] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 22-4.
[53] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 22.
[54] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 63-4.
[55] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 66-7.

(8) Any legal norm is part of an autonomous legal system consisting only of hypothetical judgements of the same kind.[56]

(9) The legal system is unique, *i.e.* there are no two different valid legal systems at the same time.[57]

(10) Finally, the legal system is all in all efficacious, *i.e.* in a certain degree people act according to the norms contained in it.[58]

To be sure, this list is rather roughly hewn – some of the conditions certainly cannot be called "transcendental" in Kant's sense, some are contestable, some of the presuppositions merge into each other, and some are even prone to result in contradictions. It's just a tentative sketch. Kelsen himself never drafted a list like this and did not even attempt to systematise the necessary conditions for legal science.

But how does one get at these universal presuppositions of any legal proposition? Pointing to the transcendental argument given above is not enough; it is not self-evident that the possibility of the truth, e.g., of the sentence "*Legally, if somebody steals, he ought to be punished* " necessarily implies all ten conditions named above. And Kelsen does not simply employ the argument that any utterance that both asserts a legal proposition and denies its presuppositions is self-refuting or inconsistent, like, e.g. "*Legally, if somebody steals, he ought to be punished; but this does not fulfil any criteria for legal validity*." Instead, Kelsen's strategy, which is only implied in his writings, is rather complex. The first step is to give a phenomenology of existing legal dogmatics. The second step consists in "rationally reconstructing" the results by mutually accommodating the superficial structure-and-meaning of factual legal utterances and their necessary implications in accordance with the general demands of science. Both procedures are principally prone to errors and, thus, assailable.

The general presuppositions of science – conditions (1) to (3) – are laid down by Kelsen in a rather apodictic way. The special demands of legal science partly combine those general demands with the implications of actual procedures in legal dogmatics: The uniqueness of the legal system is implied by the demand of consistency; the necessary existence of "meta-level-norms" derives from the demand that there should be exact criteria of truth or validity. Typical elements of legal science alone are the demand that the legal norm should connect an act of coercion to a certain condition by means of the category of normative imputation, and the demand that the legal order should be efficacious. But Kelsen does not take these postulates simply to be implied by the factual procedures of legal science, instead, he gives additional arguments: Without the category of normative imputation an autonomous legal science would not be possible;[59] the element of coercion serves to distinguish moral and legal norms even by their content; and the

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[56] H. Kelsen, *Der soziologische und der juristische Staatsbegriff* (n.22), 37.

[57] H. Kelsen, "Naturrecht und positives Recht", in: *Die Wiener Rechtstheoretische Schule* (ed. by H. Klecatsky *et al*., Vienna 1968, 215-244), 222.

[58] *Cf.* Hans Kelsen, *Reine Rechtslehre* (n.11), 69-72.

[59] *Cf.* H. Kelsen, *Das Problem der Souveränität* (n.12), 10 n.

demand of efficacy follows partly from Ernst Mach's principle of economy of thought (*Denkökonomie*),[60] which, therefore, might be added to the list of presuppositions of science in general.

2.3 The category of ought and the basic norm

The named reservations apart, the list given above covers about all presuppositions of legal science. This might be surprising, for reading Kelsen's texts – especially his major ones – leaves one with the impression that there are just two candidates for transcendental-logical conditions for law, both of which are missing in the list, namely, the category of ought, and the basic norm.

But actually, they are *not* missing. As was shown above, in his neo-Kantian legal epistemology, Kelsen identifies the legal ought with the category of normative imputation. So conditions (4) and (5) concern the ought of the legal norm which is a category of relation having a status comparable to that of Kant's category of causality but meaning something different. Its meaning is that of the relation between antecedens and consequens in the judgement "*If somebody steals, he ought to be punished* ". This relational conception of the ought involves a number of problems. One of the more important ones was mentioned above: It is scarcely compatible with Kelsen's *Stufenbautheorie, i.e.* with his theory that there necessarily are several layers of law, at least one of which consists of empowering norms. For it is difficult to see normative imputation as the ought that is operative in empowering norms (or in the individual norms of judges' decisions). Maybe Kelsen would have fared better if he had taken the ought to be a category of modality, even if this had destroyed the parallelism between normativity and causality.

Finally, there is the basic norm to account for. The basic norm, according to Kelsen, is a norm that – as a transcendental-logical condition – is necessarily presupposed by anybody who considers the highest level of positive norms in a legal system to be valid. Kelsen explains the basic norm as if it were the paradigmatic result of applying the transcendental method:

> "In formulating the basic norm, the Pure Theory of Law is not aiming to inaugurate a new method for jurisprudence. The Pure Theory aims simply to raise to the level of consciousness what all jurists are doing (for the most part unwittingly) when, in conceptualizing their object of enquiry, they reject natural law as the basis of the validity of positive law, but nevertheless understand the positive law as a valid system, that is, as norm. With the doctrine of the basic norm, the Pure Theory analyses the actual process of the long-standing method of cognizing positive law, in an attempt simply to reveal the transcendental logical conditions of that method."[61]

But this and any other explanation that Kelsen gives of the basic norm's transcendental-logical character applies almost to *any* presupposition of law.

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[60] H. Kelsen, *Das Problem der Souveränität* (n.12), 98-9.

[61] H. Kelsen, *Reine Rechtslehre* (n.11), 67 (translation from *Introduction to the Problems of Legal Theory* (n.19), 58).

And the status of the basic norm remains vague. To be sure, there is one substantial definition according to which the basic norm is a non-positive presupposed norm validating the highest positive legal norm – the constitution – by ordering that one should act in accordance with it[62] so that the basic norm in a way grounds condition (7). However, as H. L. A. Hart among others has pointed out, the necessity of this function of the basic norm is doubtful. If asked why she applies or takes to be valid the norms of the constitution, it is not likely that the average jurist will answer "*Oh, well, now you ask me – I presuppose another norm according to which the constitution is valid*"; rather, she will probably answer "*Oh, well, after all it is the highest norm of our legal system in force, so I just presuppose it to be valid. Everybody does so, and as you can see, it works!*"

But there is also a "mysterious" side of the basic norm that is mainly responsible for the thousands of pages concerning this concept in secondary literature: According to its "mysterious" side, the basic norm is an omnipotent abstract epistemic concept, the origin (*Ursprung*) of the legal system,[63] a *hypothesis* in the sense of Cohen and Plato,[64] the vanishing-point of the legal system in which all its transcendental conditions merge.[65] Or to put it in a more vulgar way: it is a kind of "transcendental trashcan", simply a token for the universal presuppositions of legal science.

On this view, the answer to the question of where there is a place for the basic norm in the list of legal presuppositions named above is not difficult: the expression "basic norm" is just a unifying sign for – at least – the presuppositions bearing the numbers (6) to (10) and perhaps even for all of them.

2.4 The triviality of the Pure Theory

After all this, the question might arise of whether the results that Kelsen's theory presents are not rather trivial. Instead of revealing "transcendental secrets" to us, as we might have expected, Kelsen, though at times raising the claim to provide a transcendental logic, simply performs a contestable meta-theoretical presuppositional analysis of existing legal dogmatics.[66]

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[62] H. Kelsen, *Reine Rechtslehre* (n.11), 65.

[63] H. Kelsen, Rechtswissenschaft und Recht (n.11), 233.

[64] H. Kelsen, "The Pure Theory of Law, 'Labandism', and Neo-Kantianism. A Letter to Renato Treves", in: *Normativity and Norms* (ed. by S. L. Paulson and B. Litschewski Paulson, Oxford 1998, 169-176), 174.

[65] See especially H. Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (n.19), 295-300.

[66] On this problem see the excellent paper by Stefan Hammer, "A Neo-Kantian Theory of Knowledge in Kelsen?", in: *Normativity and Norms* (ed. by S. L. Paulson and B. Litschewski Paulson, Oxford 1998, 177-194, 186-7: "*It might well be argued that Kelsen's position is plausible simply as that of a neo-Kantian who takes as his point of departure 'the fact of legal science', where the required presuppositions are unquestioned and the task of bringing these presuppositions to light is all that remains. Such an interpretation, however, would reduce Kelsen's effort, together with that of his neo-Kantian predecessors, to a mere analysis of scientific method, with the result that their common claim to establishing the epistemological validity of scientific knowledge, as it is given in the various sciences, is in effect dismissed*." This analysis is quite correct; the only problem

But, first, even if Kelsen might have been more cautious in his terminology, he shouldn't be blamed for his scientific retentiveness alone: "all there is to give he offers", once we accept his notion of science. Second, the status of presuppositional analysis in general gains importance on the background of Kelsen's neo-Kantian non-realist epistemology, according to which the presuppositions of legal science are one with the necessary elements of law. Presuppositional analysis takes the place of an "ontology of law", so to speak. Third, one must keep in mind that Kelsen's main concern is a critical one. In this sense he is a true Kantian. He wants to restrict tendencies in legal science that are not in accordance with its own presuppositions and with the demands that any science worth the name has to fulfil. Accordingly, Kelsen's theory of legal concepts is characterised by its "reductionism": for Kelsen, any legal concept is acceptable for science only if its extension can be determined exclusively by relying on the legitimate normative judgements of legal science. Consequently, the central legal concepts of "state", "person", "duty", "right", etc., do not denote any autonomous entities; instead, they may completely be explained in terms of the legal rules that in turn embody the necessary presuppositions of legal science.[67] Thus, the thesis that the law is entirely made up of the normative judgements of legal science, which are verifiable by objective criteria, has a critical tendency that is possibly the most substantial achievement of Kelsen's neo-Kantian phase.

CONCLUSION

At the end of this paper, it might seem as if the topic of this colloquium, which is "Law and Objectivity in the Work of Hans Kelsen", has been dealt with just in passing or indirectly. But this impression is misleading. For after what has been said, in his neo-Kantian phase, Kelsen's likely, only at first glance surprising, rather short and snappy answer to the question "*Why is the law objective?*" is – perhaps – obvious.

It would be: "*Because there is a legal science*".

I hope it has been made clear what he would have meant by this.

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with it is that, on the one hand, its result does not speak - as Hammer would have it - against, but rather in favour of Kelsen pursuing a neo-Kantian project, and that, on the other hand, it is illusory anyway to try to "establish the epistemological validity of scientific knowledge", unless by working out those elements necessary for scientific statements to have a meaning and a truth-value. So the rather disparaging tone is not appropriate. And Hammer has not convincingly argued for the case that Kelsen's theory does not even achieve this modest aim.

[67] *Cf.* H. Kelsen, *Reine Rechtslehre* (n.11), 53-9.

IS COMMON LAW IRRATIONAL? THE WEBERIAN 'ENGLAND PROBLEM' REVISITED

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Introduction: The Suspect Eccentricity of Lord Denning

> "In summertime village cricket is a delight to everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in the County of Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good clubhouse for the players and seats for the onlookers. The village team plays there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play anymore. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket, but now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket field. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground."[1]

Readers with some knowledge of English jurisprudence will not find it surprising that the above is an extract from one of Lord Denning's judgements, as it is typical, in its extraordinariness, of a man who has gone

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[1] *Miller* v *Jackson* [1977] 3 WLR 20, CA.

down in juristic history and the consciousness of thousands of undergraduate law students as a *sui generis* judge, who didn't hesitate to exercise his discretion even when there was clearly no room for any. But was Lord Denning really an exception? Is it the case that his rulings are so fundamentally different to those of other English judges or is there something inherent in English and, indeed, all common law that makes possible the justification of decisions in the manner of Lord Denning in *Miller* v *Jackson*?

It is commonly held that common law relies a lot more heavily on the judge, on rhetoric and *ad hoc law-making* rather than backward looking law-*application*. Civil law, on the other hand, is understood as being the embodiment of rationality and the rule of law. At least this is how Max Weber described the difference. In applying a set of rationality tests, he came to the conclusion that common law with its reliance on the personality of the judge and the lack of codified legislation, is marked by a lower degree of rationality than civil law. However, in denying common law the degree of rationality and, subsequently, the systematicity that he reserved for civil law, Weber was led to a dead-end. Having already correlated the rise of capitalism with the existence of formal rational legal systems, he found himself unable to explain the emergence of capitalism in England. In this paper, I offer a new approach to the Weberian 'England problem' by reconsidering the degree of rationality of common law. First, I give a brief exposition of the Weberian typology of legal systems and focus specifically on how the concept of rationality determines this classification. I also try and unpack the Weberian notion of rationality by bringing to the surface some of its necessary entailments. Then I go on to examine how the substantive irrationality that Weber diagnosed in the English legal system has been explained by various analysts of his work, namely Kronman, Trubek, Ewing and Murphy. I shall then go on to ask whether the claim that English law is substantively irrational could ever be sustained and, if so, whether it can still be sustained today. I argue that what should be taken more seriously is that legal practice is an argumentative practice. Every instance of argumentation is directed towards an audience. Using an idea of Perelman, which was adopted and furthered by Habermas, I shall argue that argumentation in law is addressed to an idealised universal audience. But in order for a judge to purport to convince this universal audience, she must appeal to universal, abstracts principles, the existence of which Weber questioned in common law. I shall then consider a sociological objection, namely that this universal audience remains precisely this: an idealisation. I shall argue that with recent developments in the area of the law, broadly conceived, the universal audience is actualised to a much higher degree than in the pas so as to facilitate the universalisability of judicial decision-making.

A Reminder of What The 'England Problem' Is

Before returning to Lord Denning and his civil law colleagues, let me remind the reader what exactly the typology of legal systems and the England problem consist in. In the part of Economy and Society[2] entitled Sociology of Law (*Rechtsoziologie*) Weber offers a conceptual framework for the

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[2] M. Weber, *Economy and Society*, (1968) Bedminster Press New York.

understanding of the legal phenomenon as well as a typology of legal systems, which he intends as a methodological tool for the study of the development of the laws and also its connection with the rise of capitalism. At a first stage he sets out to define the law in contrast to other competing normative or regulative orders. He locates the decisive criterion in the organised and legitimate enforcement of rules:

An order will be called law, if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation.[3]

There are some obvious problems with this definition of the law as the monopolisation of physical force. Firstly, there is the famous Hartian rebuttal of Austinian legal metaphysics:[4] not all law prescribes sanctions and, moreover, not all threats of sanctions presuppose an obligation.[5] Secondly, on an empirical level the law is simply not the only regulatory order supported by an intricate enforcement mechanism. In fact, since Weber's definition of the law refers to psychological as well as physical force, it is wide enough to include any religious order with an ecclesiastic institution and hierarchy. Indeed, Weber rejected the threat of sanctions as well as the groundedness of the law on a social practice or any other empirically identifiable fact as the decisive and sociologically relevant criterion for conceptualising the legal. What he did place particular emphasis on was both purposive behaviour that is motivated by a normative commitment to legal rules as well as the fact that the law was *administered* by a specialised and dedicated staff. As Kronman points out,[6] the presence of a specialised staff has a substantive significance as well, which marks the separation of the law from other normative phenomena. According to Weber, legal officials must have been vested with the authority of enforcing legal rules with other legal rules. This, firstly, precludes the possibility of anyone, who acts as self-appointed law enforcer being able to claim that she acts form within the law and, secondly, that the law develops as a closed system that reproduces and legitimates its operations from within its own pedigree. This understanding of the law clearly runs the risk of being over-inclusive and, at the same time, too narrow. However, it is useful as a heuristic device, in order for us to form a *prima facie* agreement of what we mean when we talk about law and legal systems.

A second pivotal point in the analysis of the legal phenomenon is the concept of authority. Authority in general is understood as the form of power exercised by a person over another with reference to a principle, which is accepted as binding by the person on the receiving end of this power relation. Despite this uniform conceptual basis, authority is manifested in various ways:

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[3] *Ibid*, p.34.

[4] Austin's jurisprudence (J. Austin, The province of jurisprudence determined (1995, first edition 1832) edited by W.E. Rumble ed., Cambridge University Press) moves along similar lines as Weber's, although they also differ in very important methodological and substantive respects.

[5] H.L.A. Hart, The Concept of Law, (2nd ed., 1994) with a Postscript edited by P.A. Bulloch and J. Raz, Oxford Clarendon Press.

[6] A. Kronman, *Max Weber*, (1983), Edward Arnold, p.30

According to the kind of legitimacy which is claimed, the type of obedience, the kind of administrative staff developed to guarantee it, and the mode of exercising authority, will all differ fundamentally. Equally fundamental is the variation in effect. Hence, it is useful to classify the types of domination according to the kind of claim to legitimacy typically made by each.[7]

Weber distinguishes between three kinds of authority: Traditional authority is based on age-old, established and tacitly accepted rules. Legal-rational authority rests on the belief in the legitimacy of enacted rules. Charismatic authority is related to the exceptional qualities or achievements of the particular person, who finds him/herself in a position of power.[8]

Weber goes on to form a typology of legal systems, which is based on that understanding of the law and revolves around the distinction between the three separate types of authority. The four categories he proposes result from the combination of two fundamental attributes of legal systems or the lack thereof: formality and rationality. When it comes to what exactly formality and rationality refer to, Weber is not very enlightening. Formality, which is contradistinguished to substantiveness, seems to refer to the degree, to which decision-making is an instance of deductive reasoning, in the course of which the particular facts of a case are classified under general rules and principles. The degree of formality of a legal system accounts for its systemic closure, both in the sense of the existence of a set of rules particular to the system, and the existence of a congruent complex of agents and organisations enacting, applying and enforcing legal rules.

The notion of rationality, which is the crux of much of Weber's work, is equally obscure as has been noted rather disparagingly by a number of commentators.[9] Weber shows some inconsistency in his use of rationality. There have been various attempts at unpacking the Weberian notion of rationality,[10] of which I shall mention two that will prove especially useful in the second part of this article. Kronman[11] singles out four possible candidates for the meaning of rationality in Weber's work: (1) rule-governed, (2) systematic, (3) based upon the logical interpretation of meaning and (4) connoting control by the intellect. It is true that the ambiguity of the meaning of rationality causes some problems especially with regard to the

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[7] M. Weber, *Economy and Society*, Vol.1, p.213.

[8] *Ibid*, pp.215 ff.

[9] Kronman reproaches Weber of using it in a "careless fashion" (A.T. Kronman, *Max Weber*, p.73). Lukes calls it "irredeemably opaque and shifting" (S. Lukes, "Some Problems about Rationality" in Rationality (B. Wilson ed., 1971, New York Harper and Row), p.207.

[10] See indicatively: J. Weiss, *Max Webers Grundlegung der Soziologie*, (1975) Frankfurt: UTB; G. Roth and W. Schluchter, *Max Weber's Vision of History: Ethics and Method*, (1979) University of California Press; A. Swidler, "The Concept of Rationality in the work of Max Weber", (1973) 43 Sociological Inquiry 35; U. Vogel, "Einige Überlegungen zum Begriff der Rationalität bei Max Weber", (1973) 25 *Kölner Zeitschrift fur Soziologie und Sozialpsychologie* 532; S. Kalberg, "Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History", (1980) 85 *The American Journal of Sociology* 1145.

[11] A.T. Kronman, Max Weber, pp.72-95. See also D.M.Trubek, "Reconstructing Max Weber's Sociology of Law", (1984-1985) 37 *Stanford Law Review* 919.

differentiation between rational and irrational types of legal systems. However, as Kronman points out, it is usually possible to ascertain which content Weber ascribes the term rationality from the context of the occurrence of the term. Moreover, none of these possible meanings of rationality contradict each other. To that extent, they can be seen as aspects of the same, uniform concept of legal rationality: a legal system is rational, when it is based on rules, which are systematically coherent and lend themselves to interpretation, that is a mediation between the human intellect and crude facts in physical world. Eisen[12] offers a similar but more detailed systematisation of the content of rationality as extracted from various instances of employment of the term and not only from the context of the Sociology of Law. Rationality, Eisen concludes, is used as a marker for six component elements: 1) *purpose*; 2) *calculability*, referring to the appropriateness of means for the achievement of given ends; 3) *control*, connoting guidedness by a free will; 4) *logical coherence*; 5) *universality*, which refers to abstractness, in the sense of the validity of propositions irrespective of the empirical particularities of particular cases; 6) *systematicity*. The Weberian notion of rationality is central in this paper. In the next part I shall reconsider the Weberian notion of rationality, following the way Kronman and Eisen have unpacked it, and emphasise some of its necessary entailments, which should be taken seriously. I will then and argue that sizing up common law to that re-visited notion of rationality will provide a solution to the England problem.

Let me unpack this a little further. The requirements of rationality have some necessary, intertwined entailments, the importance of which will be revealed later on in this paper, when I revisit the kind of rationality employed in the law.

1. The rule-governedness requirement of rationality entails that rational decision-making cannot be guided by personal preferences. Rules have a necessary social texture and, therefore, every instance of rule-following presupposes that there is a social background, against which decisions are testable. Personal preferences or desires cannot be projected onto that social plane. This is an analytical truth that holds both for individuals and, all the more so, in instances of public decision-making.

2. Since personal preferences cannot determine rule-governed decision-making and, as Weber insists, rationality also consists in the use of reason and the 'logical interpretation of meaning', the intentions of public officials are irrelevant in discerning the meaning of their decisions and the rules that these are either grounded in or give rise to.

3. Following on from the previous two points, when public officials produce a legal decision based on rules, they always attach to their decision two necessary claims, either implicitly or explicitly. Firstly, they claim their decision to fall into place in the system of rules, principles and previous decisions that form part of the legal system. Secondly, they raise a claim to universality, even if only in the weaker sense of their decision holding for everyone at all times under unchanging circumstances. Of course, those

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[12] A. Eisen, "The Meanings and Cofusions of Weberian 'Rationality'" (1978) 29 *The British Journal of Sociology* 57.

circumstances will at times narrow down and at others expand the constituency of people, for whom the decision will be relevant and binding. For instance, some commercial law decisions hold only for a certain class of people, for instance merchants. What is important, though, is that, all things being equal, the decision cannot create a rule that holds for certain merchants but not others.

4. The rules and principles that guide decision-making, especially instances of public decision-making, must be promulgated in the sense that they must be accessible and cognizable by all. This requirement leaves out of the realm of rationality practices such as *khadi* justice or other instances of decision-making that is based on divine revelation. Cognizability, though, does not presuppose the written word. Consolidation of rules in specific texts is not a conceptual prerequisite of the cognizability of the law, not least because it has been shown and accepted almost universally that exhaustive textuality cannot guarantee gaplessness in the law.

5. Finally, stemming from the supremacy of reason that Weber seems to consider as a requirement of rationality, it follows that a rational decision can only be one made on the grounds of the weightiest reason. It is simply not rational to act on the less strong grounds and ignore the more compelling ones. This is true of both theoretical and practical reasoning. In order for one to bring about a result, *Zweckrationalität* dictates that one must employ the most effective means. Similarly, when one engages in moral or, indeed, legal reasoning *Wertrationalität*[13] dictates that one must act on the most forceful reason available that will guarantee the rightness of one's action.

The combinations of formality and rationality gives rise to four types of legal systems. Assuming that most readers will be familiar with it, allow me to give only a very brief summary of the Weberian ideal legal types:[14]
a) *Formal irrational* legal systems rely on universalisable rules and principles. However, the source of these rules is not testable by the human intellect. Oracular justice belongs to this category.

b) In *substantive irrational* systems, decisions are made on particular grounds, related to the specific circumstances of the case. Moreover, there are no a priori, general, universalisable rules guiding decision-making.

c) *Formal rational* is based on the use of general rules and it also displays a high degree of systemic differentiation.

d) *Substantive rational* decision-making consists in invoking general criteria, which are extra-legal, that is they are drawn from other regulatory orders such as religion, politics, morality. It cannot be overemphasised that classifying specific historical legal systems under one of these ideal types will not always be unproblematic. There are bound to be crossovers and exceptions, which, though, will not alter the fundamental fact that they have some predominant characteristics, which make them recognisable in terms of their degree of formalisation and rationality.

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[13] For goal and value-rationality in Weber's work, see: S.P. Turner and R.A. Factor, *Max Weber and the dispute over reason and value: A Study in Philosophy, Ethics and Politics*, (1984) Routledge and Kegan Paul.

[14] M. Weber, *Economy and Society*, Vol.2, pp.654-658.

According to Weber, it is civil law legal systems that fit the bill of formal rationality:

> Present day legal science, at least in those forms which have achieved the highest measure of methodological and logical rationality, *i.e.* those which have been produced through the legal science of the Pandectisists' Civil Law, proceeds from the following five postulates: *viz*, first, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" rationally in legal terms is also legally relevant; and fifth, that every social action of human beings must always be visualised as either an "application" or "execution" of legal propositions or an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct.[15]

Roman law and its rightful heirs, that is the legal systems that resulted from the great revolutions and codifications of the 18th and 19th centuries, meet all the criteria of formal rationality set by Weber. The law forms a systemically closed and self-sufficient system, in the sense that decision-making can rely solely on legal resources without having to take recourse to other normative orders. Legal rules and principles are abstract, generalisable and universalisable thus facilitating the classification of facts under legal categories and, subsequently, making possible their legal evaluation and making the law gapless and perfectly symmetrical to the social reality that it is called to regulate. There can be no social instance that cannot be translated in the language of the law. As a result of the rule of abstract and ubiquitous law, the judge is dissociated from her decisions. Rules do all the work, so to speak, and the personality of the judge, her predispositions, her background, her personal opinion on the issue she has to decide, her world-theory, are immaterial and have no bearing whatsoever on the case. To put it in Weberian terminology, civil law systems are based on legal rational authority and do not rely on the charisma of the judge.

So, is common law excluded from the cohort of legal systems that are formal rational, such as the Pandecticists' laws and current civil law systems? The comparison of common law to the ideal type of formal rational legal systems soon ceases to be a comparison of an empirical reality to an ideal and becomes a comparison between two empirical realities, namely common law and civil law. However, the outcome of the comparison remains the same: common law does indeed suffer from a rationality deficit for a number of reasons. To start with, it didn't develop in an academic environment but rather as a craft in professional schools.

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[15] *Ibid*., pp.657-658.

> Even today, and in spite of all influences by the ever more rigorous demands for academic training, English legal thought is essentially an empirical art.[16]

Furthermore, despite the increasing importance of statutory law as well as the influence of discourses on principles, Anglo-American law still by and large revolves around the figure of the judge. The judgment is her own creation, as she is expected to employ her skills and talents, in order to reach the right result. Weber thinks it no coincidence that most pragmatist movements in jurisprudence have arisen in common law systems as a reaction against the formalistic tendencies in common law, which consist in the introduction of increasingly more general rules and abstract principles.

Weber goes on to list more reasons why he considers common law to be found wanting in rationality in comparison to civil law systems such as the extensive reliance on juries and the patriarchal attitude of the judiciary:

> Alongside all this we find the still quite patriarchal, summary and highly irrational jurisdiction of the justices of the peace. They deal with the petty causes of everyday life and, as can be readily seen in Mendelssohn's description, they represent a kind of khadi justice which is quite unknown in Germany.[17]

And he concludes in what I hold to be the crux of his argument concerning the rationality deficit of common law:

> "Quite definitely, English law-finding is not, like that of the Continent, "application" of "legal propositions" logically derived from statutory texts."[18]

This point has long reaching consequences. The, allegedly, particularistic and substantive, in the Weberian sense, character of English law undermines not only its rationality but also it's very systematicity. For Weber, a prerequisite of a legal system is its organisation around abstract rules and principles, under which the specific facts of the cases at hand can be classified. *Ad hoc* decision-making, which is grounded on the 'sense data' of cases and motivated by the passions, desires or values of the judge cannot be the basis of a coherent system. Legal decisions must be able to be pitched at the level of abstraction of universal legal principles that will cohere and be consistent with each other so as to form a gapless system of norms, which will accommodate all possible combinations of facts.

Weber's overall goal was to give an evolutionary sociological theory. His sociology of law falls under that broader scheme and aims at proving a connection between the rise of capitalism and the emergence of formal rational legal systems. In a nutshell, the argument goes as follows: The market, which is permeated by its own rational rules and processes, can only develop in an environment of certainty and predictability. This environment is provided by a formal rational law, as we have described it so far. Since civil law is all about rules and principles known in advance, the application

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[16] *Ibid*., p.890. Clearly, it is not the case any longer that the law as an academic discipline is atrophic.

[17] M. Weber, *Economy and Society*, Vol.2, p.891.

[18] *Ibid*.

of which will yield predictable results, it would provide the perfect context for the rise of capitalism.

And, indeed, it did. Or, at least, it is the case that in most cases capitalism and formal legal rationality went part and parcel. With one notable and persistent exception: England. The empirical application of Weber's thesis on the connection of capitalism with formal legal rationality stumbles on the case of English capitalism, which did develop and, in fact, to a greater extent and with greater consistency. However, it did not do so in an environment of formal legal rationality. Not only did the common law not give way to a civil law model but it persistently and effectively rebuffed all attempts to codification and, hence, rationalisation.

Weber himself diagnosed this historical discrepancy and tried to address it. Firstly, he singles out some aspects of common law that do display signs of formalism such as the stereotyped writ system, upon which common law pleading is based. Secondly, he places a lot of weight in the way the legal profession developed in England. The dual role of English lawyers as both solicitors and financial advisors meant that their interests lay more in the protection and advancement of the interests of their business clients than with the creation of a formal rational legal order. Finally, the fact that law in England was understood and developed as an empirical craft rather than as an academic discipline meant that lawyers never lost sight of the interests of their clients. Trubek[19] points out that what Weber persistently sought in English law was an element of calculability, which would bring it closer to civil law systems. The significance of this point will be revealed in the next part of this paper, in which I shall argue that Weber employed a rather narrow and restrictive understanding of rationality.

The options are numbered and rather straightforward: either capitalism developed in spite of a substantive irrational law, which necessarily raises questions as to the rightness of Weber's conceptual connection between the rise of capitalism and formal rational law; or capitalism developed *because* of the substantive irrational common law, which again refutes the groundwork of Weberian sociology of law; or English law is not *really* substantive irrational. Most analysts of Weber's sociology of law are not convinced by the way he addresses the English problem.[20] They find it is rather casuistic and inconsistent with the rest of his work. Hunt accuses him of displaying a historicism atypical for him.[21] Kronman points out that, even if one accepts that capitalism can develop *despite* a substantive irrational legal system by emphasising the formalist elements of common law, there is no consistent way of reconciling Weberian sociology with the thesis that

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[19] See D.M. Trubek, "Max Weber and the Rise of Capitalism", (1972), *Wisconsin Law Review* 720 for an account of how Weber struggled with the problem.

[20] For a critique of Weber as a legal historian see J.Getzler, "Law, History, and the Social Sciences: Intellectual Traditions of Late Nineteenth – and Early Twentieth – Century Europe" (2003) in *Law and History: Current Legal Issues 2003* Vol. 6, Oxford University Press, pp.215-263.

[21] A. Hunt, "Max Weber's Sociology of Law" (1978) in *The Sociological Movement in Law* (Hunt ed.) , London, Macmillan.

English capitalism developed *because* of the substantive irrationality of common law, which Weber himself suggests at various points.[22]

Ewing[23] comes to Weber's defence by opting for the last of the possible solutions to the English problem, namely that English law is not substantive irrational at all. She argues that Weber's critics are mistaken in focusing on the juridical sense of the typology of legal thought. The focal point should be shifted towards the sociological aspect of the legal system. She concedes that Weber himself allows the confusion to arise by insisting on referring to types of *legal thought*. However, she maintains that this problem can be redressed in such a way that the England problem vanishes and the soundness of Weber's conceptual sociology is restored.

> "But if one is concerned not with legal thought but with empirical validity, then Weber quite clearly set out the historical conditions that in England gave birth to a legal system that was particularly well suited to the demands of the bourgeoisie for guaranteed rights and formal justice, the characteristics that distinguish a bourgeois, or liberal, legal system from all those that preceded it."[24]

Looking at the English legal system as a whole, its formal rational character is unmistakeable and therefore it creates those conditions of certainty and predictability that facilitate the rise of capitalism based on free and predictable market transactions.

It is debatable whether Ewing's argument suffices to rescue Weber's treatment of the English problem, that is whether looking at the English legal system in a sociological light makes irrelevant its formal, juridical substantive irrationality. Firstly, there is Weber's text to reckon with. He consistently speaks of types of legal thought and not types of legal structures, organisations and the like. Secondly, even if one goes beyond hagiographic exegesis, how is it possible to have a sociologically formal rational system, which is based on a type of decision-making that is casuistic and relies on substantive, ad hoc reasoning?

Murphy[25] seems to take these issues on board and tries to tackle the problems rising from the Weberian typology of legal thought and the classification of common law as substantive irrational. He argues that Weber placed too much emphasis on legal doctrine and its place in legal education thus underestimating the importance of adjudication and obscuring the ways, in which technologies and discursive practices in the law actually have developed and determined legal thought. He therefore finds Weber's attempt "to provide a grid for understanding the decisive characteristics of adjudication, of conflict resolution and of decision-making, all at the same time"[26] less than satisfactory. Instead, he suggests that we pay closer

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[22] A.T. Kronman, *Max Weber*, p.123.
[23] S.Ewing, "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law", (1987), 21 *Law and Society Review* 487.
[24] *Ibid*., p.499.
[25] T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Clarendon Oxford, 1997).
[26] T. Murphy, *The Oldest Social Science?*, p.61.

attention to all these technologies and practices that constitute the "conditions of possibility" of modern law. Without purporting to provide an exhaustive list or, indeed, one that coheres historically, he singles out five such technologies and practices, namely: a) *public speaking* as not "one of the frills worn by power" but as the "very aggregate of power"[27] b) *rhetoric*: The Glossators were working up lecture materials. Writers of summae were preparing textbooks. What was being learnt by students with those aids was the art of disputing. This is unsurprising, perhaps, in a world in which all questions of authority tend to be turned into questions of jurisdiction. {. . .} And, inescapably, questions of jurisdiction meant questions of law and fuelled the articulation of both substantive and procedural rules, which served as emblems, however futile or Canute-like, of who was in charge";[28] c) *the organisation of courts*; d) *writing and print* and the subsequent standardisation and decontextualisation of meaning; e) more recently, the development and expansion of *computers and information technology*, with, among other things, the implicit potential for the formalisation of the decision-making process.

3. Common Law and Discursive Rationality

It is now time to ask whether the claim that common law is substantively irrational could be sustained at all at the time that it was made. Whatever the answer to that question may be, we shall then have to ask whether the thesis is sustainable *today*. I believe that the path opened by Murphy is a very promising one to follow. I shall take on board his suggestion that adjudication should be taken more seriously, when exploring the kind and degree of rationality of a legal system. The trial is the culmination of legal practice in that it is the instance, in which the need to reason practically becomes more pressing than in any other occasion. Still, though, adjudication and the claims raised by judges or, indeed, all the involved parties in its course, is nothing but a starting point, albeit a fundamental one. It serves to observe which reasons are employed and how. With this as a point of departure, we can then turn to the surrounding conditions in the legal system that interact with this kind of rationality and how it affects it. So, unlike Murphy who focuses primarily on the sociological background factors that facilitates the modernisation of the law, I prefer to focus on the conceptual aspect of the law that allowed for all these sociological factors to have an impact in the first place.

Before I proceed, it is necessary to come clear about an assumption that will weave through my analysis from this point forward and cannot be defended in this context but needs to be outlined all the same: I consider the purpose of the law to be the delivery of justice. I take this thesis to be, firstly, at least empirically true, to the extent that all legal systems claim to be aiming at resolving disputes but also organising social co-existence and co-operation not only effectively but also justly. This is also the expectation that the people have from their laws. If a legal system ever openly purported to be permanently and unqualifiedly unjust or to be concerned not with the question of justice but merely with questions of efficiency and expediency, it

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[27] *Ibid*., p.64.
[28] *Ibid*., pp.65-66.

would simply not be tolerated by people. But this empirical aspect of the question reveals, I think, an analytical truth as well. A judge passing a decision does not simply decide on the grounds of a means-ends calculation. She always vests her judgment with a further claim to rightness, that is a claim to have delivered a just result. In other words, considerations of efficiency and expediency cannot trump considerations of substantive correctness in the law.[29] Therefore, to the extent that law is about *justice*, the reasons that are employed in legal reasoning cannot be merely instrumental but they have to be fully practical. In other words, as is the case in moral reasoning so is it in legal reasoning, that the notion of Reason, of the Kantian *Vernünftigkeit* cannot be fragmented so as to divorce *rationality* from *reasonableness*. Instrumental rationality is or ought to be always put to the test of reasonableness and, if it fails that test, it should be amended appropriately. Of course, the law, as indeed any other human endeavour, is directed towards a purpose. But the way, in which this purpose is to be achieved, is always subject to the test of rightness through the procedure of universalisation. I believe that this is not an altogether unwarranted assumption to make, when discussing the place of the law in Weber's work. Weber's methodology is by and large neo-Kantian, to the extent that he builds upon the idea that knowledge is based on a *priori* categories. However, in a neo-Kantian vein, he contextualises these necessary presuppositions and accepts that they can be culture-specific.[30] However, this does not mean that the category of the *law* can be bound to a community's conception of the ends that its members want to achieve collectively but is rather connected to a collective conception of the right. This is indeed what all the cases of laws that Weber surveys in *Economy and Society*. They all converge to the normative commitment of the people to legal rules in the light of justice.

Let me now go on and ask whether the claim that common law is substantively irrational could ever and can still be sustained. My point of departure is that legal practice is argumentative.[31] When reasoning in law,

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[29] This assumption clearly points towards Kantian directions and echoes, partially, Dworkin's distinction between policy and principle (R. Dworkin, *Taking Rights Seriously, 1977,* Duckworth).

[30] For the neo-Kantian undertones in Weber's work as well as the affinities of his legal sociology with von Ihering's legal theory see: S. P. Turner and R. A. Factor, *Max Weber: The Lawyer as Social Thinker*, (1994) Routledge.

[31] This thesis has been put forth by various theorists over the last few years. This is how Dworkin puts it: "Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible – because senseless – without a law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims".(emphasis in the original). R. Dworkin, *Law's Empire*, (1986) Fontana, p.13. See also O. M. Fiss, Foreword: "The Forms of Justice", (1979) 93/1 *Harvard Law Review* 1; O. M. Fiss, "Reason in all its Splendor", (1990) 56 *Brooklyn Law Review* 789. Robert Alexy has produced the most cogent account of the law as a discursive practice in R. Alexy, *A theory of legal argumentation: the theory of rational discourse as theory of legal justification*, (translated from

judges as well as all the parties involved in a specific case, purport to *convince* an audience about the rightness of their positions and not demonstrate some kind of direct correspondence of the facts of a case to the relevant rule, whichever its source may be. Even if one accepts that deductive reasoning is possible, at least in some cases, in the law, one must still accept that the agent engaging in this deductive reasoning purports to defend the soundness of that reasoning. There is an implicit linguistic distinction here that needs to be voiced more clearly. I said that the parties try to *convince* an audience and not simply *persuade* them. The distinction is drawn by Kant and adopted by Perelman.[32] To *convince* someone entails reference to reasons beyond self-interest or the specific circumstances of her existence, whereas to *persuade* her, means to invoke reasons that are valid for her but not necessarily for other rational beings. In view of the unity of reason in all morally relevant practical dilemmas, it must be accepted that what is at play in legal argumentation is an attempt at *convincing* one's audience instead of rather *persuading* it. One (the parties, the judge, the jury) is trying to reach a decision that will be universalisable and valid for all rational human beings.

Recognising the argumentative character of the law has at least two significant implications. Firstly, since legal practice is conceptually connected to the purpose of convincing a certain audience about the rightness and appropriateness of a set of reasons in a specific, real context, it can be differentiated from practices that entail rule following and application but do not involve argumentation. Thus many of the practices that Weber describes as legal would probably not pass this threshold test of discursiveness. For instance, it is very difficult to see how the type of "legal" thought that is guided by charismatic authority, such as khadi justice, can be compared to legal practices such as the common law. The crucial difference is that the former does not aim at *convincing* but it is based on an unquestioned and unqualified *conviction* concerning the divine provenance of rules, the rightness of which is presupposed. It is therefore not a different *variety* of law, the formal irrational kind, but probably a completely different normative phenomenon to legal systems such as civil or common law ones. Therefore, perhaps the Weberian typology ought to be rethought in the light of a more careful conceptualisation of the law.

A second implication of the discursive nature of the law has to do with the kind of rationality employed in law and its limits. It is true that, very often, reason is finite. We simply find ourselves split between two options that do not seem to differ in any relevant respect. How are we supposed to decide in such cases? Things get even more difficult when it is public officials, who are required to make a decision. Some would argue that, in such cases, those public officials cannot but be motivated by their personal preferences, desires

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German by R. Adler and D.N. MacCormick, 1989), Oxford Clarendon Press. Alexy's legal theory is rooted in Jürgen Habermas' theory of general practical discourse. See indicatively: J. Habermas, *Between Facts and Norms, (*1996) Polity Press; J. Habermas, *Justification and Application,* (1995) Polity Press.

[32] C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (1969), University of Notre Dame Press, p.28.

or emotions.[33] Others argue that the appeal to reason can be suspended and the dispute at hand can be resolved randomly.[34] This, the thesis goes, is still a rational enterprise, to the extent that it minimises the economic and emotional cost of the case. These lines of argument share a fundamental shortcoming, namely what Hart has termed "disappointed absolutism": they expect reason to yield accurate and correct results at all times, so that we can be certain that we have not committed an error. This aspiration, however, is based on a wrong premise, namely that it is possible in most cases to arrive at unquestionably and diachronically right decisions. Therefore, it is only in a minority of cases that we will have to resort to sortition or our personal preferences. But, in fact, it rarely, if ever, is possible to be certain about the absolute correctness of one's decisions. At best, we can say that we have reached the best decision possible under the circumstances, following the most compelling reasons at our disposal at the time. And in a public forum of practical reasoning, the most compelling reasons are those that would convince any rational being. So, if we take seriously the argumentative character of the law, there is no need to suspend reason but simply emphasise its discursiveness and, of course, allow for the possibility of falsification of our decisions in the future and create those conditions that will make possible the departure from those decisions, if a weightier reason appears.

So, the reconceptualisation of legal rationality as *discursive* deals with the objection that reason meets its limits sooner or later and therefore has to be suspended in one way or another. However, there is a stronger objection that still needs to be dealt with, namely that even discursive rationality meets its limits in the law, simply because the law and, especially the law sanctioned and enforced by the state, is *not discursive enough*. This critique does indeed pose serious problems to legal theories that portray the law as a crucible, which can accommodate all communicative inputs, as a 'forum of principle', which will result in the right answer. The law cannot achieve this high a degree of discursiveness. On the contrary, it silences some discourses that it tries to regulate and disenfranchises social groups that develop their own way of understanding the law. Clearly, this critique is much more difficult to reckon with. But it does not have to be dealt with in this context, because it is not directed against the crux of the argument in this paper, namely that legal rationality is *discursive* but rather questions the inclusiveness of the law and demands the repoliticisation of the latter. The argument from the *finiteness of the discursiveness* of the law does not necessarily imply a thesis concerning the argumentative/discursive *nature* of the latter.

A question has been left hanging. If the law is indeed an instance of discourse and argumentation, who exactly is the audience? Those who argue that rationality in the law meets its limits and is therefore either suspended or focuses on outcome rather than procedure, seem to presuppose that the addressees of argumentation in the law are the parties directly or indirectly affected by the decision. If they are kept happy, then the law has succeeded. But, if the law is conceptualised as a discursive venture and the claims to

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[33] Legal realists would fall under this category but also those versions of positivism that admit the finiteness of positive law and its meaning.

[34] For an argument as to how judicial decision-making can be equally rational, when it happens at random, see N. Duxbury, Random Justice; *On Lotteries and Legal Decision-Making* (1999) OUP.

rightness raised in legal reasoning are context-neutral, then the audience is much wider than the parties involved in the case. Let me use here an idea put forth by Perelman,[35] which was adopted and furthered by Habermas.[36] When arguing from within the law, the speaker purports to be able to convince a *universal audience* comprising all rational beings under conditions of free discourse. Using as a point of departure the shared faculty of reason, that is the ability to reflect about the conditions of our existence, anyone engaging in legal argumentation attaches a universal claim to truth and rightness to his or her arguments. Even if one subscribes to Weber's neo-Kantian perception of the law, the audience of legal argumentation is universal in the sense that it comprises all those who share the presupposition of what counts as law. Therefore, even if we temper the thesis that the claims raised in law are universal, it will still have to be accepted that arguments will have to be pitched to such a level of abstraction that will be intelligible and acceptable *qua legal* by the specific community.

The argument has been pieced together now. On a conceptual level, in order for it to be shown that common law is substantively irrational in the Weberian sense, it does not suffice to show that judges often appeal to their personal preferences, that legal education has developed in an empirical manner or that the doctrine of *stare decisis* does not inscribe and consolidate rules and principles in the same empirically identifiable way as the big codifications of civil law system. What needs to be proven is that common law is not a *discursive*, *argumentative* venture with everything that this denial entails. I do not think that this thesis could ever be sustained. Judges in common law do bring forth reasons in the form of arguments and, as Murphy points out, engage in rhetoric. Thus their purpose is to convince not only the parties in a legal dispute as to the rightness of their decision but also the idealisation that is the universal audience, which is actualised, at least to a certain extent, with institutions such as the doctrine of *stare decisis* and the system of appeals. Courts purport to be able to convince with the power of their arguments *any higher or future court* faced with the same or a factually similar case. Thus they attach claims that reach a lot farther than the confines of the specific case. Even when this is not done consciously and explicitly, when asked to justify her decision any common law judge would have to reconstruct her arguments as having universal validity. Even the adversarial system that Weber interpreted as a hindrance to the rationalisation of common law, will be understood as yet another factor revealing and fulfilling the discursive character of common law. And it is upon the universality of those arguments, upon their defensibility *in abstracto*, that provide the bedrock, upon which the systematicity of common law is built. Those principles might not be inscribed but they are still present in common law.

And this flexibility of common law is of paramount significance. As I showed when analysing the Weberian notion of rationality, rational decision-making requires more than simply systemic integrity. A rational decision

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[35] C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (1969), University of Notre Dame Press; C. Perelman, *The Idea of Justice and the Problem of Argument*, (1963) Routledge and Kegan Paul.

[36] J. Habermas, "Was heißt Universalpragmatik?, in Habermas, *Vorstudien und Ergänzungen zur Theorie des Kommunikativen Handelns*, (1995) Suhrkamp.

can only be one that is grounded on the most compelling reason available. It is only thus that the paradox of knowingly doing the wrong thing and the ensuing self-contradiction of admitting the wrongness of a purposefully committed act can be avoided. Clearly, acting on the basis of the best possible reason will sometimes mean that one will have to go beyond a formal set of pre-given rules. Much as such a system may provide *prima facie* reasons for action, these reasons must always remain defeasible.[37] Again, much as systemic integrity needs to be maintained, this cannot be done against the demands of rationality.[38] To put it very simply, it is not rational for one, even a judge who is *prima facie* bound to a certain extent by pre-existing formal rules, to decide against her better judgement, when, of course, this judgement passes the tests of universalisability. In that respect, not only is common law not substantive irrational but, in fact, it can even be argued that it enjoys a higher degree of rationality than civil law. The method and form of judicial decision-making in common law lends it a flexibility that facilitates the weighing of reasons stemming from the existence of formal rules as well as extra-systemic[39] reasons to a much greater degree than in civil law.

So, perhaps, the problem that Weber diagnosed is not conceptual but merely sociological. Maybe common law judges were indeed addressing a universal audience but that universal audience was simply not actualised to a sufficient degree.[40] Let us accept for the sake of the argument that the doctrine of stare decisis and the appellate system do not provide enough guarantees that judicial decisions were reconstructed and defended against a backdrop of general legal principles.[41] Let also accept that the judiciary was not under close enough scrutiny in the public sphere, that judges occupied a small niche impenetrable by anyone outwith it. Is this still the case today? Can it still be argued on a sociological level that common law is irrational, because of the lack of certain conditions that will facilitate the actualisation of the

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[37] For a comprehensive account of the notion of defeasibility, which was of course introduced in contemporary legal theory by H.L.A. Hart in legal reasoning see H. Prakken and G. Sartor, *The Three Faces of Defeasibility in the Law*, (2004), 17 *Ratio Juris* 118.

[38] One could argue that it cannot go against the requirements of substantive rightness either but this is a different story. For the performative contradiction at play, when a judge pronounces her decision to be morally wrong see R. Alexy, *A theory of legal argumentation: the theory of rational discourse as theory of legal justification*, (translated from German by R. Adler and D.N. MacCormick, 1989), Oxford Clarendon Press.

[39] It should be clarified at this point that these reasons that are not bound to formal legal rules are only *prima facie* extra-systemic. However, whether and how they become part of the legal system is a wholly different debate.

[40] Lord Denning lends himself as an excellent example again. It was suggested to me by Neil Duxbury that the way Denning single-handedly developed the "deserted wife's equity" shows how important a part personal preferences and convictions play in common law adjudication. Here are a few relevant cases heard by Denning: *Cooke* v *Head* [1972]CA 1 WLR 518; *Hussey* v *Palmer* [1972]CA 1 WLR 1286; *Binion* v *Evans* [1972] CA Ch 359; *Eves* v *Eves* [1975]CA 1 WLR 1338; *Greasley* v *Cooke* [1980] CA 1 WLR 1306.

[41] For the need of explicit justification in judicial decision-making, see D. Hellman, "The Importance of Appearing Principled", (1995) 37 *Arizona Law Review*, p.1107.

universal audience. In what follows I shall take on board some of Murphy's insights, projecting them to contemporary reality and also adding to them. The list should by no means be taken as closed or conclusive. At best, it is tentative, suggestive and rather impressionistic. My aim is to single out some *prima facie* important developments in law, broadly conceived, that reveal the discursive character of judicial practice as well as the tendency to optimise the potential opened up by this inherent discursiveness.

Law and the media: The proliferation of traditional media as well as the emergence of new ones (the Internet, digital television, mobile phone technology) in combination with the growing demand for increasing accountability of all public officials, including judges, seems to have resulted to judicial practice being scrutinised by the wider public to a greater degree than ever. Legal material is readily available on the Internet. It doesn't take more than a simple search in order to find full details of any case as well as the theoretical debate underpinning it. Discussions about cases raising controversial or emotive issues[42] nowadays do not only take place in the courtroom or the House of Commons. They are dispersed throughout the public sphere and become topics of discussion in various social contexts with the debate revolving not only around the facts of the case but also around the reasons for and the correctness of the decision, without that meaning that all the informational input in such debates is always accurate, well-informed or correct.[43] Not only are the details of cases reported but debates over significant legal theoretical problems get more air-time than ever. The significance of this relatively recent phenomenon lies not only in that it makes judges more accountable but it also makes the latter conscious of the actual widening of the audience that they address. Various objections could be raised here. First, one could object that this expansion of the audience simply means that the judges will feel the need to appear principled without actually endorsing the reasons that they put forth. I don't really see how this can be a viable objection, because what it describes is the desirable: that judges put aside their personal preferences in order to decide in a principled manner. Second, it could be argued that, in being too conscious of the popular response to their judgments, judges will only be trying to please their audience instead of applying principles and rules and striving to deliver justice.[44] This would be a valid objection, if there were no other tiers of

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[42] When this article was in its final stages various such cases hit the headlines: assisted suicide, treatment of neonates with sever health problems, the right of householders to defend their property against burglars and others.

[43] It was brought to my attention by Lieve Gies that in the Netherlands some judges are specially designated *press-judges*, whose job is to be the link between the media and the judiciary. The rationale behind the institution is to improve the image of judges by explaining to the wider public what exactly it is that they do and how.

[44] Again a topical example that explicitly shows that legal discourse concerns principles and defends that character of the law against populism: H. Kennedy, "For Blair there is no such thing as legal principle", *The Guardian*, 27 November 2004. Baroness Kennedy concludes with the following telling paragraph: "However, just law matters. It is the mortar that fills the gaps between nations, people and communities, creating a social bond without which the quality of our lives would be greatly undermined. If we fritter away the principles that underpin law, if we pick them out of the crannies of our political and social architecture,

scrutiny of judicial decisions. But, in reality, there are numerous levels of inspection of judicial decision-making both in the public sphere but also in domestic legal orders and, more importantly, in supranational ones, to which we now turn.

Supranational legal orders: The specialised legal audience that judges must address now is not exhausted in appellate or future courts. The proliferation and expansion of supranational legal orders organising their own courts, means that domestic decisions must be defensible in those higher, international jurisdictions in the light of the principles that lend those supranational orders coherence and also make possible communication between domestic ones. In the UK, visualising this new audience has certainly become easier after the introduction of the Human Rights Act 1998.

Legal Education: Legal education in the UK has of course long become an academic subject. University Law Schools operate rather differently from practitioners' schools. Whether legal academics take a doctrinal/positivistic approach to the law and legal education and see their task as *descriptive* or whether they take a more radically critical standpoint, they go about interpreting and assessing legal decisions in the light of a more or less shared understanding that the concept of the law extends beyond its textuality. I do not want to suggest that what judges decide on the basis of what law lecturers or law journal editors will think of them, but it is important to see how academia and judicial practice have come to closer contact thus facilitating the attainment of the discursiveness of the law to a greater extent than in the past.

My main aim in this paper has been to show that the rationality of common law, which Weber questioned in his typology of systems of legal thought, can be restored if we take seriously the discursive, argumentative character of common law. Like all in all instances of argumentation, the appeal to the universal audience guarantees the emergence of a set of legal principles, which provide the bedrock for a coherent, consistent and discursively rational legal system. Moreover, I showed, albeit in a tentative manner, that the sociological conditions are today more ripe than ever for the actualisation to the greater possible extent of this universal audience. Although it was not possible to raise the issue in this context, I believe that on this basis of this reconceptualisation of the rationality of common law the correlation of the latter with the emergence of capitalism in England can be explained more convincingly. But this clearly requires a separate, careful conceptual and sociological enquiry.

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restoration will be impossible. The US supreme court justice, Louis Brandeis, got it right 75 years ago: "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself." "

ON LAW'S CLAIM TO AUTHORITY*

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1. INTRODUCTION

In an influential work, Herbert Hart argued that a theory which suppresses the normative component of law "fails to mark and explain the crucial distinction between mere regularities of human behaviour and rule-governed behaviour."[1] This is a serious drawback for a theory of law, since an important part of the legal domain has to do with rule-governed behaviour and so may be expressed only by use of such notions as those of norm, obligation, duty, and right. These notions require us to acknowledge the existence of a normative dimension in the legal domain. As a result, the problem of law's normativity lies at the heart of any comprehensive legal-theoretical project, and "the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task."[2]

This task is significant indeed, and not just for theoretical reasons: a general theory of legal normativity will have to answer questions such as "what role do legal rules play in practical deliberation?", "what reasons, if any, does an agent have to obey the law?", "do these reasons hold even for citizens who disapprove of the legislation in question or think it wrong in principle?", "when is one justified in disobeying the law?". These questions concern us not only as legal scholars, but also as responsible citizens. It follows that a theory of law's normativity is going to impact significantly on our ordinary lives.

This paper looks at a specific aspect of the normative dimension of law, namely at the implications that a legal system's claim to normativity, or claim to authority, carries for the concept of law. By "law's claim to normativity," or "law's claim to authority," I mean the contention that a legal system makes to place people under obligations that they would not otherwise have. To put it differently, I will deal with the law's normative posture, that is, the law's presenting itself as a body of authoritative standards and requiring all those to whom it applies to acknowledge its authority. A system that lays a claim to authority is therefore asserting that it is an action-guiding institution, for it provides individuals with special reasons for action.

That this claim to action-guidingness exists in all legal systems, at least implicitly, is recognised by all the traditional schools of legal thought (legal realism, legal positivism, and natural law theory). For it is widely accepted that legal systems, even if morally defective, cannot abstain from claiming

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1 H. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983), p.13.

2 S. Perry, "Hart's Methodological Positivism" in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.330.

authority.[3] So, "the idea that the law purports to bind us by exercising authority over us" will have to be regarded "as an element of the concept of law."[4] A detailed analysis of the claim to authority, then, is an appropriate perspective from which to compare the disparate conceptions of law and test their explicative capacity.

In this paper, first I distinguish the claim to authority from the related question of political obligation. Next, I pass to illustrate briefly the ways the traditional schools of legal thought cope with a legal system's claim to normativity, pointing out as well the main reasons why these traditional approaches are less than satisfactory. Section 4 goes further into these failures with an account by which we are enabled to see the conceptual relationship between the claim to authority and the concept of law, such that no adequate explanation of the claim to normativity can be provided unless an appropriate concept of law is had. In this part of the paper I also show how the concept of law need to be recast to make possible an account of legal systems' claim to authority. In so doing, I introduce the conception of law as an argumentative practice. This view informs the works of Ronald Dworkin and Robert Alexy, but is still in need of an analytical exploration to become a perspicuous concept.

2. Law's Claim to Authority and Political Obligation

The question posed by law's claim to authority is closely intertwined with the issue of political obligation. Before submitting law's normative claim to scrutiny, then, it is essential to clearly distinguish it from the question of political obligation and determine the relationships between the two.

The problem of political obligation has been extensively studied by philosophers and legal theorists.[5] We owe it to their effort if we now have a

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[3] This aspect is underlined by Joseph Raz in his statement that "though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority" (J. Raz, *Ethics in the Public Domain* (Oxford, Clarendon, 1994, at p.199). Similar ideas are expressed in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon, 1979) at pp.28-33; G. Postema, "The Normativity of Law" in *Issues in Contemporary Legal Philosophy* (R. Gavison ed., Oxford, Clarendon, 1987, pp.81-104) at pp.92-93; G. Postema, "Jurisprudence as Practical Philosophy" (1998) 4 *Legal Theory* pp.329-357, at p.333; and L. Green, "Law and Obligations" in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro eds, Oxford, Oxford University Press, 2002, pp.514-547) at p.520. For a dissenting opinion, see K. Einar Himma, "Law's Claim of Legitimate Authority" in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001), pp.271-309.

[4] S. Perry, "Hart's Methodological Positivism" in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.331. See also G. Postema, "Jurisprudence as Practical Philosophy" (1998) 4 *Legal Theory*, pp.329-357, at p.349.

[5] See, for example, R. Wasserstrom, "The Obligation to Obey the Law" (1963) *UCLA Law Review*, pp.790-797; M. Smith, "Is There a Prima Facie Obligation to Obey the Law?" (1973) 82, *Yale Law Journal*, pp.950-976; J. Simmons, *Moral Principles and Political Obligation* (Princeton, Princeton University Press, 1979); K. Greenawalt, *Conflicts of Law and Morality*, (Oxford, Oxford University Press, 1987); N. O'Sullivan, *The Problem of Political Obligation* (New York, Gardland,

better understanding of the definition and scope of the notion of political obligation. As a result, today there is a wide agreement over defining political obligation as the presumptive moral duty incumbent on citizens to obey all the directives enacted by the political institutions of the community they inhabit. The problem of political obligation, then, turns on the question whether a legal system can provide ultimate reasons for action so that individuals are morally bound to surrender their personal judgement and to submit themselves to a legal authority or they are entitled to reserve to themselves the final decision as to their conduct.

Different answers have been given to this question. At the risk of oversimplifying a vast bulk of literature, I venture to say that, for all their diversity, the main approaches to the problem of political obligation can be reduced to three fundamental positions.

First, some scholars have claimed that the existence of political obligation is inherent in the very nature of law.[6] On this view, by definition legal systems are institutions which must be obeyed and no system of rules disregarded or treated by its addressees as only partially binding can be considered a legal one. Thus, the existence of a political obligation is taken for granted and does not constitute a problem at all.

Other theorists have been more wary in their approach to political obligation.[7] So, whilst they have accepted the claim that individuals are under a duty to obey the law, they have argued that the reasons why people must obey the law are far from self-evident and we need to engage seriously in the search for the grounds of this duty. Among the principles that, on this view, can justify the obligation to obey the law we find such concepts as the idea of general welfare or common good, the notion of consent, the feeling of gratitude, the principle of fairness, and the duty of justice, to name but a few.

Finally, a more sceptical approach has been endorsed by the scholars who have gone so far as to deny the very existence of political obligation.[8] In a nutshell, the sceptical approach about political obligation assumes that there is no moral reason to act as it is prescribed by legal rules because "the mere receipt of an order backed by force seems, if anything, to give rise to the duty

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1987); C. Gans, *Philosophical Anarchism and Political Disobedience* (Cambridge, Cambridge University Press, 1992); J. Horton, *Political Obligation* (Houndmills, MacMillan, 1992); M. Kramer, *In Defence of Legal Positivism* (Oxford, Oxford University Press, 1999), pp. 254-308 and R. Higgins, *The Moral Limits of Law* (Oxford, Oxford University Press, 2004).

6 This is the position of T. McPherson, *Political Obligation* (London, Routledge, 1967), p.64, for example.

7 *Cf.* H. Hart, "Are There Natural Rights?" (1955) 64 *Philosophical Review*, pp.175-191; J. Rawls, "Legal Obligation and the Duty of Fair Play" in *Law and Philosophy* (S. Hook ed., New York, New York University Press, 1964, pp.3-18); H. Beran, "In Defense of the Consent Theory of Political Obligation and Authority" (1977) 87 *Ethics*, pp.260-271; and G. Klosko, *The Principle of Fairness and Political Obligation* (Lanham, Rowman, 1992).

8 This view is defended in M. Smith, "Is There a Prima Facie Obligation to Obey the Law?" (1973) 82, *Yale Law Journal*, pp.950-976; R. Wolff, *In Defence of Anarchism* (New York, Harper, 1970); J. Raz, "Authority and Consent" (1981) 67, *Virginia Law Review*, pp.103-131; and J. Simmons, *On the Edge of Anarchism* (Princeton, Princeton, University Press, 1993).

of resisting rather than obeying."[9] So, on this view, the decision about whether the law should be obeyed on a particular occasion is to be left to the autonomy of each and every individual. This position ties up closely with a strenuous defence of individual autonomy and is grounded on the assumption that the idea of personal autonomy is incompatible with the acknowledgment of a legal authority. Whereas the sceptical stance sits uneasily with the widespread intuition that citizens have political obligations, it is now popular among political philosophers and legal theorists.

I will not take a position on this debate here. Instead I confine myself to remark that my analysis of law's claim to authority makes sense whatever we happen to think about political obligation. For whereas there is an obvious relationship between the question of political obligation and law's claim to normativity – in that both have to do with the idea of authority – political obligation and claim to normativity are somewhat independent and conceptually distinct.

Their conceptual difference can be better appreciated, I believe, when we consider that the notion of political obligation identifies the question of the existence and justification of a duty owed to legal and political institutions. This raises issues of legitimacy, namely, it requires us to justify existence and scope of the coercive power of legal systems. Hence, whether or not the law is in fact authoritative is a question to be discussed in the context of a study of the *force* of law.[10] By contrast, law's claim to authority has to do with the obligations that a legal practice necessary asserts to generate, not with the duties that are actually owed to the legal practice. Thus, it links up with the *assertion* to have authority rather than with the *existence* of an authority. Clearly, to argue that legal systems necessarily *claim* to have authority is not equivalent to maintain that in fact they *have* (legitimate) authority. Accordingly, the question of legitimacy is not directly at stake when we consider the assertion made by a legal system to be able to obligate citizens. The analysis of legal systems' claim to authority is rather part of a study of the concept of law, *i.e.* is carried out in the context of an investigation over the *grounds* of law.[11]

While a comprehensive philosophical account of law must include both these dimensions – force and grounds – the two questions do not collapse one into another. They run parallel to a large extent instead, and tend to overlap only partially and to a limited degree. It is this conceptual distinction that does not only justify but indeed requires us to discuss the two questions independently. For the same reasons, one can without contradiction deny the existence of a moral obligation to obey the law and argue that a claim to authority is implicit in all legal systems. Law's claim to authority makes sense even if we ascertained that there is no general obligation to obey the legal rules because, in this case too, the notion of authority and obligation

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[9] H. Prichard, *Moral Obligation* (Oxford, Clarendon, 1949), at p.54.

[10] Following Dworkin by "force" of law I mean the "power of any true proposition of law to justify coercion in different sorts of exceptional circumstance." (R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.110).

[11] The problem of determining the grounds of law consists in establishing the "circumstances in which particular propositions of law should be taken to be sound or true" (R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.110).

would remain central to the legal domain and should be taken into account in explaining the nature of law.

3. Traditional Jurisprudence and Claim to Authority

The significance of law's normativity has led legal theorists to put forward different explanations of this notion. All the traditional schools of legal though have attempted to puzzle out this difficult question. In this section I will sketch the main theories of legal normativity and their account of legal systems' claim to guide action. I will take up in turn legal realism, legal positivism, and natural law theory. This survey will be critical and constructive at the same time: on the one hand I will set out the reasons why these traditional approaches can be considered less than satisfactory; on the other I will lay the groundwork for a treatment of law's claim to normativity that can attack the problems identified in the critical section.

3.1. Legal realism

The concept of law theorised by legal realism is framed in terms of regularity of compliance and use of punishment for non-compliance: here law is an empirical concept relating to the possibility of coercing people (physically or psychically) to act in certain ways. By endorsing this approach and focusing on such ideas as conformism, coercion, and punishment, legal realism (especially in its pragmatic instrumentalist version) conceives of the law as nothing but "the prophecies of what the courts will do in fact."[12] Thus, "when we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. . . . People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."[13]

The primary concern of legal realists, then, is with predicting what the decision-making institutions are going to do. Accordingly, legal realism emphasises the importance of the social efficacy of rules and regards the authoritative issuance of norms as a relatively marginal dimension of the legal realm. We are thereby required to study the actual behaviour of officials in a given legal system, and not just enacted laws (referred to as "paper rules", or "law in book"). It is only if we know the patterns of behaviour, the convictions, the more or less conscious prejudices, and the underlying evaluative conceptions of judges that we can anticipate the content of judicial decisions in so having a grasp of the "real rules", or "law in action."

On this approach, legal normativity is not seen as an autonomous notion but as a by-product of law's coercive dimension: like legal positivism in its earlier stages, legal realism fleshes out a sanction-based account of legal

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[12] O. W. Holmes, "The Path of the Law" (1896), 10, *Harvard Law Review*, pp.457-478 at p.461.

[13] O. W. Holmes, "The Path of the Law" (1896), 10, *Harvard Law Review*, pp.457-478 at p.457.

normativity. On this view, the normative nature of law can be explained in terms of the sanction one is likely to suffer for acting or failing to act in a certain way: to be under a legal obligation is nothing but to be likely to incur a sanction provided by the system and imposed under the law. Here, normativity is something factual: it connects up with what people can expect or may suffer from in consequence of their wrongdoings. As Oliver Wendell Holmes puts it, "a legal duty . . . is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgement of the court; – and so of a legal right."[14] Legal realists account for normativity, thus, by referring to the imperative and probabilistic elements associated with the existence of a legal system. Normative statements can be reduced to factual propositions indicating the law's likelihood to react against and punish unlawful behaviour. In consequence of this view, to claim that a practice is normative means to assert that the practice possesses the ability to sanction people's unlawful doing, *i.e.* to state in advance that certain conducts will be punished.

These views have recently found a restatement within the law and economics movement. As well as legal realists, the advocates of the law and economics movement claim that the power of a theory can be measured against its capacity to make accurate predictions on how the law influences behaviour. Accordingly, the account of legal normativity originally sketched by the law and economics movement is an internal variation of the sanction-based account.[15] Here, the penalty for non-compliance is seen as an additional cost for the law-breaker and so as a disincentive to disobeying the rules of law. Legal rules, then, are reasons to act in the ways prescribed by a legal system and obedience is an act that, other things being equal, will reduce the costs associated with our social conduct.

By theorising a sanction-based account of law's normativity, legal realism as well as the law and economics movement have intended to expel metaphysical elements from the legal domain. The merits of these demystifying approaches cannot be overstated. The sanction-based account of normativity is hardly satisfactory, however. As Hart observes, "the statement that a person has a legal obligation to do a particular action can be combined without contradiction or absurdity with the statement that it is not likely that in case of disobedience he would suffer by incurring some sanction."[16] The possibility for us not to be detected, thereby escaping a sanction, does not mean that we are under no obligation. It is possible to refer to the notion of a duty even in the absence of penalties. Hence, the likelihood of suffering painful consequences for unlawful behaviour is not a necessary condition of legal normativity: sanction can well reinforce an obligation but it is not constitutive of it. These remarks allow Hart to argue that a sanction-based approach can at best explain our "being obliged," not our "having an obligation."[17] But only the latter, which cannot without distortion be reduced to former, can be associated with the idea of legal

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[14] O. W. Holmes, "The Path of the Law" (1896), 10, *Harvard Law Review*, pp.457-478 at p.458.

[15] *Cf.* R. Cooter, "Prices and Sanctions" (1984) 84 *Columbia Law Review*, pp.1523-1559.

[16] H. Hart, *Essays on Bentham* (1982, Oxford, Clarendon), at p.135.

[17] H. Hart, *The Concept of Law* (1994, 1st ed. 1961, Oxford, Clarendon), at pp.82-83.

normativity. Therefore, the sanction-based approach should be dismissed as an unacceptable form of reductionism.

3.2. Legal positivism

The inability of the sanction-based approach to account adequately for the normative nature of law has led the sophisticated versions of legal positivism to put forward a rule-based theory of normativity.

The many theories of law that have come under the label "legal positivism" present differences, sometimes significant. But these differences are internal to a single, overarching theoretical perspective, and one cannot help but see that the several versions of legal positivism have some tenets in common. The cluster of ideas around which the positivist concept of law has developed consists in the social fact thesis, the conventionality thesis, and the separability thesis.[18] The social fact thesis makes out the law to be a social artefact, on the reasoning that the law's existence depends exclusively on social facts, such as the sovereign's capacity to "receive habitual obedience from the bulk of a given society,"[19] or gain the fact of officials' accepting a certain kind of rules.[20] The conventionality thesis asserts that the criteria of legal validity are established by a social convention among the officials of a given community. Finally, the separability thesis affirms a conceptual distinction between law and morality: on this view, it is not necessarily true that the criteria of legal validity consist, either partly or entirely, in moral standards. This thesis grounds the positivist concept of law on only two defining elements – due enactment and social efficacy – so that any reference to moral correctness becomes a merely contingent possibility: what is law depends exclusively on what the authorities have enacted and on what is socially efficacious. Legal positivism in essence sees the law as a normative coercive order whose validity does not necessarily rest on moral standards.[21]

From these premises a rule-based theory of normativity is set out. This view has been argued most notably by Hart and has been the reference point for subsequent positivist studies ever since. On this account, law's authority arises from the fact that a legal system consists in a set of rules of a certain sort. As Leslie Green concisely summarises, for Hart legal rules are social practice-rules, meaning rules that exist insofar as we have before us a "regularity of behaviour, deviations from which are criticized, such criticism is regarded as legitimate, and at least some people treat the regularity as a standard for guiding and appraising behaviour."[22] The existence of a practice governed by such rules gives rise to obligations in self-identified

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[18] K. Einar Himma, "Inclusive Legal Positivism" in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro eds., 2002, pp.125-165) at pp.125-126.

[19] J. Austin, *The Province of Jurisprudence Determined* (London, Weidenfeld and Nicolson, 1954), at p.221.

[20] H. Hart, *The Concept of Law* (1994, 1st ed., 1961, Oxford, Clarendon), at pp.82-91.

[21] H. Kelsen, *Pure Theory of Law* (Berkeley, University of California Press, 1967), at pp.44-50.

[22] L. Green, "Law and Obligations" in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro eds., Oxford, Oxford University Press, 2002, pp.514-547) at p.517.

participants, *i.e.* those who share a special attitude towards the practice. This attitude, or internal point of view, consists in our acceptance of the social practice-rules, that is, in our willingness to regard them as reasons binding us to act in certain ways. In brief, only to the extent that this attitude exists can social practice-rules carry normative (and not only natural) consequences: when law is defined as a set of social practice-rules it can determine people's duties and rights. This being so, the law's claim to authority will be all the more intelligible.

In Hart's explanation, normativity is consequent upon both the existence of a conventional practice and the endorsement of an internal point of view relative to that practice. But it is the second of the two elements that carries the whole of the explicative burden. If we leave the internal point of view out of account, law becomes a mere convention. The existence of a convention will not alone be enough to provide people with obligations. For the convention is a mere fact ("Is") and facts alone are constitutively unable to create duties ("Ought").[23] Conventions can contribute to identify the legal standards in force in a given system, but they cannot play a justificatory role. For the general agreement on behaving in a certain way under given conditions will account for the existence of a (common) habit, not of an obligation.

Furthermore, it has been convincingly remarked by Dworkin, there need not be any convergent social practices for obligations to obtain.[24] We can argue that there is an obligation to act in a certain way also in the absence of a social practice, or even contrary to it. Think of vegetarians, to follow Dworkin's original example. Vegetarians regard the prohibition to eat meat as obligatory. This position makes sense and is fully understandable although we are well aware that in our societies today there is not a convergent social practice in that respect.

Therefore, obligations are conceptually independent from conventions and an account of obligations in terms of conventions is plainly bewildering. Because a convention is not an obligation-imposing entity, a conventionalist theory of law falls short of explaining the binding force, and so the authority, of legal rules. Accordingly, as long as the law is depicted as a merely conventional practice its claim to authority rests unexplained. So we need to move from the external element to the internal point of view in order to explain the authority that law claims to have over its addressees.[25] In other terms, central to Hart's theory of normativity is our attitude towards a social practice (rather than the social practice itself).[26] It is the internal attitude that

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[23] So, Lon Fuller questions the positivist thesis that "an amoral *datum* called law" has the peculiar quality of creating a duty to obey (L. Fuller, "Positivism and the Fidelity of Law – A Reply to Professor Hart" (1958) 71 *Harvard Law Review* pp.630-672, at pp.656-657).

[24] R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978), at pp.49-58.

[25] For similar critical remarks see L. Green, "The Concept of Law Revisited" (1996) 94 *Michigan Law Review*, pp.1687-1717, at pp.1692-1697.

[26] This is remarked clearly by Perry when he argues that "the essence of Hart's response to the problem of normativity of law is thus to point to the phenomenon of acceptance" (S. Perry, "Hart's Methodological Positivism" in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.332.

promises "to unlock the mysteries of law's normativity"[27] and hence of the claim to authority, by morphing a mere state of affairs – a social *datum*, of itself unable to give rise to obligations – into a normative practice, *i.e.* an institution entitled to a normative status.

Hart's account of normativity, sophisticated and interesting though it is, is open to question for at least two reasons. On the one hand, it tends to collapse into a form of subjectivism; on the other hand, it does not explain law's claim to create obligations for all the citizens.

First, to claim that the normativity of a practice lies in people's attitude towards a practice is to explain normativity by invoking their disposition to regard the social practice at issue as a justification for their conduct. Thus, on the Hartian approach the normative nature of law stands on a subjective basis: Hart, by making the internal attitude so pivotal, ends up locating normativity in the subjects rather than making it a character of rules. A legal system's normativity is thus made to depend on people's attitudes and beliefs, such that the objective dimension of law gets neglected.[28] But the normativity of law is not a subjective notion (to the same extent as it is that of a critical morality, to make one example): it is somewhat objective, and as such partly independent of people's dispositions.[29] In other terms, following Hart on this commits us to do away with the objective status of legal rules, and yet this objective status is a distinctive feature of the legal domain. Hence, Hart's account of normativity is inadequate to explain *legal* normativity: an appropriate theory of law's normativity requires us to go beyond the ambit of people's subjective states, commitments, and beliefs.

Secondly, Hart's account – because it relies on the notion of an internal point of view to elucidate normativity – can explain only partially law's claim to be a normative practice. In particular, if Hart explains why law is normative for self-identified participants – the people who accept, recognise, and are willing to regard the legal system as a normative institution – he is unable to illuminate law's claim to create special reasons to act for all the members of the group governed. But legal systems claim to be normative in the latter sense, not in the former: they claim to place all (rather than some) citizens under obligations they would not otherwise have. This general claim resists Hart's explanation of normativity – it does so to the extent that this explanation relies on the internal point of view.

We can therefore conclude that the positivist approach is inadequate and partial: it cannot be said to clarify the concept of legal normativity in any significant way and, accordingly, it can at best provide "the beginning, but

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[27] G. Postema, "Jurisprudence as Practical Philosophy" (1998) 4 *Legal Theory* pp.329-357, at p.335.

[28] This point has been convincingly made by N. Stavropoulos, *Objectivity in Law* (Oxford, Clarendon, 1996) at pp.55-61. There Stavropoulos mentions the risk, inherent in Hart's approach, of missing the objective dimension of law.

[29] The objective dimension of law has recently attracted the attention of several legal theorists. For an overview of this debate, the reader can refer to the essays in B. Leiter (ed.), *Objectivity in Law and Morals* (Cambridge, Cambridge University Press, 2001).

only the beginning of one possible philosophical analysis of the concept of legal obligation" – not a comprehensive insight into it.[30]

3.3 Natural law theory

The difficulties inherent in the positivist stance might induce us to revaluate the approach set out by the natural law theory. The concept of law embraced by natural law theorists is based on the belief that a definition of law must incorporate the notion of material correctness. It follows that the law must take in and fulfil the ideal of justice, understood to be a component of morality. In maintaining that some standards of morality should enter into the definition of law, natural law theorists accept the connection thesis, *i.e.* the claim that there is a conceptual, or necessary, connection between law and morality. Stated otherwise, if a norm is to be a legal norm, it will have to pass an ethical test: *moral* validity is a necessary condition of *legal* validity. They therefore articulate an "ethical" concept of law.

By incorporating an evaluative element into the definition of law, natural law theorists are well positioned to explain legal systems' claim to guide action. When law is defined as a valuable practice, rather than a mere social convention provided with sanctions, its claim to normativity is fully understandable because values can, as a matter of principle, create obligations. Thus, the naturalist explanation of legal systems' claim to authority is straightforward and immediate. In short, the naturalist argument has the following structure: since law is a practice that instantiates values, and values are entities capable of grounding a claim to guide action, law's claim to normativity presents nothing like a conundrum.

Now, if these fundamental assumptions of natural law theory do not come in the way of explaining law's claim to authority, other related and likewise essential features of natural law theory are more problematic. According to the naturalist approach, the law provides people with reasons to act in certain ways only to the extent that it incorporates basic values, universal and self-evident. Legal systems are viewed as concrete, specific, and historically determined instantiations of such universal standards: only to the extent that legal systems embody universal values and protect basic goods can they be considered valuable (and, then, entitled to claim authority over their citizens). Law's normativity is explicable only to the extent that a legal system incorporates pre-existent universal standards and does not veer away from them.

The general cast of this representation of legal systems is amiss. In this, natural law theories end up predetermining the range of goods worthy of being fostered under a legal system, thereby making legal values a *numerus*

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[30] S. Perry, "Hart's Methodological Positivism" in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.335. As Perry observes, a complete analysis of the notion of normativity will have "to tell us why and under what conditions the mere fact of general conformity to a pattern of conduct can help to create a reason for action, amounting to an obligation, for individuals to conform their own conduct to the pattern" (S. Perry, "Hart's Methodological Positivism" in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354, at p.335). Which is something that legal positivism fails to do.

clausus and in effect placing a quota on their number.[31] But this contradicts dramatically the well-grounded conception of legal systems as institutions open to an indefinite range of needs and evaluations: the law does not instantiate a given model of life, framed by a given selection of values, but is free to embody the most variable contents and to incorporate the values and goods that get actual recognition over time among social groups.

Hence, while we should reject the view that "any kind of content might be law,"[32] it would be wrong, on the other hand, to delimit in advance the legal possibilities in so a radical a way as natural law theories do. The requisite that law should come in the service of basic human needs must be understood as a limit to the possibility for a system to be simultaneously existing and unjust in the extreme,[33] but it does not justify setting up rigidly the substantive contents of law: legal systems are mainly shaped by the models of life endorsed by their members. These models can be heterogeneous and are often incommensurable. Far from being settled once and for all, the values instantiated by legal systems are embedded in history and in social relationships: they are not fixed entities out there to be discovered, as natural law theories maintain, but are rather created, or at least they get continuously redefined and reshaped by social groups in different historical periods and in different cultures. Hence, natural law theories are off-course in their attempt to establish in advance legal values and goods: a legal theory must give wide scope to needs in constant change, since legal contents and goods do not exist prior to, but only by way of, positive law. So we will have to account for legal practices on a conception of law operating without predetermined values and goods. Which natural law theory does not do.[34]

These general shortcomings of natural law theory reverberate on, and hence disqualify, its conception of normativity. It therefore becomes impossible for us to accept the accompanying explanation of law's claim to authority: an overall miscast conception of law can only beget a bewildering picture of normativity and a mystifying explanation of law's claim to make obligations and duties binding upon people at large.

4. Claim to Authority and the Concept of Law Revised

In the foregoing I have attested a failure, providing different reasons why the traditional schools of legal thought fail to explain adequately a legal system's claim to authority. But this failure is instructive: there is much to learn from it, for it enables us to lay the basis for a truer account of law's normativity,

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[31] For a definition of law in this vein, see J. Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon, 1980) at pp.276-277.

[32] H. Kelsen, *Pure Theory of Law* (Berkeley, University of California Press, 1967), at p.198.

[33] R. Alexy, *The Argument from Injustice* (Oxford, Clarendon, 2002, or. ed., 1992), at pp.40-68.

[34] Similar considerations have led Jürgen Habermas to conclude that natural law is no longer an option today (J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996, or. ed., 1992) at p.199). While Habermas' conclusion can appear excessive, it does point out the place where the natural law account of the working of contemporary legal systems falls short.

letting us as well to appreciate the close relationship that holds between this claim and the concept of law.

There can be extracted from the analysis just made one factor that is common to the failings noted. The root cause behind the failure of the traditional explanation of normativity (and of law's claim to authority) can be expressed thus. Each of the traditional schools bases its account of normativity on only one foundational element: the sanction, the internal point of view, or the notion of a universal value. But by appealing to one element to clarify a phenomenon as complex as that of legal normativity we lapse into a form of reductionism and, hence, wind up with an over-simple theory. So what the failures in question teach us is that if we are to account for law's normativity and for legal systems' claim to guide action, we need an integrated approach, an approach that brings to bear more than just one basic element.

It falls outside the scope of this study to delineate a general theory of legal normativity. I will only venture to say here that an institution must satisfy at least three conditions to present itself as normative: social efficacy, practicality and worthiness. It is the combination of these elements – rather than a single notion – that gives us the key to a legal system's claim to authority, or so I argue. A brief statement of these three elements will be a way forward in explaining an institution's claim to normativity.

Social efficacy is the first condition to be met if an institution's normative claim is to make sense. A neglected institution that claims to guide people's conduct will only be doing some wishful thinking: a claim of this sort, if understandable at all, is practically meaningless and unworthy to be taken into serious consideration. An institution's claim to be normative requires in practice, if not logically, that the institution be socially efficacious beyond a minimum level. Its claim will be totally irrelevant otherwise.

Second, there is (at least implicit) in the claim to authority a practical requirement: a legal system purporting to guide conduct will have to create reasons to act and not (or not only at least) reasons to believe. The former are indisputably practical reasons as opposed to the latter, which are theoretical reasons. Hence, a normative body which purports to guide people's conduct necessarily presents a practical dimension, too.

Finally, no claim to normativity can provide people with special reasons to act in certain ways unless the institution making this claim puts out valuable directives. Only a valuable practice can guide action, since "practices that are pointless, or inconsistent in principle with other requirements of morality, do not impose duties."[35] If a practice is not even conceivably justifiable, it will be conceptually unable to impose obligations. So the value in taking this or that course of action must be manifest in the concept of an institution claiming to be normative.[36]

Consider now what these general remarks entail for the law. To hold that law necessarily lays a claim to authority is to defend the thesis that law has to

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[35] R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978), at p.57.

[36] This relationship between the notion of "having a point" and that of legal normativity is discussed by N. Stavropoulos, *Objectivity in Law* (Oxford, Clarendon, 1996) at pp.59-61.

be an effective and valuable institution whose nature is practical. The analysis of a legal system's claim to authority forces us to define the law in terms of a composite set of factors, meaning as a balanced combination of social efficacy, practicality and worthiness. The very idea of law stands affected here. In recognising the necessary existence of law's claim to normativity we delineate a specific concept of law, essential to which are the three mentioned aspects of efficacy, practicality, and worthiness.

These remarks have some direct implications on legal theory and practice. First, they point to the necessary connection that holds between normativity and the concept of law: just as our notion of normativity will find its way into our theory of the nature of law, so this theory must be tested by looking at how it affects the concept of normativity. It can be argued in consequence that the traditional concepts of law, like their accounts of legal normativity, are (in different measure and to a different extent) inadequate in their failure to take into consideration the multiple dimensions of a legal system. Hence, the traditional approaches to law need to be replaced with a more integral and comprehensive theory. This is the first consequence (one in the negative) to follow when we consider the claim to authority to be an essential feature of legal systems.

The second conceptual consequence to follow from the recognition that the claim to normativity is an essential feature of law is in the positive. It connects up with the observation that there is a given practice, within legal systems, which undeniably presents the three features just mentioned: the practice in question is argumentation, and its importance cannot be overstated.[37] When argumentation takes place in an institutional context (as within the framework of a legal system), it presents the three dimensions essential to an account of the claim to authority.

Let us consider judicial reasoning, for example. Judicial reasoning is efficacious, meaning that officials, legal practitioners, theorists of law and citizens pay specific attention to it (or at least they do so in a well-functioning legal system) and take it into account (not necessarily uncritically) in the way they model their behaviour. There is, secondly, a practical aim in judicial reasoning, given its purpose to guide the conduct of its addressees – the parties involved directly in a court decision, on the one hand; and the wider audience of specialists and the public at large, on the

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[37] Here "argumentation," and the largely synonymous term "reasoning," designates a number of practices that vary considerably and yet are conceptually connected. Examples are ascertaining, systematising, interpreting, weighing, applying, and justifying legal norms; settling conflicts between directives encased in the same legal order; following precedents; constructing statutes; and providing a legal classification of facts. The conceptual connection is that these activities are all forms of deliberative reasoning, and as such are not entirely rule-bound forms of argumentation. For a similar use of "argumentation" and "reasoning," see R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.VI; R. Alexy, *A Theory of Legal Argumentation* (Oxford, Clarendon, 1989 or. ed., 1978) at pp.231-232; and N. MacCormick, "Donoghue v Stevenson and Legal Reasoning", in *Donoghue* v *Stevenson and the Modern Law of Negligence* (P. Burns ed., Vancouver, Continuing Legal Education of British Columbia, 1991, pp.191-213) at p.211; and N. MacCormick, "Argumentation and Interpretation in Law" (1993) 6 *Ratio Juris*, pp.16-29 at p.16.

other. Finally, as much as judicial justification may be discretional to some extent, it is neither arbitrary nor irrational. Legal reasoning must follow given forms and rational criteria if it is to be legitimate and have wide appeal: in no form does legal argumentation depend entirely on pure acts of will, since it cannot be given course to without rational tools. Judicial reasoning is thus an inherently rational practice, and so a valuable practice. In summary, we have here something that incorporates every element central to an explanation of the claim to authority.

Hence, an adequate concept of law, one by which we can explain a legal system's claim to authority, should be couched in the idea of argumentation. A conception of law as an argumentative practice seems particularly appropriate because, on this basis, we can recognise the practical nature and moral value of law without leaving out of account its social dimension. We can explain law's claim to authority to the extent that we understand law as the product of argumentation and argumentation as a rational enterprise. Hence, only a comprehensive approach based on the recognition of the centrality and ubiquity of legal reasoning can adequately explain law's claim to provide special reasons to act.

While I believe that it is a main challenge for jurisprudence today to work out in detail a similar concept of law and its implications on both legal theory and practice, I also believe that important steps in this direction have already been made by the theorists who have paid specific attention to the nature and role of reasoning in law.[38] For putting forward a fully-fledged conception of law as an argumentative practice has been the not-yet-accomplished target of a leading group of legal theorists since the 1980s.[39]

In my view, the most well-rounded of these redefinitions of the concept of law are Alexy's and Dworkin's. To make due allowance for the conceptual scope of reasoning, Alexy has redefined law as a "system of norms that (1) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution by and large socially efficacious and that are not themselves unjust in the extreme, as well as the totality of norms that are issued in accordance with this constitution, norms that manifest a minimum social efficacy or prospect of social efficacy and that are not themselves unjust in the extreme, and, finally, (3) comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness."[40] With this definition Alexy makes the concept of law consist, not only of rules, but also of principles, arguments, applicative procedures, and a claim to correctness. All these elements tie in closely with argumentative procedures. Thus, in his

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[38] In particular I refer to A. Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (Dordrecht, Reidel, 1987); R. Alexy, *A Theory of Legal Argumentation* (Oxford, Clarendon, 1989 or. ed., 1978); A. Peczenik, *On Law and Reason* (Dordrecht, Reidel, 1989); and N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon, 1994, or. ed., 1978).

[39] This research programme has been expressly set out in A. Aarnio, R. Alexy, and A. Peczenik, "The Foundation of Legal Reasoning" (1981) 21 *Rechtstheorie*, pp.133-158, 259-273 and 423-448, at pp.131-136).

[40] R. Alexy, *The Argument from Injustice* (Oxford, Clarendon, 2002, or. ed., 1992), at p.127.

redefinition Alexy presents us with a concept of law that takes seriously into account the role of argumentation.

In a similar vein, Dworkin writes that "law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is".[41] Here, law is made out to be primarily a practice: "law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process. . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense."[42] In this way, Dworkin puts interpretive reasoning at the centre of his theoretical interests and hints at a redefinition of law based on the notion of argumentation.

This is not to say, however, that Alexy and Dworkin have a fully-fledged and perspicuous concept of law as an argumentative practice. Their redefinitions fail to break radically enough with traditional jurisprudence. So they tend to uncritically follow the research priorities and main issues set out by the traditional schools of legal thought. In this way, they fall short of ascribing to argumentation the pivotal role it plays in the legal domain.

This much is evidenced paradigmatically in what Alexy has to say about the concept of the basic norm and the traditional canons of legal interpretation: he substantially accepts both, amending them but slightly. As for the basic norm, he finds the concept to be theoretically useful still, once its contents, as Kelsen sets them out, are reformulated to account for the conceptual connection between law and morality. As for the traditional canons of legal interpretation, Alexy sets these canons in a broader normative framework, that of discourse theory, but without questioning any of them.

Likewise Dworkin does not push through far enough into a coherent argumentative turn, since his potentially innovative statement that law is an interpretive enterprise is couched in a framework where the strong version of the right-answer thesis is upheld.[43] This thesis presupposes a conception of reasoning as something by which we come to know something objectively. Hence, on Dworkin's view, arguing correctly is not any different conceptually from knowing truthfully, in that both activities are in large measure descriptive and independent from the subjects carrying them out. This standpoint – beside being theoretically ungrounded, as MacCormick rightly observes – defeats the innovative import introduced with the

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[41] R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.410

[42] R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.413.

[43] The strong version of the right-answer thesis consists in the idea that for every legal case there exists one correct solution, which judges and lawyers can discover by rational inquiry. This is a two-part thesis: (1) contemporary legal systems are developed enough to provide for one solution (nothing less and nothing more than that) to each question arising within them; (2) legal scholars and practitioners are in a condition to always ferret out this solution by bringing to bear their professional expertise and rational capabilities, since the right-answer is hidden in law and only needs to be uncovered. For an introduction to the main versions of the right-answer thesis, see A. Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (Dordrecht, Reidel, 1987) at pp.158-161.

definition of law as an argumentative practice.[44] This last thesis, if coherently developed, asks us to shift from the idea of law as an objective entity, fully defined and out there only to be comprehended, to an idea of law as an unsettled practice which consists in evaluating reasons and confronting arguments. In this process, the right solution is not *discovered* and *described*, as Dworkin would have it, but *shaped* and *reconstructed*. In other words, law should be considered more akin to an exercise of rational criticism than to an act of knowledge.

Alexy's and Dworkin's proposals are therefore open to challenge at several places. In directing my attention to them, hence, far from calling for a wholesale acceptance, I urge for developing more radically what is only hinted at therein. By pursuing this direction coherently, we will see that reasoning not only comes into play at specific stages in the development of a legal system, but is also a defining feature of the law as a whole. Otherwise said, law consists, in the main, of argumentative activities which take place at different levels and are carried out by different subjects. This view entails a change in the notion of law itself: the underlying argumentative processes need to be regarded as making up the bare bones of the very concept of law. So the law does not emerge on the sole basis of social facts (like social conventions and political practices), as legal positivists and realists wrongly assume, nor does it emerge on the sole basis of moral considerations, as natural law theorists mistakenly believe. The structures and contents of law depend rather on the interpretative practices that take place in a given social setting. Unlike many other social phenomena, argumentative and interpretive practices consist in a complex intermingling of facts and values. Since, on this view, the law enjoins interpretation, and interpretation is essentially evaluative, the legal domain necessarily incorporates a critical moral component, and the legal validity of directives always depends on moral considerations. Evaluative considerations, then – especially in the form of a distinctive value or purpose imposed on a practice – are inherent in the concept of law, and hence are constitutive of it. Accordingly, describing what the law is will make it necessarily to establish what the law should be. For the law consists not only of a set of norms, but also of the justification of settled norms, and justification can neither be equated with social facts nor be entirely captured by conventions. In due course, this transformation of the concept of law will make a legal system's claim to authority fully explicable.

5. CONCLUSION

In this study, I have focused on a specific dimension of legal normativity, namely, legal systems' claim to guide people's conduct and give them reasons for action that they would not otherwise have. I have argued that the traditional accounts of this claim are hardly satisfactory: legal realism puts forward a sanction-based theory of normativity that fails to explain the notion of someone having an obligation and so cannot come to terms with law's claim to authority; sophisticated versions of legal positivism give us a rule-based account of normativity that ends up making of a subjective state –

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[44] N. MacCormick, *Legal Right and Social Democracy* (Oxford, Clarendon, 1984) at p.130.

the internal point of view – the locus of normativity, a method by which we cannot elucidate the objective character of legal obligation; finally, natural law theory bases the idea of legal normativity on the definition of law as a set of universal values fixed in advance and independently of concrete historical societies, but this view is hardly tenable. The inadequacies of the traditional accounts of law's claim to authority suggest that we should approach the issue on a different theoretical ground. I have argued that an appropriate notion of normativity comes from a simultaneous consideration of a set of elements, rather than just one. These elements combine into a fuller account of legal normativity, making it necessary to view the legal enterprise as an interplay of empirical, practical, and evaluative features. We have something of this kind taking shape, but only just do so, in the definition of the legal domain limned in the writings of some leading legal argumentation theorists. In defining law as an argumentative practice they recognise explicitly that an adequate comprehensive concept of law must of necessity incorporate empirical, practical, and evaluative dimensions. This way, and contrary to what is possible with the traditional schools of legal thought, the concept of law as an argumentative practice can explain in an appropriate manner a legal system's claim to authority.

In a nutshell, throughout this paper I have defended the thesis that recognising the claim to normativity as an essential feature of legal systems carries with it the need to redefine the concept of law in a non-traditional way central to which is the notion of argumentation. But this radical revision of the concept of law, needed to account for the legal system's normative posture, is only the beginning rather than the end of the story: this transformation of the concept of law opens up a completely new research programme for legal theorists, calling on them to redirect the focus of jurisprudence and flesh out a fully-fledged argumentative concept of law. Only so will we arrive at a comprehensive theory with which to understand current legal systems and attack the problems attendant on them.

Whereas in this paper I have confined myself to submit the idea of legal normativity to scrutiny and so to contribute to the studies of this specific problem, I have also (indirectly) aimed at attesting the value of a philosophical approach to legal questions. The practical nature of legal normativity does not marginalise the theoretical approach to the issue. For the practical dimensions of law's normativity and claim to authority can be fully appreciated only if we analyse them with the aid of theoretical tools.

These remarks suggest a more general point, namely, that the need to establish a dialogue between theory and practice cannot result in a retreat from the philosophical perspective. Resorting to an a-theoretical approach to legal questions in general, and to the questions that impact directly on legal practice in particular, can appear a convenient move. It will enable legal practitioners to break away from a field that they justifiably find arduous and challenging as it requires a specific knowledge and a peculiar mindset. The specific knowledge is provided by legal education only to a limited degree nowadays and the philosophical mindset is understandably not necessarily the one more common among lawyers. But escaping from theoretical thinking, tempting as it may appear today, would be disastrous. It will lead legal practitioners to conceive of their role as that of blindly applying pre-existing rules rather than that of deciding highly sensitive questions arising within an exceedingly debatable and intricate practice. In so it would be

jeopardised the very idea of the rule of law, an idea "far more complex and intelligent" than the notion of law as a system of standards enacted beforehand and there simply to be applied by decision-making institutions.[45]

Further, moving away from philosophy would have as an unavoidable consequence the result of impoverishing the analytical tools at disposal of legal profession. Abstract as it may be, legal philosophy provides practitioners with a specific and peculiar standpoint from which to observe the law's domain. In providing this additional perspective legal philosophy enriches, expands and deepens our understanding of legal systems, their essential traits and their basic problems. Far from evading the concreteness of legal practice, then, by conducting their analysis at a high level of abstraction, theorists provide legal profession with an alternative way of looking at concrete legal questions. The value of theoretical studies, thus, lies also in their power to analyse legal problems from a different angle. This in turn enables us to grasp the multiple dimensions of each legal issue and appreciate the complexity of legal practice. Therefore, practitioners can significantly profit from philosophical writings, even when these works may seem too abstract to have an immediate and direct impact on more specific legal debates.

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[45] R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978), at p.222.

BOOK REVIEW

THE PHILOSOPHICAL FOUNDATIONS OF ENVIRONMENTAL LAW: PROPERTY, RIGHTS AND NATURE. By Sean Coyle and Karen Morrow (Hart Publishing, 2004. Paperback, 228 pages, £18.00)

Probably the prevailing modern view of environmental law sees no obvious connection to jurisprudence. Environmental law is about regulation. As a discipline it is composed of various discrete statutory or case law developments, which have nothing necessarily in common with each other save that each purports to respond to some problem of modern living. It is not about philosophy, nor does it depend on its own distinct jurisprudence, in the way that we might say that 'tort' does, or 'contract' does. Environmental law, as a category of legal thought, has no philosophical foundation.

It is with these kinds of comments that Sean Coyle and Karen Morrow introduce their recent offering, and it is these kinds of comments which their book ultimately will succeed in dispelling. The main argument of the book challenges the traditional view of environmental law as a collection of discrete legislative responses to specific problems, and argues instead that it is the product of a rich philosophical tradition. This it does by situating environmental law within the broader context of theories of rights (and in particular property rights) and of the relationship between pubic and private law. It is an ambitious and highly original project, and one which was recently the winner of the second SLS Prize for Outstanding Legal Scholarship.

After a short introductory chapter in which a summary of the main argument is offered, the substance of the book begins in Chapters 2 and 3. Taken together, these chapters provide a sort of philosophical history of the common law concept of property, and reveal a shift from a conception of property intrinsically limited by moral (and so environmental) values to one where such values can be pursued only instrumentally. Chapter 2 effectively deals with the former of these extremes, describing the views of the seventeenth century natural law theorists which saw in the idea of property an intimate and necessary connection with man's place in the world. Here there is lucid and lively discussion of the familiar writings of Grotius, Hobbes, Pufendorf, and Locke, and there is more than enough to chart the intellectual development of these theories of rights, and to stimulate in the reader an awareness of and reflection upon the key differences between their main advocates. But more significantly for the main argument of the text, the prevalent themes of stewardship, of man's unique and privileged position to use and care for creation, succeed in revealing that it is not inevitable that collective goals or substantive moral values are related to individual (property) rights only instrumentally. Indeed, the authors argue strongly for an intrinsic connection: 'the intellectual, political, and philosophical currents which led to the emergence of individual ("subjective") rights in fact

perceived the extent of an individual's rights to be *essentially* limited and determined by the nature of those rights themselves' (p.57).

In the third chapter we find the contrasting position. In the legal theory of the eighteenth century, the emerging view has property (indeed, has law) as the regulation of interpersonal relationships, underpinned by posited rules rather than philosophical ideals. Insofar as this is true, it represents a significant departure from the natural law theories. Far from being intrinsically limited by environmental (or any moral) goods or values, such a positivist view of rights has private property standing in direct opposition to the collective needs of the community. Liberal rights define a sphere of freedom for the individual, which is free precisely to the extent that it disapproves of any form of official interference in the name of public welfare. As the common law comes to display a concern with individual rights and duties (in itself a significant development, not at all in keeping with the traditional theory of common law as unconcerned with doctrinal coherence or systematicity: see pp.61-64), the law itself is set in opposition to those rights. Its function is to hem them in: it is a posited system of rules, which curtails, amends, and adjusts the rights of individuals to facilitate the common good (p.64). In other words, legal restrictions on individual rights in order to facilitate environmental protection (or pursue any other moral good) count as legislated (posited) restrictions on those rights, rather than as reflections of the intrinsic nature or quality of those rights. Rights in turn, are the product of conventions. They are constituted by the existence of contingent social rules and practices, and have no necessary connection to any moral truths.

This shift in our thinking about rights is admirably contextualised in Chapter 3, both historically and intellectually. A substantial section on 'Property and Liberal Rights' (pp.62-83) considers the transformation of property through the writings of Rousseau and Kant, which provide (sometimes novel) philosophical grounds for the treatment of the common law as a *system*. This latter finds its expression in the writings of Blackstone, and eventually Bentham, and the views of both of these are related to the general intellectual shift towards positivism and doctrinal legal science. Moreover, in all of this the authors' work is eminently readable, the prose lucid and consistent notwithstanding the complexity of the material, and indeed of the main argument.

In the fourth and fifth chapters the authors' attentions turn more ostensibly to environmental law. The analysis in the first of these details 'the evolution of common law attempts to reconcile pollution-based conflicts of property rights brought about by the Industrial Revolution' (p.6), first through the common law of nuisance, and then in the development of statutory schemes designed to regulate on a larger scale problems of public health, pollution control, and planning. Here the text takes on the character of doctrinal analysis, and contains a useful narrative account of the development of these environmental rules again set in its historical context. But what is most surprising (and most crucial for the central thesis) is that the authors find a doctrinal framework which is philosophically sophisticated, and reveals a concern, notwithstanding the developments in the theory of rights, with an exploration of the intrinsic moral value of property rights. With this in mind, the last chapter turns to the future of environmental law, and we find that we have completed a kind of intellectual circle. Modern environmental law concerns (for example stewardship of resources, sustainable development)

are portrayed as reflecting the same kinds of concerns found in the seventeenth century natural law theories of right insofar as they concern man's relationship to the world and his entitlement to use natural resources. The problem for the modern environmental lawyer is that arguments about environmental law must be made in the context of a legal system which is deeply positivistic and committed to a view of rights as interpersonal (that is, regulating relationships between man and man, not relationships between man and world). The authors acknowledge that given the developments not only in legal theory, but also in science, philosophy, and theology, an account of property as intrinsically limited by environmental concerns is probably no longer possible. The only answer is a fundamental shift in thinking, and to this end the book concludes with a kind of rallying call to environmental lawyers, who seem uniquely positioned to articulate 'a deeper conception of environmental responsibility and intrinsic value' (p.215) in the face of a legal order otherwise preoccupied with technicality and positivism.

This central argument, linking environmental law to its philosophical foundations through analysis of rights and the common law generally, successfully permeates the book. There are frequently short summaries to re-orientate the reader (usually in the form of a discreet prefatory paragraph here and there), and the overriding impression is of an original and rigorous argument well sustained throughout the text. Moreover, there is a good deal in this argument which is persuasive, and no doubt it offers a plausible challenge to the prevailing theory of rights in our common law. But that said, much of what is valuable and interesting about this text is that in the course of the argument it reveals so many more asides and lines of enquiry that will stimulate even the reader who has no commitment to the specific case of environmental law. For example, throughout there is evidenced a sophisticated understanding of positivism as a theoretical position, located in the idea of laws as *articulated* rules and standards. Such a (perhaps literal) view, not necessarily dismissive of work on the separation of law and morals, but neither depending on it in any way, allows the introduction of commonly unremarked features of positivism, perhaps best exemplified by the short discussion of Kantianism as a ground of positivism on page 71. Elsewhere there are comments on the relationship between the Roman ideas of *dominium* and *ius*, on the nature of legal commentary (specifically the legal treatise), and, perhaps most usefully of all, on the historical contingency of theories of rights. Of course, no review of this length could hope to do any justice to any of these issues. The present point is no more than that in this book we have a rich and varied text, which should stimulate as much as it informs.

In many ways this is a remarkable piece of scholarship. To capture not only the development of the rules of environmental law as those traditionally have been understood, but also the broad ideas and theories of rights and of common law upon which these rules must depend is a considerable achievement, and one seldom tackled (at least, not to this depth) by modern lawyers in related disciplines. Probably there is much in this text to support the general argument that the study of 'black-letter' law is made richer and more profitable by an appreciation of the philosophical and/or historical underpinnings of the rules in question, and with those given to this view this text will resonate happily. But it will appeal also to legal historians, to legal and political theorists, to property lawyers, (of course) to environmental

lawyers, and more generally to anyone interested in the development of the common law. None of which is to say that it is an easy text: far from it. The main argument is detailed and sophisticated, and affords evidence of a masterful understanding of the boarder political and legal theories involved, and whilst the text is throughout accessible and lively, parts of it will need to be read more than once to ensure complete understanding. But it is a text worth returning to, and surely will repay careful study.

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