

The Depiction of Unwritten Law

by

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A thesis
presented to the University of Waterloo
in fulfillment of the
thesis requirement for the degree of
Doctor of Philosophy
in
Philosophy

Waterloo, Ontario, Canada, 2016
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I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

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Abstract.

Even though tacit legal norms are deeply important to our past, present, and future, the very idea of unwritten law has been difficult to pin down, and problematic in a range of ways. Existing discussions of the phenomenon fall short of adequacy on one of several fronts: either they have focused on describing the normative features of one *kind* of unwritten law, or completely *conflated* the study of unwritten law with natural law, or else offered examinations of unwritten social *rules*, focussing on (mere) custom, ethics, and/or etiquette. A particular defect is the fact that unwritten law has not been given a treatment by those working in the tradition of analytical jurisprudence.

My thesis introduces a novel means of analyzing and explicating the elusive concept of unwritten legal rules, striving thereby to advance the state-of-the-art. In what follows I argue that unwritten laws are informally publicized rules held on the threat of formal sanction by an appropriate political authority. I argue that a law is informally disseminated just in case the appropriate governing theory of law, known to subjects, provides those subjects with a set of instructions about who to defer to concerning the contents of the law, absent dissemination in official venues.

I propose that there are at least five potential kinds of unwritten law routinely recognized in legal studies: operations, implicit constitutions, justice norms, fiat rules, and secret laws. Through careful examination of extant theories of law (Aquinas, Hobbes, Foucault, Marx, Austin, Fuller, Hart, and Dworkin), I argue that there are identifiable structural features of the contents of these theories that make them more or less likely to endorse the legal validity of each kind of unwritten law. Throughout the course of the dissertation, I show how we are able to diagnose the ways in which these structural features of our theories of law differentially support the validity of—and shed important, additional light upon—each potential variety of unwritten law.

Acknowledgements.

This work could not have been completed in its current form without the mentoring and active feedback of my supervisor, Dr. Brian Orend. I am grateful for his honesty, professionalism, and seasoned wisdom.

I could not have hoped for a better committee. I owe a debt of gratitude to Dr. Dennis Klimchuk who first planted the seed of this project in my head more than a decade ago. I am also especially grateful to Dr. Heather Douglas for her expertise, good humor, and intellectual versatility. I would also like to offer my sincere thanks to Dr. John McLevey and Dr. Mathieu Doucet for their comments.

I could easily fill the rest of the page with names of those who have influenced the development of the current thesis. I will confine myself to only a few. Special thanks goes to Alex Wellerstein, Neil Braganza, Brandon Fenton, Steve Coyne, Nomy Arpaly, and Elijah Milgram for their thoughtful feedback throughout the course of the dissertation on potential approaches and case studies. Dr. Paul Thagard, Dr. David DeVidi, and Dr. Steven Weinstein deserve credit for showing me where some nearby intellectual minefields are located (in social psychology, game theory, and Wittgensteinian scholarship, respectively). I also owe thanks to Greg Andres, Nicholas Ray, Wesley Buckwalter, Chris Lowry, Tim Kenyon, and Patricia Marino for their advice and encouragement on related ideas.

As philosophers we are sometimes expected to think about the intellectual foundations of our work on the model of axioms, but I find that my intellectual foundations can be found in the support, engagement, and encouragement of my friends. I owe my sincerest gratitude to W. James Jordan and Shelley Jordan, Ashley Keefner, Nathan Haydon, Corey Mulvihill, Paul Simard Smith, Sara Weaver, Peter Blouw, Ian MacDonald, Rosalind Abdool, Eric Hochstein, Susan Dieleman, Kyle Johannsen, and Jason Breen.

Last but not least I would like to thank my students for keeping my ideas alive, and my family for their support.

*Dedicated to the baristas
of Kitchener-Waterloo*

*Jess Fallon
makes
pretty good coffee.*

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CHAPTER I. INTRODUCTION

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

Oliver Wendell Holmes (1986-7)

I. Varieties of unwritten law

II. Informal dissemination

a. Ways of knowing law

i. Folk deference and the basic picture

1. Legal appearances and legal verity

2. Rules of the system and rules of change

3. Pictures and uptake

ii. Expert deference and the sophisticated picture

III.A systematic account of informal dissemination

a. Chapter summary

Scrutiny into unwritten law is often done with a sense of urgency. It is a commonplace for liberal democracies to see unwritten law as a perversion of systems of governance, fit to be replaced with public codification. Public periodicals and academic journals may decry the use of secret law as an apparently insidious legal construct – a construct that seems best understood as a form of unwritten law. Indeed, there is a very real sense in which the history of systems of law has always been a history of the unwritten law; tacit legal norms have never gone unmentioned. Worries about such laws are especially poignant in times of civil unrest, as unwritten law is a potential point where a legal regime may be especially vulnerable to critique. With each new pass over extant studies of the law, we renew an ongoing project to discover its hidden facets.

And yet, while the phrase 'unwritten law' has a great deal of purchase in our legal traditions, the essential structure of the abstract concept remains something of a mystery. Existing discussions of the phenomenon of tacit legal norms are boundless, but fall short of adequacy on one of several fronts: either they have focused on describing the normative features of one *kind* of unwritten law, or completely *conflated* the study of unwritten law with natural law, or offered examinations of

unwritten social *rules*, focussing on (mere) custom, ethics, and etiquette. These vices might be lessened by an account that makes use of the methods and standards of critique embodied in the tradition now known as “analytical jurisprudence,” exemplified by such figures as HLA Hart. And yet, it seems to me that the literature in analytical jurisprudence has largely passed over more fundamental questions about the nature of unwritten law considered as a concept worthy of investigation in its own right. Unwritten law is only in some respects a well-trodden field, profitable in its own way; but if we set ourselves to dig a little deeper beneath the dirt, we may unearth a buried city below.

The idea of unwritten law exudes a tacit menace. It may seem very much like Holmes’s dragon, referred to in the opening quote: a thing to be lured and conquered. Prudence dictates that if we aspire to do away with unwritten law, we must first take steps to understand more widely and deeply the phenomenon we are trying to do away with. But a necessary second step is that we should take stock of the various ways in which blows have already been secured against our dragon, by those adventurers who have attempted to tackle the beast in their own fashion. In the main, these are the philosophers of law: those who have proposed and defended criteria for the explanatory adequacy of any concept of legality. **My original contribution to knowledge, and ultimate aim throughout this dissertation, is to provide a systematic, modest, and interesting methodology for articulating the conceptual boundaries of unwritten law.** This Introduction provides a concise overview of key distinctions which we shall delve into, in greater detail, in the later chapters and with the aid of some of history’s most influential philosophers of law, including Aquinas, Hobbes, Austin, Marx and Foucault, and on to such present-day figures as Hart, Fuller, and Dworkin.

1. Varieties of unwritten law

We shall see throughout this dissertation that at least two things are true about unwritten law. At the outset, we should be able to infer two things about unwritten laws. First, that unwritten laws are *potentially diverse in kind*; second, that they are *absolutely everywhere*. Consider these examples:

(a) **Implicit constitutions.** Over the past 40 years, the United States judiciary has been embroiled in a conflict over the best methods of interpreting the Constitution and founding documents. Traditionally, justices on the Supreme Court have tempered their interpretation of the Constitution by implicitly drawing upon moral norms. There are a number of examples where the Courts have arrived at rulings that have no direct and specific grounding in the contents of the Constitution: e.g. dual federalism, vested rights, fair procedure, equality before the law, and the right to privacy. (Grey 1975, 708-709) We shall examine some of these more specifically in future chapters. The right to privacy in particular evolved out of interpretations of the meaning of due process and freedom of association, first and most explicitly in *NAACP vs. Alabama*. (NAACP vs. Alabama 1958) And this is by no means just an American quandary, as roughly analogous examples can be given in the context of the government of Canada and the European Union. So we might reasonably entertain the notion that, in each of these cases, there is an implicit constitution, discovered or elucidated by judges who seek to articulate fundamental norms that bind the political community at the root.

(b) **Secret rules.** During the presidency of George W. Bush, the Office of Legal Counsel (OLC) advised the executive branch that ‘enhanced interrogation techniques’ were qualitatively distinct from torture, thus permitting those techniques to be used by the

government without violating federal law. The OLC's opinions served as "functional amendments to the scope of congressionally-defined law, for purposes of executive enforcement". (Kutz 2013) Such policies were communicated to the executive by senior civil servants and not disclosed to the public, but nevertheless had an effect on the operational meaning of the terms of law that governed the actions of American citizens, and promulgated through the press's discovery of the practice. For want of a term, we might refer to secret instructions which have this kind of effect on enforcement as a particular sort of secret rule.

Another example of the secret rule from international law would be the quite common practice of sovereign states including secret provisions within otherwise public peace treaties or treaties of alliance. This was done, e.g., because it was thought that the secret provisions were either too complex or else too controversial to be understood and appreciated by the general public. More often, it was the latter, and the secret provisions often referred to such sensitive matters as the governing of minorities within contested territories. One of the most scandalous examples in recent times was the secret provisions contained within *The Treaty of Non-Aggression between Germany and the USSR* (more popularly known as the "Molotov-Ribbentrop Pact"), signed and promulgated in 1939. The secret provisions therein contained detailed deals about the partitioning of Poland between the two countries, as well as the mutual acknowledgement of certain "spheres of influence" for each country throughout Central and Eastern Europe. (Orend 2013, 190-2)

(c) **Norms of justice.** During the rule of the German Third Reich, sedition was harshly punished by the prevailing government. Some Germans engaged in resistance against their government in secret, and were betrayed to the ruling party by friends and loved ones. After the fall of the National Socialist regime, the betrayers were put to trial by the Allies for their acts. When put to trial, they claimed that they were merely obeying the law of the Reich. The international court had another opinion: that their betrayal was a *crime against humanity*, and could be punished on those grounds. (Groarke 2013, 257-9) (Hart 1961, 208) Their decision reflected a tacit norm of justice, where prior convictions about equity seemed to function as law, despite lack of more commonplace legal virtues like precedent or established jurisdiction.

What is peculiar about justice norms is that they involve laws that may be seen to emerge *ex nihilo*. They were not officially recognized until the case arose, and thus (to that extent) seem to have been unwritten laws. To make matters murkier, some of these norms of equity end up being qualified heavily over time, altered by new thoughts about what the law needs to do for the purposes of the apparent requirements of justice.

(d) **Fiat rules.** In the ninth century the king of France suffered a shortage of wine and petitioned the monks at Saint-Denis to hand over a portion of their reserves. The monks delivered on the king's request. Yet afterward, the king came to expect the wine as a tribute in perpetuity. (Graeber 2011) In short: the king made a request, and the request became a standing rule when he saw he could get away with treating it as such. The cleverest subjects could have easily foreseen that the king's initial request was going to lead them down a slippery slope, and that capitulation on the first occasion would obligate them to continue providing the king with wine from there on in. This is a kind of fiat rule, where a complex intermixture of authority, common expectations, and the acquiescence of subjects conspire to create a rule that has the force of law.

(e) **Operationalizations.** Consider the following illustration discussed by HLA Hart. Suppose that the municipal government of a city puts a sign at the gates of a public park that reads: “KEEP VEHICLES OFF THE GRASS”. (Hart 1961, 126-132) Now suppose that a citizen in a motorized wheelchair were to cross the green. Question: *was the citizen breaking the law or not?* This is an example of a case where the letter of the law does not provide adequate instructions on how to arrive at a suitable verdict. Such cases are more or less ubiquitous in jurisprudence; indeed, in some ways it is what jurisprudence is all about. Hart refers to these as “penumbral cases,” where the exact meaning of the law is not settled prior to judgment, and must be explicated through judgment. But, to be more precise, the unwritten aspect of these penumbral cases can be found in the ambiguity of how to operationalize the demands of the law by transforming abstract words into practical rules that govern action. When these interpretations of the written law are not themselves formally disseminated, they form their own subspecies of unwritten law, which we will call the tacit operations of law.

This rough taxonomy only describes the *potential* varieties of unwritten law; independently of further analysis, and on first blush, we can only suppose they are unwritten rules. But even if we cannot yet be confident in their status as unwritten law, they are all surely *near misses*. For one thing, at the very least, each of the taxa describe some kind of public phenomenon. There is no doubt that these social phenomena exist under some description, and it is beyond question that they all have the character of rules. But it is by no means clear whether or not these are examples of *legal* rules – whether each of the taxa counts as unwritten *law*, or is merely an instance of some kind of unwritten social *rule*. The problem is with the notion of *proper jurisdiction*: whether or not some unwritten rule counts as an unwritten law depends on whether or not the speaker is the right kind of person to offer sanctions. There are many different *a priori* accounts of what counts as proper jurisdiction – many different ways of drawing the “picture of law”, so to speak.

Second, laws are rules prescribed by the appropriate social authority which guide the actions of citizens, and which must be obeyed under threat of official sanctions. Given that each of the taxa involve proscription of action, leveraged by the potential threat of official sanctions, it seems plausible that each case *might* be the expression of law.¹ Yet these are all cases where the law is left implicit; all of them are disseminated to the public in an informal, deviant, or peculiar way. (Fuller 1971) As a result, a law-abiding public possessed of intellectual good faith might still reasonably question whether or not some or all of these rules are truly legal. It is part of our task to figure out whether or not their doubts are misplaced and, over the course of this dissertation, we shall look in detail at each of the five kinds enumerated above.

¹ By the ‘threat’ of ‘formal sanction’ or ‘official sanction’, I mean to identify the relevant kind of institution whose rules we are investigating, and which we would like to call ‘legal’. By that phrase, I mean something approximately like this: the threat of formal sanction means to be at justifiable risk of being found at fault by the kind of political institution that fits the appropriate picture of law, through a venue that that institution has designated as official for the purposes of settling its rules. Here, ‘institution’ is used as a broad term, roughly along Searlean (2010) lines, as a system of norms held through collective intentionality that impose statuses upon persons, which in turn grant powers and impose obligations within the ambit of the institution. Notably, I do not mean ‘threat of formal sanction’ to always imply coercion in the form of penalties, as in the criminal law; nor do I mean that all rules of that institution must involve threat of formal sanction. Instead, I mean to point to rules that hold for a political institution, given that that institution can be uniquely characterized as empowered to impose threats of formal sanction, relative to other institutions which lack such powers. (I am grateful to Dennis Klimchuck for pushing me on this point.)

2. Informal dissemination

The difference between ‘written’ and ‘unwritten’ laws has to do with a difference in the relationship between the laws and their dissemination.² But what does the difference amount to? We would fare well in contrasting written and unwritten laws if we looked more closely at the conditions that are necessary for subjects to recognize a law, as well as the typical features of the two forms.

There are three different features of dissemination. First, the spreading of knowledge of the law occurs in different *ways*, i.e., the vital difference between written and unwritten laws is that they take different routes to dissemination, formal or informal. Second, we should understand that dissemination occurs in different *degrees*, i.e., that both written and unwritten laws can be relatively prominent (i.e., advertised) or relatively obscure (i.e., hidden in the back of the library, or in the midst of a senior civil servant’s briefing to a government minister). Third, we need to observe that *the contents of laws make different demands* on the ways they are disseminated to subjects of good faith, and so that while in some cases formal advertisement of the law is unnecessary and redundant, in other cases it is vital.

At core, the distinction between written and unwritten laws is that the laws are disseminated in different *ways*: the dissemination of the written laws has a formal or *official* character, while the dissemination of the unwritten laws does not. The official dissemination of a rule consists in three conditions: the presentation of a rule in a *venue* that is accessible to the public, in such a way that it faithfully conforms to the expectations of *the right social authority*, and presents it in such a way that it is *self-described as a law*. In short, a written law is disseminated by faithfully representing the decrees of the rulers as laws, typically in a venue that is tailored to serve that purpose (e.g., the venue for the dissemination of United States administrative law is the *Federal Register*). In contrast, while unwritten laws may also be presented in some publicly accessible venue, and in some manner of speaking these rules need to conform to the expectations of the rulers, these laws do *not* wear their legal status on their sleeve. For example, if we were to consider a set of rules that hold when backed by the weight of history or custom (e.g., many of our justice norms), such rules will appear in the venue of everyday common practice. Often, law is found in deeds and not words. (Fuller 1971, p.64-70) In such places, the practice will not admit of any self-description. (Indeed, at such points, frequent reference is made to the practice, or principle, being “self-evident”.)

Dissemination can also occur to different *degrees*. This fact is perfectly obvious when we compare the rules passed as law by the legislature but which are rarely consulted (e.g., the tax code) and compare them to laws that are widely advertised by signs in the salient contexts of application (e.g., parking bylaws). Both are examples of written law, but one appears in a venue that is easily to access by the public while the other is not. As a matter of vocabulary, we can make this distinction explicit: laws that are prominent to a high degree are *advertised*, while relatively non-obvious are *obscure*. All the same, we do not think a particularly obscure tax-code is any less of a law, or any less of a written law, just because it is obscure; we do not expect the written laws of the tax-code to be plastered on every street corner. (A similar distinction between dissemination and publication is observed by (Grant 2006, 323-5).)

It is worth emphasizing that the degree to which a law is disseminated is independent of whether or not it is *formally* or *officially* disseminated by the appropriate political authority. An unwritten law can be utterly obvious to everyone and still not be formally disseminated (e.g., conventional aspects of the common-law); a written law can be utterly obscure (e.g., the tax-code),

² I use the term ‘promulgation’ to mean something equivalent to ‘dissemination’. That said, I recognize that some sources prefer to reserve the word ‘promulgation’ to refer to formal dissemination for its primary meaning. (<http://dictionary.reference.com/browse/promulgate>)

and nevertheless count as formally disseminated. A formal venue, roughly, is one which bears the signs of the steward of the public trust, and bears those signs in a way that conforms to the technical regularities conducted by the caretakers of that office.

While all laws must be disseminated *in some sense or other*, it is not true that every law must necessarily have clear formal advertisement. The technical aspects of the law prohibit making every rule known to the people, so part of the system of laws shall always be unadvertised to the majority of subjects. An apt example of an obscure written law can be found in the law of Roman Emperor Caligula, who was reputed to have posted all his laws at the top of high pillars in small writing, so as to be unreadable. (Grant 2006, 321-2) In our idiom (or, anyway, for purposes of present illustration) we might say that these laws were formally promulgated, hence ‘written laws’, but *obscure*.

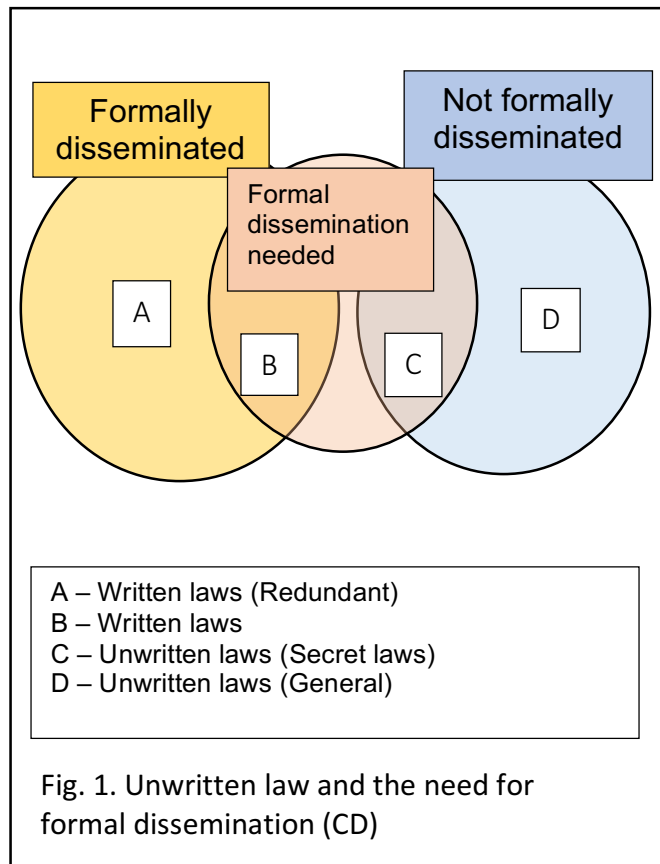
For the purpose of coming to understand how it could be the case that a great many cases of unwritten law are utterly obvious, and yet not formally disseminated, we will need to make one final observation: not all laws need to be disseminated officially in order to be rationally followed.

When an official city sign on the side of the road reads “No parking”, it is in most respects an especially significant case of written law. This is exactly what one might expect; as any weary road traveller can attest, municipal parking bylaws in urban areas seem so mendacious and arbitrary that you need signs along the road in order to follow them. But if the parking bylaws were somehow knowable as laws without the subjects needing to consult any signs, then those laws would be able to persist across time without having to be explicitly recognized by the legislature, except when the time comes to enforce them.

When does a law not *need* to be formalized? I would like to abstain from offering a robust general characterization of the conditions where formalization is necessary at this stage of the dissertation, since it seems to me that what counts as ‘necessary’ or ‘unnecessary’ will depend on the good faith verdicts of communities and governments, predicated upon the approach to law they take for granted. In due course we will have to say something about what it means to be reading in good faith, and what kind of communications network is available to the subject, and whether subjects are at risk of running afoul of the law.

That said, for the moment, I do think some idealized ‘common-sense’ features can be enumerated if we just reconsider the example of an unwritten law governing street parking. Imagine a case where there was a manifest convention in place where everyone was visibly parked on one side of the road, and this convention is necessary to maintain traffic flow (owing, e.g., to the narrowness of the road), and traffic flow is commonly thought to be essential to the common order. Such a case would satisfy the criteria for dissemination, in that the custom is ‘manifest’ (hence

and nevertheless count as formally disseminated. A formal venue, roughly, is one which bears the signs of the steward of the public trust, and bears those signs in a way that conforms to the technical regularities conducted by the caretakers of that office.



accessible in a public venue), is a genuine conventional rule because it holds across time and across situations, and has the form of a legal rule because the narrowness of the road clearly demonstrates that some convention or other is essential to the common order. If you have all that, then formal recognition of the law by the legislature might very well be thought to be redundant. The good faith participant need only to open one’s eyes, so to speak, to see the prevailing practice.

So there are three characteristics of dissemination: it can be done in different ways, to different degrees, and with different requirements for uptake. (Fig.2) These three characteristics of the law help us to understand both the conceptual and ideal features of unwritten laws. Each feature tells us something different about the nature of such rules. A necessary condition for unwritten law is that it lack formal dissemination; no formally disseminated laws are unwritten laws (Fig 1., AB). But in the ideal case, unwritten laws also do not need to be formally disseminated to be followed (D), and such cases are most dramatic and vivid when the rules are not even informally advertised. Many of these obscure unwritten laws rest upon background assumptions that we take for granted before any court put them to paper. For example, restrictions upon the application of the law will often derive from the principle of equity, as in the grudge informers case.

Fig.2. (In)formality	Formal / Official	Informal / Unofficial
Dissemination	Written law	Unwritten law
High extent	Advertised, written (e.g., municipal parking signs)	Advertised, unwritten (e.g., conventional parking practice)
Low extent	Obscure, written (e.g., the tax code)	Obscure, unwritten (e.g., principles derived from equity, secret laws)
None	Non-law	Non-law
Threat of political sanctions	Laws	Mores (non-laws)

Taking stock, we are well-placed in our inquiries if we notice that the concept of unwritten law obeys the following constraints. Unwritten laws are *rules which are legally binding*, or part of a system of norms that are legally binding as a joint enterprise; that legal bindingness originates in the capacity of the relevant institutions to both define and threaten to engage in *formal sanctions* of conduct; and where the threat of formal sanction is *not disseminated through official venues*; but the rules are knowable anyway. The five varieties of unwritten law are distinctive as varieties of unwritten law insofar as they satisfy those criteria, consistent with the appropriate picture of law.³

2.1. Ways of knowing the appropriate picture of law

Up to this point I have been making wide use of the concept of ‘dissemination’, as if it were perfectly obvious when a law was disseminated or not. But it is reasonable to ask: when is it appropriate to believe that a law has indeed been disseminated (let alone *informally* so)? Consider, again, the example of the tax-code: despite being relatively obscure as a law, it is a fact of the matter that anyone who does not know the tax-code will at least know *how to find out* if they tried. This ability

³ It may seem to some commentators that there is greater disunity among the five varieties of unwritten law than there is unity. The point is well-taken, though it is endemic to any definitions that apply to any non-basic categories. For example, famously, the family resemblance between all different members of the extension of the concept “furniture” is relatively low (it including everything from armoires, to televisions, to kitchen sinks); the meaning of the concept relies abnormally upon the instructions for use embedded in its intension.

to know which experts to defer to, and which books to refer to, tells us something important about the nature of dissemination itself: namely, that it is primarily about whether or not subjects have the ability to find out what the law requires of them. This demand is sometimes referred to as the *access-condition*, and it is properly regarded as a *sine qua non* for the law. (Grant 2006) In my view, the access-condition must be cashed out in terms of *access of the folk to legal expertise*. First and foremost, the ability to know the law involves some prior, rudimentary sense of knowing who to defer to: educated persons, lawyers, jurists, and legislators. Folk knowledge of the chain of deference and knowledge of who counts as expert is an essential feature of access to systems of law.⁴

It might seem as though there is a very significant difference, here, between *referring* to literal expressions of a code and *deferring* to the testimony of experts. If you are able to read the printed text of some law in front of your eyes, then it shall certainly have a feeling of weight, permanence, and stability that is not necessarily inherent in mere testimony. But this difference is merely apparent. When you refer to the published signs of the law, you are helping yourself to their literal meaning; and the literal meaning of law simply involves referring to representations of what ought to be done as offered by the right kinds of people. This is a truism that holds for all pictures of law. Even the divine law depends on deference to the will of God; even an anarchist who claims extreme autonomy in deciding the demands of law for themselves will claim the authority to be deferred to, as far as it extends to their own private sphere. That is why deference takes central place in an account of the dissemination of law.

When people are thoroughly confused about who has a reasonable claim upon the ability to interpret the laws, it can be fatal for the prospects of law as a governing force. Franz Kafka demonstrated that he had an ear for the difference between different levels of confusion and their effects on what we intuitively consider to be *law*. K., the fastidious protagonist of Kafka's *The Castle*, is a land surveyor who arrives in a remote kingdom to complete a contract for the local sovereign. The ruler Count Westwest lives in a castle above the city. Through a series of strange encounters with the local populace, K. discovers that he is forbidden to speak with his employers directly. When he does make contact with representatives of Westwest, they give advice that is uncanny, obtuse, sometimes contradictory, and always unhelpful. All the same, he has a fairly good idea about who speaks with the force of law – i.e., who is the force that the citizens defer to, and the people who bear the authority of the office. (Kafka 2009) A lively contrast can be made with Kafka's *The Trial*, in which the protagonist Josef K. faces a barrage of obstacles: accused of an unknown crime, by persons with indeterminate authority, in the name of an indeterminate sovereign, implemented by a faceless bureaucracy, and represented by an attorney who possesses no knowledge on how to defend him from conviction. (Kafka 1925) It is obvious that the second sort of case does not involve anything that it is useful to refer to as a *dissemination of law*, while the former case does seem to possess an intelligible legal order, and hence invites interpretation.

This is all just to say that when we talk about the 'dissemination' of a law, we cannot entertain any unreasonable expectations about how much knowledge a public possesses about the local legal system. Some laws are better known than others, and require more precise instructions in order to be followed. In many cases, individual laws are thought to be disseminated, not because each citizen is aware of those laws, but because citizens have the knowledge required to learn about the law when the situation arises.

For that reason, it seems reasonable as a first step to try to articulate the bare minimum conditions under which a rule can be thought to be disseminated. It seems part of the answer must

⁴ HLA Hart refers to the stable organizational features of the law along with the rules of jurisprudence as both being part of what he calls the "rules of adjudication" of a legal order. (Hart 1961 96-7)

be this: a law is disseminated when a sufficiently large subset of the subject population has *basic knowledge* of how the legal system works, so that the subject of the law knows who to ask when they identify the need. The idea is that subjects who possess ‘basic knowledge’ may or may not know what a particular law is, but they do have enough information at hand that they know where to look in order to find out -- which experts to defer to, which books to refer to.⁵

Folk deference and the basic picture

So what is “basic knowledge” of the law? It amounts to the body of justified beliefs that are required in order to figure out the organizational structure of the society, such that people will be well-placed to assess and interpret the laws (whether written or unwritten). At least on first blush, it seems that there are at least three ways in which subjects might find it difficult to ascertain the legality of some implicit rule.

Legal appearances and legal verity

At least in the first instance, rules are ways of explaining the stuff we’ve taken for granted when our expectations have been frustrated. However, there are many different ways of carving up an explanation of what has been taken for granted -- many different “whereas” clauses that might be fixed to a rule, grounded in different kinds of reasons for action. To be sure, we know that laws must derive from some appropriate political authority, and in that sense they ostensibly provide some reason to act -- but what sorts of reasons should we expect the legislators themselves to offer? Some will expect that the stewards of the public trust will be moral and sensible, and others will deny that these stewards will offer little or no reasons for action at all apart from “I said so”.

It is a fact that everyone approaches the law with different cognitive attitudes, and can have different relationships to it and, as a result of these conditions, people may have very different ideas about what the law even looks like. For example, some will approach the topic by assuming that the law functions as a kind of steward for the common good to facilitative collective action, while others will enter into the discussion by assuming it is a structured assembly of social relations that generally impedes efforts to secure collective solutions to collective problems: e.g., by facilitating the interests of the dominant social or economic class, and/or by oppressing the pillars of the society. Attempts to resolve confusions over this question are attempts to talk about the *appearances of law*, as far as they relate to the centrality of reasons to the life of the law.

In the scholarly literature on the philosophy of law the appearances of the legal order are thought to be a function of the *perspective* that one occupies in relation to the law. Those who envisage the primary characteristics of law in terms of the coherent reasons used to justify the rules are sometimes said to occupy a perspective that is *internal* to the law (Aquinas, Dworkin, Fuller), while those who look at the primary effects of law in terms of the relationships of power and domination (Foucault, Marx) are said to occupy the *external* point of view. The distinction between internal and external points of view is related to, but distinct from, the difference between optimistic and pessimistic orientations to the law: i.e., whether the law is doing anybody any good or not. For instance, you can arguably understand the system of reasons involved in a legal system (occupying an *internal point of view*) without endorsing those reasons as minimally good ones (adopting a

⁵ Heather Douglas has pointed out, rightly, that in some cases, reference to a ‘chain of deference’ will seem a bit odd, e.g., when the rule emerges from the norms of the community (though it be held in power by the threat of formal sanction by the steward of the common trust). In such cases, I prefer to say that the distinction between ‘the folk’ and ‘the experts’ collapses: there is only the individuals and their community. But I take it that the chain of deference is not abolished in such cases, but only simplified, given that the individuals can and do get the rules of their own community wrong (even if infrequently).

pessimistic attitude). (Groarke 2013, 186-187) (Fuller 1971, 2)

Each of these orientations to law can occur with different degrees of severity: each can be either about the apparent conditions for law, or about the causal influences on law. So, for example, optimism comes in two forms, the strong and the weak: one might think that morality always seems to be a criterion for what counts as the law, or one might think that moral rules inevitably have some kind of defeasible influence on the direction of law. Or, to illustrate externalism, one might think the influence of reasons is always part of the point of law, or one might prefer to take legal phenomena on the model of mere commands. (Fig.3.)

Fig.3. Views	Weak form	Strong form
Internalism	Reasons are significant constraints on an account of the nature of law	Reasons are indispensable to an account of the nature of law
Externalism	Reasons are misleading in an account of the nature of law	Reasons are otiose in an account of the nature of law
Optimism	Good (moral) reasons are significant	Good reasons are indispensable
Pessimism	Good reasons are misleading	Good reasons are otiose

Oftentimes we take for granted that it is just plain obvious who will count as experts at the law, since we live in a professionalized political era. But if we want to understand the changes that are happening in past or present times, then we need to start from the beginning. Indeed, without having at least a crude picture of what the law looks like in its consequences, the subject will not be in a place to see who could plausibly be an expert at the law. If the law looks like a *bone fide* steward of the common trust, then the folk will be inclined to infer that expertise in the law involves acquaintance with the best intentions and *reasons* that legislators could appeal to in the construction of the laws. On the other hand, if the law looks like a self-interested parasite working to exploit the labor of free peoples, or a burden on the tax-payer or working class, then subjects will be less trusting in the reasons offered by legislators and the expert classes for their laws, and will instead seek explanations offered by people who claim some expertise on the ways that power is distributed in the system. And if the law looks like a vehicle for justice, then subjects will have greater reason to trust the judgments of seemingly virtuous persons over the requirements of law.

Constitutive criteria and regulative rules: identification of the appropriate political authority

Suppose, as we have, that the law’s official or formal standing derives from its relationship to some appropriate political authority, who we sometimes call the steward of the public trust. Let all hands agree that the steward of the public trust creates rules that regulate the conduct of subjects, and in particular, the conduct of the folk. We call these ordinary laws *regulative* rules.

It is by no means obvious *who* counts as such a steward, and at no moment is it at all clear what makes a political authority appropriate. So there may also be confusion over what counts as a legislative authority for a society, and/or what it is to be law *properly speaking*. To forestall such confusion, we try to lay out the constitutive criteria for the law. In most instances, this involves laying out the ‘hard’ *constitutive rules* of the law: i.e., the conditions under which someone counts as the steward of the public trust, or as an appropriate political authority. Constitutive rules tell us what *technically* counts as law. In other instances, we may try to establish the ‘soft’ *constitutive norms* of the law, which involves the provision of criteria for establishing what it takes for some law to be

representative, non-defective instances of its kind. Constitutive norms tell us, in other words, what it takes for rules to be *non-defective instances* of law. In both cases – of constitutive norms and constitutive rules – we are answering the question, “What is the law properly speaking?” Where the appearances of law give us the gist of what it is to be a law, the constitutive criteria provide the folk with essential focus.

The constitutive rules of the law are the conditions under which something *actually* counts as law, insofar as it is law. This criterion is close to, but distinct from, the appearances of law: if you think that the law is a force for the moral good, then your criterion for who actually counts as the appropriate political authority will not be too far from the mark. For example, one may be an error theorist about the constitutive rules of law, denying up and down that there is such a thing as the sovereign legislature, while still having a positive characterization of the law as an apparent social phenomenon. Legal appearances can be assessed independently from *bonafide* legal facts, even though both may be assessed across similar dimensions. This difference is important, for our purposes, because we look to the characteristic effects of law when trying to know who to defer to, while the actual constitution of law tells us who we actually ought to have deferred to.

A dramatic contrast between two different accounts of the constitutive rules for the law is between the doctrines known as *legal positivism* and *natural law theory*. *Legal positivism* holds that the law is conceptually distinct from other kinds of normative practices in that it traces the source of its authority to social and political institutions: either to those who govern the society, or to the society itself. (Groarke 2013, 132-40; 226-47) The oldest alternative to legal positivism is *natural law theory*. Legal positivism grounds the authority of law in prevailing political sources, empowered to realize the rules through physical and financial coercion. In contrast, the “natural lawyer” grounds the authority of law in its conformity to reason available to all rational persons by nature. On this view, the legality of a norm corresponds to whether or not the norm succeeds in adhering to the substantial requirements of natural justice. So, for instance, one might argue that the appropriate political authority is not the dominant one, but one who respects and adheres to equal rights to life and liberty. (Groarke 2013, 35-40) In short, legal positivism traces the legality of rules to their social pedigree and the actual mechanism of intended enforcement, while natural law theory traces it to the contents of the principles deployed.

To use an alternative vocabulary, in the one case, law is constituted by its pedigree, while in the other it is constituted by its principles. Natural lawyers insist that the law is constituted by moral codes which may or may not be upheld by the social order: e.g., as we shall see, according to Thomism, the social rules of the Egyptians did not have the force of law when the Pharaohs stood toe-to-toe against Daniel. Positivists insist that the law is constituted by social sources, either by the habitual obedience of a public to the coercive verdicts of rulers (Austin) or to some basic norm that is recognized by all, usually more for prudential reasons than moral ones (Hart, Kelsen). (Groarke 2013, 132-40; 226-47)

The idea that there are constitutive conditions to law is distinct from, but related to, the idea of a national Constitution (e.g., the *Charter of Rights and Freedoms* in Canada). To make a claim about the constitutive conditions of law is to say something about the propriety of recognizing any political system as a legal one. Borderline cases exist for law which bring about contested, often protracted interpretations (e.g., indigenous law, international law), and the constitutive criteria are used to define who and what counts as a legal system, and how we are meant to understand ourselves and each other when we make such commitments. That said, the constitutive conditions of law in general allow us to identify what counts as a particular state Constitution when we see it.

As a default, we should expect that legal appearances will map roughly onto legal truths. As far as the law is concerned, we might intuitively suppose – reasonably – that *what you see is what you get*.

This is to say that, in the ordinary course of events, we should expect that the folk who have justifiable beliefs about who to defer to, and experts who have justifiable beliefs about the contents of law, ought to face little risk of getting the law wrong. Call this the *risk of legal error*. However, there is no antecedent reason to suppose that this determination can hold generally across all pictures of law and in all contexts of application. Some pictures of law, like a roughly Marxian one, want to say that the law appears to be a force for justice but is usually not. And some contexts may produce considerable divergence between appearances and the truths of law, since not all stakeholders *need* legal appearances to match legal facts, and not all communicative contexts are conducive to present the law in its proper light.

Rules of the system and rules of change

While the real and apparent constitutive criteria tell us something about law as a static system, we also need to account for the fact that legal systems change in big and small ways. Every new passing of legislation is a change in the whole; every succession in the holders of public office, and every new office created and filled, marks a new state of the system. At least in broad strokes, subjects need to understand the ways in which legal systems are altered across time, and in particular, the process of appropriate transformation. Rules of succession are a serviceable example of orderly or legitimate rules of change, as in a democracy, political representatives are ostensibly elected by popular vote; the mechanisms that exist to change the system are in place and (in theory) well-known. A more dramatic example is when the essential precepts of a political order are altered: e.g., constitutional amendments.

Since the mechanisms of legal change are essentially diachronic, not synchronic, it is sensible to say that they explicitly invoke a different dimension of analysis. When they are distinctive, rules of change add to constitutive rules and appearances by giving subjects some guidance on who to defer to during periods where there is a disruption in the ordinary course of legal affairs, e.g., during the interregnum. But in other respects, the rules of change can also be viewed as a substantial extension of the constitutive rules and appearances of the political order, in such a fashion that they may seem hard to pry apart: the constitutive rules, after all, potentially provide limits on the kinds of changes that are permissible as a matter of law, as when we consider the possibility of sovereign decrees made *ultra vires*. There is an overlap, but the overlap is not total, and the space where the two diverge is considerable.

Rules of change are meant to forestall confusions during moments of abrupt transformation in the legal order. Such confusions might occur in at least two ways: with respect to the question of whether subjects have the legal power to decide who count as stewards of the public trust *intraregnum* (within a period of rule), and whether or not there are any appropriate criteria that may be used in finding that steward *interregnum* (between periods of rule). The first question addresses the formal supremacy of the legislator over their domain: i.e., whether it even makes sense for us to talk about the acquisition of powers of legal authorship by agents outside of the sovereign office. The second concerns whether or not *substantial* legal considerations are appropriately brought to bear on the system undergoing change: that is, whether there is an appropriate set of rules that guides (or demands) succession from one occupant of the sovereign office to the next.

With respect to the *intraregnum* question, some offer *fixed* answers about who counts as the appropriate political authority; this move would be to deny the thesis of legislative supremacy, e.g., denying the idea that sovereign reigns supreme over law. Conversely, some will claim that the appropriate legal authority can be altered. And with respect to the interregnum question, robust or substantial criteria might be introduced which determine who counts as an appropriate political authority, proposing fixed criteria for the transition between governments, allowing the legacy of

the dead legislators to live on. But this, too, might be denied by the basic picture of law. Importantly, the rules of change tell the folk who are subject to a legal regime how much of **a risk of error** can be properly countenanced when trying to figure out who counts as an expert, during periods where some variety of change is at hand (*interregnum* or *intraregnum*). The clearer the criteria, the lesser the risk of legal error.

This cross-section of different propositions seems to characterize some of the views of philosophers of law, as we see in (Fig.4):

Fig.4. Change		<i>Interregnum</i> (between-periods)	
		Fixed rule (i.e., substantial constitutions)	Alterable rule (non-substantial)
<i>Intraregnum</i> (within-period)	Fixed ruler (i.e., formal constitutions)	<i>Low risk</i> Hart	<i>Medium risk</i> Austin, Hobbes
	Alterable ruler (Non-formal)	<i>High risk</i> Aquinas	<i>N/A</i> Foucault

Pictures and uptake

The answers you arrive at to these basic questions about legality (1-3) will and must have dramatic effects upon how we think about the legal structure of a society, and hence, how we consider the laws to be disseminated. If the system of law looks like a highway robber, so to speak, then a proper subset of the society who wants to be apprised on the unwritten laws of the social order needs to be able to defer to experts with a penchant for knowing when and where the hammer falls. If the system seems like a way of getting along and fitting into civil society, then the subset of folk in the society who want to understand unwritten law need to defer to experts on what conduct is generally thought to be reasonable.

Without knowing the information that would resolve any confusions related to (1) the appearances of law, (2) the constitution of law, and (3) the rules of change, it will not be possible for educated subjects to know how they might figure out the basic legal structure, and hence not be in a place to know who to defer to. Without at least the assumption that this information is known to a reasonably large subset of the populace, coupled with the assumption that the experts are within arm's reach, we cannot believe that the law has been disseminated. Each of the parts of the basic picture provide unique and important information to the folk about who to defer to, by supplying information about the conditions under which a candidate expert is to be trusted and the risk of error assumed in doing so. And without dissemination, there is no law. If subjects in general are ignorant of (1-3), no-one will be placed to understand what it even means to be an appropriate venue for dissemination, nor have any conception of who counts as the steward of the public trust.

This may sound like I am saying something ambitious about the very nature of law: that if a law is not *in fact* disseminated in practice, then it cannot be law. Actually, I am just making an austere conceptual posit, which is that theorists must *assume* the law is disseminated in order to be law. This assumption may be little more than a kind of formal fiction. As a matter of practice, some areas of law might *in fact* not be disseminated in any significant sense, even though they need to be: e.g., as Caligula might describe his own practices.

To be sure, it may be also true on further investigation that systems of rules that do not *actually*

disseminate their rules in practice are not *bone fide* systems of law. But on my approach, the question, “how much official dissemination is required for a decree to count as law?”, will be settled from within the picture of law that it is appropriate to adopt. In other words, there is no reason to assume from the start that Caligula had the appropriate picture of his own laws; but there is also no reason to assume he didn’t. We must retain a studied neutrality from the outset, and only earn partiality as we go.

Expert deference and the sophisticated picture of law

Now, what about the experts, whom we are supposed to consult once we are in possession of the knowledge of the organization of law based on our basic picture of law (1-3)? The public’s knowledge of the law involves deference to a class of experts, and the experts are competent in understanding and conveying the rules that the rulers would have us follow. At least in the abstract, with necessary simplifications, the expert’s facility with the regulative rules inherent in the written law involves having the ability to point to a series of texts which are self-designated as law which are written by the right kinds of authors (i.e., legislators and their representatives). They know the right venues, and have the abilities to read what is found there. In contrast, when it comes to unwritten laws, much of the work that the expert needs to do in thinking about and individuating unwritten laws (and demarcating them from non-legal norms) can rely only on a sophisticated theory of the law, which bottoms out in declarations about what justices *should* say, legally speaking, and expectations and predictions about what they *could* say on the condition that they are appropriately informed, rational, and possessed of intellectual good faith.

The knowledge of the jurist is not just acquaintance with a corpus of verdicts over cases; it also involves a practical skill, or set of skills, in interpreting novel cases at trial and how they best fit with legislative opinion. Part of that sophisticated knowledge of the law requires coming to terms with the fact that there is often enormous uncertainty about how subordinate judges and/or legal experts possessed of intellectual good faith might account for hard cases that compel divergent verdicts. e.g., there are differences in policy over whether law should be interpreted in accordance with the original intentions of lawgivers or according to their contemporary utility; and in Canada, originalism is rejected as a matter of course. (Miller 2009) Without some knowledge about the processes of proper deliberation that the government is invested in, there is no secure sense that the putative experts really do have a skill at predicting how the expectations of the rulers will affect the system. Taken as a body of knowledge, this is a fourth consideration in the development of a picture of law, which we may refer to as (4) **the rules of operation**. These include policies on how to go about jurisprudential deliberation (jurisprudential rules), as well as policies on how the government itself means to direct its own activities (administrative law).

It is not necessary for the public at large to have any acquaintance with these rules of operation. Moreover, the actual rules that are deployed in judicial and executive decision-making making be astoundingly diverse. The descriptive analysis of the appropriate rules of governance may function like context-sensitive principles, by default being of most interest to the political scientist and policy wonk, and only peripherally to ordinary subjects (including experts). What is required, however, is that we assume *intellectual good faith* in the exercise and interpretation of these rules to cases: that the experts shall adhere to the rules, principles, and desiderata in deliberation that are suitable to the regime as a participant in law. Without the presumption that experts are faithful to their own professional ethic or ethos, there is no alternative but to see the law as an instrument of secret machinations. So our assumptions of good faith must be *justified* by appeal to the sophisticated picture of law.

Each of these dimensions of analysis (1-4) can be cross-referenced when applied to cases. The

rules of operation can themselves be scrutinized in terms of their mechanisms of change. In Canada the federal executive is ostensibly characterized by a formal bureaucracy that operates by way of the deliberation of the Cabinet and its committees. However, over the past few decades (ostensibly beginning with Trudeau) policy-making has tended to shift away from a model based on deliberation by committee, and instead policy priorities are set strongly by the Prime Minister. (Savoie 2008) This practical fact about how decisions are made has substantial weight in how we experts must think about the facts of rule *intraregnum*.

More dramatic examples are easy to find. Sometimes change occurs in the very constitution of the government itself without being mediated by any formal appeal to statute or power of precedent, and only through the discretion of the executive branch in question. Indeed, wherever there is a division of powers in government, there will be a tug of war between the branches as they test out the *de facto* and *de jure* limits of their powers. Issues of war and peace, government intervention in the economy, and issues related to social justice and social change—such as tackling discrimination against certain groups—have been areas that have sparked such inter-branch struggles into more obvious and overt forms. And while these changes are of obvious interest to those interested in the notion of unwritten aspects of law, it is not clear how we might account for the legal status of these changes.

An important distinction to note, here, is that we are most interested, not just in the *existence* of experts, but also of their *accessibility* to the public. If the informal experts behind the law cannot be consulted, then the law is not promulgated. When such experts are available to the public – that is, when there is a satisfactory communications environment -- we can call these experts '**venues**' for the dissemination of law. In contrast, during periods of extreme civil disorder and/or natural disaster, when public communications with the experts are cut or severely compromised to the point that they are not satisfactory, we may say that there are no formal venues available (where 'satisfactoriness' is fixed by the appropriate basic picture of law). To the extent that law still exists under these conditions, such laws can be known only by the experts themselves through consultation with formal venues. And if the experts cannot consult the formal venues, owing to cuts or compromises in the communications environment – say, if in a revolution, and all the legal books are burned -- then there is no law. (Again, unsurprisingly, the notion of what is 'satisfactory' is established by reference to the appropriate sophisticated picture of law.)

3. A systematic account of informal dissemination

A rule is only law if we assume that it is disseminated, and it is disseminated just in case a sufficiently large section of the subject population has basic knowledge of how the legal system works. That basic knowledge allows people to do two important, interesting things: first, at least in ideal conditions, to identify official venues of dissemination from unofficial ones; second, in both cases (but especially in the case of unwritten law) to identify experts who are well situated to explain the requirements of law, and who do not themselves function as a formal venue. In this approach, so much of the life of the unwritten law depends on the 'basic picture'; and what counts as 'basic knowledge of a legal system' depends on the basic picture of legality it is appropriate to adopt.

With those points kept in mind, this dissertation aims at offering persuasive reasons to accept the truth of the following propositions:

- A rule counts as an unwritten law just in case:*
 - A. Transgression of the rule is faced with threat of formal sanction;*
 - B. Subjects have access to venues which recommend the rule, such that:*
 - a. A sufficient number of subjects know those venues;*

- b. *Those venues are populated by experts who know the law;*
 - c. *Both subject and expert are operating in a satisfactory communication environment; and moreover,*
- C. *Those venues are not formal -- i.e., they do not bear the stamp of the appropriate political authority.*

The lion's share of the work must go into giving content and color to (Ba), which is fixed by the right picture of law. By examining a sample of different ways we can draw the basic and sophisticated pictures of law, and by figuring out how different pictures of law serve to guide subjects to different kinds of available experts, we can in some suitable sense figure out which broad kinds of unwritten rule considered at the outset (implicit constitutions, fiat rules, justice norms, secret rules, and operationalizations) really do count as laws, uncompromised in legal force.

Accordingly, my aim is to examine the different ways in which unwritten law has been formulated in relation to theories of law in general, and with respect to their remarks on dissemination or promulgation in particular. The thesis will dedicate chapters to canonical thinkers who have discussed deeply the phenomenon of unwritten law as well as foundational theories of law: Aquinas, Hobbes, Austin, Marx, Foucault, Fuller, Hart, and Dworkin. At each step of the way, we will be thinking about how and when each basic picture of the law allows us to regard (a-e) as suitably promulgated, and hence whether or not they can qualify as unwritten laws. The final chapter will examine the conceptual structure of unwritten law in light of our survey, and offer some final remarks on the conditions in which the different types of unwritten rules (a-e) qualify as unwritten laws.

My account of unwritten law is both *systematic* and *modest*. It is systematic in the sense that it attributes definite relationships between a public's conception of the appropriate picture of law and their orientation towards knowledge of the actual law.⁶ So understood, the systematicity of the account produces useful results just in case we assume that some rough-and-ready knowledge of legal philosophies are present to the public in two respects. First, at minimum, that the appropriate sophisticated picture of law must be available to experts, in order for the idea of a formal venue for promulgation to be intelligible, and hence, for law to exist at all; second, the appropriate basic picture must be available to subjects in general in order for unwritten laws to be accessible. Observing these relationships is both instructive and, I hope to show, of significant importance to applied theories of justice, and makes for a robust advancement on the state of the field. But my account is also modest, in that the contents of these relationships are minimalistic: at no point do I commit to a particular robust view on what it is to be an appropriate picture of law.

Chapter summary

I began this chapter by laying out the essential elements of the method by which I will be examining the concept of unwritten law. This method makes ample use of two conceptual tools: first, the background theories of the nature of law in general, and second, the taxonomy of unwritten rules. So what I shall do in the remainder of the introduction is summarize the contents of the basic pictures of law, and then go into further depth on how we are to understand the taxonomy of potential unwritten laws.

Each subsequent chapter is structured around one or more canonical works in political and

⁶ When I say that the theory is 'systematic', I mean only to state that I am engaged in conceptual analysis of a kind, and that the salient concepts are strongly *inter-defined and inter-related* regardless of the particulars of the institutional environment and the relevant picture. Yet that conceptual analysis is austere, as I generally only speak in terms of necessary constraints on theories of unwritten law without venturing to lay claim to any jointly sufficient conditions. Hence, I do not mean to suggest that the 'system' is logically exhaustive and totally complete.

legal philosophy, arranged roughly in chronological order, with illustrations and references provided to the philosophy of law. Such works are chosen according to two criteria. First, we are broadly concerned with contributions to the literature that have been historically influential on the philosophy of law. Second, according to the diversity of their contents: for in order to canvas the fullest range of conceptual space concerning the main issues that affect the promulgation of law, we should be sensitive to the costs and benefits of each theory.

In the second chapter I examine the Thomistic approach to legality. After conducting a close reading of the *Summa Theologica*, I shall attempt to motivate two conclusions that help to make sense of Aquinas' legacy as a moral optimist and metaphysician. I conclude that the basic Thomistic picture regards the law as beset by a kind of principled heterogeneity. For Aquinas' analysis of the varieties of law depends significantly on his own taxonomy of the kinds of law: eternal, divine, natural, human, and animal. The varieties of law are unified in principle owing to the fact that each law *derives* from a superior one (i.e., human law from the natural and divine law, and the natural and divine law from the eternal law). Aquinas also asserts that the natural law and human law are not coextensive in their verdicts: that the divine law is not simply equivalent to the human law, for example. (Aquinas 1944, I-II, 93, iii) His denial of the co-extensivity of the laws complicates any plausible analysis of how Aquinas would treat the taxonomy of unwritten laws (a-e) proposed above. Yet while the denial of co-extensivity might be interpreted as a defect of his view, there is actually a plausible explanatory point their asymmetry: namely, in order to have a working theory of how and why human laws change over time. In any event, Aquinas' stature as one of the leading figures in the natural law tradition makes an examination of his view on law in general, and unwritten law in particular, a must-do for this dissertation.

In the sequel I delve into Hobbes's *Leviathan*, which is a fixed point in the analysis of the concept of unwritten law. I will explain the importance of unwritten law to Hobbes, with a chief emphasis upon the relatively minor significance he attributes to the distinction between 'natural' and 'civil' law. Indeed, for Hobbes, the 'natural' principles of the law *are coextensive with* the civil law, leading him to resist the label of 'natural law' and favor 'unwritten law' instead. Some plausible arguments exist to the effect that his conception of natural and civil law are not coextensive in certain cases, and the cases coincide with some of the varieties of unwritten law provided in the original taxonomy. Hobbes is an important and fascinating figure in this regard: though he uses such terms as "natural" (e.g., "natural right", "state of nature"), in many ways his philosophy of law is an influential expression of positive law or positivism. Thus, the first two chapters are really detailed examinations of how two leading thinkers have considered unwritten law, one from the perspective of natural law, and the other from the major rival perspective of positive law.

In the fourth chapter I move to an opposite extreme of legal theory, that which tangles with externalist and pessimistic readings of the aim of law. In this chapter, I attempt to examine some of the ways that Michel Foucault's juridico-epistemic musings can make sense of the varieties of unwritten law. This cannot be an entirely straightforward application of his theory, since his insights resist easy systematization. (One does not dare to read structure into a self-described post-structuralist without incurring the wrath of all comers.) Instead of pretending to faithfully interpret Foucault's work as a whole, I will instead formulate an interpretation of Foucault's approach to law based on his remarks in *Discipline and Punish*. Under this interpretation, legality can be understood in terms of strategic orientations towards action and belief, resting on relationships shaped by differential access to information. One might regard law as a kind of technology which is used to manage populations – in a manner of speaking, law is power-politics all the way down. In order to orient the reader properly to the Foucauldian extremes, we will also arrive at two way-stations as we go: John Austin's command theory of law and Karl Marx's ideological conception

of law. Taken together, these accounts of law proper will turn out to have valuable insights into the nature of unwritten law, which encourage different ideas about which venues one ought to consult.

The penultimate chapter elaborates on the various avenues in which more modern political and legal philosophers take in the study of this subject, and how they either complement or contrast with the foundational Hobbesian and Thomistic pictures. So in the fourth chapter I examine a trinity of closely related philosophers of law: HLA Hart, Lon Fuller, and Ronald Dworkin. What these figures have in common is that each struggled to articulate a democratic conception of law that suitably resists any simple reduction to paternalism. The primary issue they differ on is how to best make sense of the internal point of view of the law, articulating a dissatisfaction with Hobbes's hypothetical consent model embodied in an original convention. For Hart, that internal point of view is articulated by the basic social norms (i.e., "the rule of recognition") that ultimately form the basis of law, and grows out of matters of actual fact. For Fuller, it is in the basic procedural requirements that are distinctive of all legal phenomena; "the ethos of law," which establishes what it is for justices to reason in good faith, is the unbridled core of utility that makes the law an institution worth saving. And for Dworkin, it is in the full worldview of a public, adjudicated by justices who are interested in preserving the integrity of law. The issue of publicity is of vital interest to all of them, but in different ways. Because these figures were substantially interested in the philosophy of jurisprudence, emphasis in this chapter shifts towards the ways in which particular laws are made and put into practice.

While the first five chapters are organized around the relationship between theories of law and their relation to the taxa of unwritten law, every opportunity will be taken to apply these insights to paradigm cases of the taxonomy. That having been said, the bulk of our attention throughout the thesis is on the philosophy, not the minutiae of the legal cases. The final chapter will function as an overview of the various ways of thinking about how the law relates to the political order, and a summary of what we have learned from the preceding chapters about the concept of unwritten law. This will require a more comprehensive exploration of the cases in question, comparing and contrasting different approaches to some of the most curious and vexing legal phenomena that first drew our sustained attention. It will be here where important complications will be addressed, e.g., the ideas of *intellectual good faith*, a *satisfactory communications environment*, *sufficient number of subjects*, and the like.

I am not the first to broach the subject of unwritten law. In Plutarch's *Lives*, the philosopher Anacharsis teased the lawmaker Solon for the latter's belief that "the dishonesty and covetousness of his countrymen could be restrained by written laws". Anacharsis argued that written laws "were like spiders' webs, and would catch, it is true, the weak and poor, but easily be broken by the mighty and rich." (Plutarch 2016) Anyone with sympathy towards *realpolitik* will think of the 'cobwebs' analogy as an inspired one. But a sensitive reader might infer something from the implicit contrast that Anacharsis puts on offer: the implication is that written laws might be weak, but the *unwritten* ones are made of sterner stuff. If that is right, then it is vitally important for us to make sense of unwritten law, else run the risk of angering a dark elder god who stymies even the great civil leviathan. It is by the torchlight of existing philosophy that we can find out whether or not there was anything to fear from the dark.⁷

⁷ Anacharsis's provocative remarks are open to many interpretations, all of them interesting, and which can motivate potential alternates to my account of unwritten law as informally promulgated threats of formal sanction. So, for instance, one might quite plausibly interpret his use of 'unwritten law' as meaning 'raw power', of the 'coercion to get what I want' variety; or perhaps as meaning 'culture'. To be sure, as we shall see, these may be vital elements of the analysis -- in particular, during times of transition between states. The connection is tight enough between these concepts that reference to one shall always imply reference to the others. But, I insist, the role they play is mediated

by one's choice of picture of law. For the concept of 'raw power' to get what one wants cannot be plausibly regarded as a bare synonym with legal bindingness or formal sanction, even if we think they often coincide, because the threat of formal sanction does not ever need to imply that any particular, unique instance of the application of a rule is desired or desirable by anyone in particular, or even anyone at all, nor to imply that coercion was specifically used to achieve it. Second, 'culture', as I understand it, is a mere pattern of behaviors held by a population, with no attention paid to their normative status. Hence, as concepts go, 'culture' is descriptive concept; and as such, it cannot be held as synonymous with unwritten law, the latter intrinsically demanding some reference to standards of correctness and incorrectness for conduct.

CHAPTER II. THE INTERNAL OPTIMISM OF ST. THOMAS AQUINAS

*“...After him I went
To testify against that evil law,
Whose people, by the shepherd’s fault, possess
Your right, usurping. There, by that foul crew
Was I releas’d from the deceitful world,
Whose base affection many a spirit soils,
And from the martyrdom came to this peace.”*

*Ghost of Dante’s ancestor to Dante, in heaven
Dante’s Paradiso, Canto XV (2012)*

*Of naked spirits many a flock I saw,
All weeping piteously, to different laws
Subjected: for on the’ earth some lay supine,
Some crouching close were seated, others pac’d
Incessantly around; the latter tribe,
More numerous, those fewer who beneath
The torment lay, but louder in their grief.*

Dante’s Inferno, Canto XIV (2012)

Chapter structure

1. *Aquinas’s picture of law: authoritarianism with dispensations*
 - a. *Theoretical unity and the five systems of law*
2. *The natural phenomenon of law*
 - a. *Effusive optimism from the internal point of view*
3. *The constitution of human law*
 - a. *Divine justice as an implicit restriction on human law*
4. *The evolution of divine and human laws*
 - a. *Human laws change*
 - b. *Divine laws change*
5. *The soul of the judiciary*
 - a. *Three tendencies*
6. *There is no stepping outside*

Thomas Aquinas's *Summa Theologica* is both one of the classics in Western philosophical theology and an ambitious statement about the nature and origins of law. The *Summa* aspires to tell the ultimate grand story about where the law comes from and why we ought to follow its commands, and aims to provide a positive blueprint that articulates what counts as practical and moral success in the legal domain. Despite its imperfections, the *Summa* includes an astute and vivid rendering of its subject matter. Since we are out to examine the most influential basic pictures of law in order to understand the ones implicitly promulgated, there are few better places to begin than with the *Summa*.

Aquinas had a large canvas and his picture of law was rendered in immaculate detail. Not all of those details are going to be central to the current project. But for the purposes of examining the legal standing of unwritten rules, five features of the Thomist's basic picture of law are most salient: its pre-occupation with attributing law to those standards of conduct that appear just; the constitution of human law in divine, natural, and social sources; its uneasy endorsement of both political conservatism and (occasional bouts of) radical insurrection; its admission of dispensations from law; and the relatively strong weight it gives to deference to authority over truth in the courts.

When you get down to the details, each of these features help to establish the extent to which Thomism is friendly to the concept of unwritten law in general, and to the possible varieties of unwritten law in particular (secret rules, fiat law, tacit operationalizations, implicit constitutions, and justice norms). What we will see is that Aquinas endorsed the concept of implicit constitutions and a particular kind of justice norm, and thought operationalizations had to be guided by virtues of institutional integrity and fidelity to proper ends. Yet he had made it virtually impossible for even the most clandestine legal rule to be called a secret law, and had no tolerance for fiat law. But before we can arrive at those conclusions, we must examine the work in some detail.

One of the safest general comments one can make about the *Summa* is that its author aimed to give us a relentlessly unified account of the place of the law in the world. For him, the legal norms governing human societies are grounded in religious, practical, and moral facts. There are two major points of connection between Aquinas's account of law and his broader worldview. First, he argues that the source of the validity of human laws is best conceived in terms of the meaning of human life itself, described as the final end of humanity. (Aquinas 1944, 2-1.90.2) That 'final end' of humanity is the common happiness of the greatest political community, conceived as Catholic beatitude under the guidance of divine sources. So the law is metaphysically charged. Second, Aquinas argues that law has a strong moral valence, in that any genuine law is an instrument of justice. The comprehensive moral force behind human law owes to the fact that human laws are grounded in, and necessarily aim at, justice. We judge a set of social practices as 'legal' by investigating the extent that they do service to the higher, non-human forms of law that govern the life of the cosmos. To put it mildly, then, the idea of human law is of a piece with our story about what counts as appropriate guidance in directing human action in the widest possible sense. Hence, the law is imbued with a moral aura.

This project of reconciling the divine, human, and natural laws had worldly applications. Aquinas worked throughout Europe through the mid-to-late thirteenth century as a scholar and Dominican friar. At a time when Catholic theology was being challenged by neo-Aristotelian heresies, his philosophical aim was to reconcile Catholic faith with Aristotelian reason through the unity of the laws.

The reasons that the law provides for action derive their distinctively legal character in part through the assumption that those reasons can be cashed out in terms of the good they are doing, measured in terms of their metaphysical accuracy and/or practical success, and promulgated as

such. The law is not just what the right kinds of people say it is; rather, the law that governs human societies is what political institutions say it is, but *only insofar as those institutions are deemed competent*. Insofar as the political institutions fail to do good, and fail to even appear to be vehicles for the good, they lose their legal authority. The rulers of a society suffer the burden of needing to justify their rulings in terms of those ends, at least when it comes to topics that naturally fall under the jurisdiction of human rulers.

I will be making use of the notion of ‘source defeasibility’ of the social aspect of human laws in this chapter. For any basic picture of the law, we might appropriately say that it is ‘source defeasible’ just in case it does not trace legal validity exclusively back to standard social sources (i.e., the rulers or the community), and hence that the decrees about proper conduct that issue from standard social sources can be defeated by appeal to substantive considerations regarding the nature and force of moral and prudential principles of action. In contrast, a ‘source indefeasible’ picture of law is one which claims that the ultimate source of legal validity lies in its connection to social sources. (Raz 2009) To help see the difference, imagine that in advance of a major foreseeable cataclysm, the rulers of a city ordered subjects to stay under house arrest, and in so doing, effectively doomed them. Assuming the rulers and subjects both had appropriate foresight, we might say that the rule provided people with no good reason to stay home whatsoever, owing to the fact that the rule was foolish, unjust, immoral, or impractical. But do we say that it was, for that reason, no law at all? Those pictures of law that claim law is source defeasible will say no – in extraordinary circumstances, the social source has been ‘defeated’.

Now, in some trivial sense or other, it could be alleged that almost every basic picture of law is ‘source defeasible’ so long as it recognizes exceptions to standing law, or recognizes that there are extraordinary conditions where the law does not apply as a guide to action. But note that there is a distinction between blameless flouting of a rule and the claim that there is no legal rule at all. So when I speak of source defeasibility, I am referring to cases where the human rulers explicitly attempt to set out the scope of their jurisdiction with respect to human conduct, but are thwarted on theoretical grounds. That is the fashion in which we might say that the deference that we owe to those social sources that we ordinarily take for granted as law-bearers can be *mooted or interrupted* if the requirements of cases demand it.

On Aquinas’s account, the validity of a law is determined by its ability to provide appropriate reasons for action. (Aquinas 1944, 2-1.93.6) Because the human law has grand universal aims that can be specified in terms of the cosmic order, the jurisdiction of the law does not always map onto the expectations of the rulers. Indeed, Aquinas thought that the scope of the law was capable of revision in certain hard cases -- i.e., those cases where human rules must be disregarded during manifest emergencies. (Aquinas 1944, 2-1.93.6) On these narrow grounds, the citizen is entitled to judge when the express dictates of the human judges do not apply, owing to exceptional features of the context which go beyond any reasonable interpretation of the legislator’s intentions. In the more dramatic cases, when a rule fails to do service to the divine good, it can be regarded as non-legal regardless of the ruler’s intentions. The paradigm case, here, is from chapter 13 of the book of Daniel, when the eponymous protagonist denounced and brought about the execution of two lascivious rulers when they engaged in attempted rape, blackmail, and perjury. (Aquinas 1944, 2-2.67.1)

However, it would be a mistake to think that Aquinas’s integration of the human law into a broader worldview rendered the dictates of human rulers redundant. The rulers of human societies do have wide discretion in how they interpret the requirements of nature and divinity, so long as their reasons are directed towards these ends. (Aquinas 1944, 2-1.90.1) Indeed, there is a default assumption that the dictates of the rulers are to be followed, and an assumption of charity must be

followed in interpreting their rules: i.e., more often than not, the rulers must be assumed to be asserting propositions that are true, right, and good. In this way, all other things equal, charity helps subjects to be sensitive to the will of the sovereign. It is a different story, of course, when all other things are not equal. Still, despite the defeasibility of human rules in times of dire emergency and cases where the ruler is heretical, there is a very powerful general obligation to obey the dictates of the rulers. The Thomistic doctrine is by and large a conservative one.

So does Aquinas countenance unwritten laws? What does he have to say about each of the criteria we set out for publicity last chapter? And which, if any, of the potential cases of unwritten law would he acknowledge as genuinely legal and binding? These are difficult questions to answer in short form, and depend on his own formidable attempts to formulate a full theory of law in terms of its unity, its constitutive conditions, source defeasibility, and the requirement of charitable interpretation towards authorities. We will proceed by summarizing the *Summa's* theory of law roughly in the order that he presents it, and then examine some of its most important features in analytical detail. The exegesis and summary are done in the fashion of a rolling commentary, with bolded sections for exegesis and italicized subsections reserved for discussion of how they characterize Aquinas's basic picture.

1. Aquinas's picture of law: authoritarianism with dispensations

The grandeur of the law potentially comes from many places, and one way of developing an aura of greatness is by connecting it to the laws of the cosmic order. In earlier times, the idea of natural laws – say, the laws of physics – was replete with reference to intentions. The regularities of nature corresponded to the internal nature of the objects and the precepts they followed, analogous to the way that a citizen follows the rules of the legal order; so for example, if a stone falls, it is only because it is following the law that commands it to do so. The intentional structure of the universe was taken quite seriously by legal regimes for quite some time, and was directly reflected in how it managed material objects. So, for example, in ancient law if certain things accidentally caused death (e.g., if in some unhappy accident someone were to fall upon a sword), then the offending object (the 'deodand') would be held responsible as the cause of death, excommunicated from the city, and destroyed. (Groarke 2013, 360)

Just as the laws of physics used to have a quasi-legal character, the rules of law used to have a quasi-natural character. Indeed, for Aquinas, the human law possesses the same essential structure as the laws of nature. What they have in common is that both are *teleological*, or directed towards divine providence. While providence governs the universe, a special feature of providence is its plan for humanity, stated in terms of humanity's 'final end'. The final end of humanity is the common happiness, and the progressive integration of peoples into a broader community. (Aquinas 1944, 2-1.90.2) Laws in general have to be understood as being a result of God showing things how they can move towards the good and the orderly, coming more and more to approximate Him and His greatness. These ideals and considerations lead to Aquinas's formulation of law as a phenomenon that meets four criteria: it is a directive of reason, for the common good, which is promulgated, and which is upheld and enforced by the steward of the community. (Aquinas 1944, 2-1.90)

At least in principle, Aquinas was one of the chief proponents of codification and promulgation of the laws, be they human or divine. (Aquinas 1944, 2-1.90.4) For him, an *unknown* rule is not a law and cannot be a law – to be a law is to be rationally knowable as a directive towards the common good. (Aquinas 1944, 2-1.90.4) (Law, he says, is not just *right* –it is also the *expression of* right. (Aquinas 1944, 2-2.57.1)) But as we shall see, as a matter of practical fact, Aquinas was also a strong believer in unwritten laws in various ways, at least according to the conception of unwritten

law introduced in the previous chapter. While these seem like opposing sentiments, his holding to both doctrines does make sense so long as you argue (as he does) that each relevant class of unwritten laws is knowable *by some means*. It is a matter of some interest that all of the different kinds of laws are known in diverse ways. While many laws are not ‘promulgated’ in the sense of being published by the sovereign, they have the ability to structure our cognitive life, which (for Aquinas) is sufficient reason to regard them as being promulgated.

Aquinas argued that there are at least five different systems of law, each of which has its own unique properties. The law that governs the order of the universe is called the ‘eternal law,’ meaning the providence that arises as a function of God’s meditations upon His own being. There are two sub-systems of law, natural and divine, which derive out of the eternal law. The natural law governs the order of the universe in general. The moral component of the natural law is knowable to everyone through reason, and provides us with knowledge of good and evil. The divine law also derives from the eternal law, and functions to provide us with God’s instructions on how we can all achieve the final end of human life (i.e., the ultimate happiness). The divine law is known through faith, and only to a select few. (The Bible gives a glimpse of it, of course, but as we know there are interpretive issues with divine text and it’s the experts who are thought to grasp it better than others.) While these systems of law are nominally distinct, they are also strongly intertwined, in ways that we shall explore where necessary in the commentaries below.

Beneath the natural and divine laws, there are two other subsidiaries: the human law, and the law of non-human animals (hereafter, the ‘animal law’). The human law is the interpretation of the principles of natural law by authorities who govern the state. The animal law is the law that governs the experience of sensuality, which in the context of non-human animals effectively refers to the impulses that generate the fight-or-flight response (*irascibility* and *concupiscence*, respectively). (Aquinas 1944, 2-1.91.6;81.2-3) Although the animal law is not always emphasized in the literature, it will be of considerable interest for the purposes of making sense of the Thomistic understanding of what counts as the promulgation of laws.

In order to avoid confusion, it will be necessary to pay special attention to the varieties of law. In most contexts, the phrase ‘the law’ would be used to intuitively designate only the human institution of law; in the present context, ‘the law’ will instead be used to refer to any or all forms of law under the Thomistic conception, and especially to what they have in common. This is justified as clearly Aquinas himself views them as tightly inter-twined. When I wish to make a more particular point -- about one of the Thomistic systems of law (say, eternal law), or to a possible type of unwritten law (say, fiat rules), or a specific law (say, ‘keep off the grass’) – I will say so.

Theoretical unity and the five systems of law (II-I. Q90-95)

It is appropriate to think that the religious elements of the Thomistic picture of law are rooted in the ultimate ideal theory of the just political order. Ideal theories begin with notions of perfect justice, a vision of how things ought to be, in order to give us something to strive towards, in contradistinction to ‘real theories’ which begin from a conception of the real world and seek to find opportunities for improvement. But Aquinas’s ideal theory also aspired to be a realistic theory, since his conception of reality was teleological, drawing from both his Christianity and the influence of Aristotle. (Finnis 2011, 52-3) It is in the spirit of making sense of his conception of the ideal or the just world that we can make the most out of his approach to law, and hence to unwritten law. It just so happens that, for Aquinas, the very same doctrines provide us with an account of the cosmos.

For Aquinas, the order of life, the universe, and everything is conceived in terms of its potential for perfection. God is a perfect being, and He functions as the ultimate ruler. Our fleeting existence

in space and time is understood as being the consequence of an eternal, omniscient deity meditating upon his own perfection. (Aquinas 1944, 1.14) God is capable of relating to Himself in a variety of different ways: as first cause, as the creator and caretaker of living creatures, and as the force of love (which correspond to the elements of the Trinity). (Aquinas 1944, 1.29) Divine providence is a function of the perfect being thinking about His own perfection, and when Aquinas talks about the ‘eternal law’, he is just referring to providence. (Aquinas 1944, 1.22; 2-1.91) The eternal law is promulgated through ‘the Word’, which is only directly known by angels who still possess their grace (i.e., not demons, the disgraced angels). (Aquinas 1944, 2-1.91.1) Providence is, in a manner of speaking, the “Book of Life”; but it would be a very bad mistake to call providence written law on these grounds, because the expression is just a metaphor. (Aquinas 1944, 1.24)

The contents of the Word are not directly accessible to humans while we are alive, though its existence can be inferred from the effects that it has on the natural order. (Aquinas 1944, 2-1.9.1) It is only presented to us in oblique form, knowable indirectly by rationally considering the effects of the law upon the world and then properly conceiving of the principles that give rise to those effects. (Aquinas 1944, 2-1.91.1) The unwritten eternal law is known to us through the effects of the Word upon the world.

All subsidiary laws (human, divine, natural, and animal) derive from the divine Word, since they derive from right reasons, albeit by different degrees of separation. (Aquinas 1944, 2-1.90.4; 2-1.91.1) It seems that for Aquinas the law qualifies as promulgated in different ways, depending upon the sort of law we are interested in talking about. At one extreme, the laws must be knowable at least indirectly by their effects (as with the eternal law); at another extreme, the laws must be rules that govern the conduct of persons who actually do participate in their satisfaction, owing to the fact that an impression of the principles of nature have been made on them which guides their conduct (as the unwritten animal law does for non-human animals). (Aquinas 1944, 2-1.91.1,6) The effects of the law in general are cashed out in terms of the positive function of rules in the improvement of life, not through words on the page. (Aquinas 1944, 2-1.92.1) It is only the human law that is centrally concerned with written law, i.e., advertising standards of conduct by the dictates of the political rulers in official venues.

Looking at the laws as a whole, it is striking to notice that, in fact, the bulk of them seem unwritten. The opacity of the eternal law owes to the fact that, first and foremost, the eternal law specifies the will of the Eternal, and is not directly communicated to mortals, nor presumably could it be understood by them. All laws must provide agents with direction towards action in terms of those ends that are fit to be pursued, and while it may very well provide the divine persons with a blueprint for divine providence, the actual contents of that providence are not easy to translate into our limited temporal perception and vocabulary. At the very least, the eternal law provides us with austere formal instructions on how our laws ought to be conceived: i.e., that our laws ought to provide us with authoritative and practical reasons for action, and that the guidance should have the quality of being directed towards the most general good (as is consistent with providence). (Aquinas 1944, 2-1.91.1)

Given the obscurity of the eternal law, we must supplement our legal canons with the divine law, expressed in terms of the precepts of the Old and New Testaments. The divine law exists as a means of instructing us on how the eternal law proceeds: if the eternal law is the ruler of the world, then the divine law is the closest we are going to get to its written rules. The divine law serves four functions in the life of the human law. First, it directs our conduct towards the final end, which is order and happiness derived from divine favor; second, it specifies the proper means for heading toward that end that can be established with absolute certainty, and in that respect provide guidance that is superior to that of the human law; third, it provides reasons for action that are

binding upon the person from the internal point of view, unlike the human law which binds us by providing (dis)incentives for action. Fourth, the divine law acts in parallel with and as a supplement to human law, in order to aid us towards universal beatitude in ways that human governments could not accomplish when left to their own devices. (Aquinas 1944, 2-1.91.4) The moral precepts of the divine law derive from its essential lessons: in the case of the Old Law the essential lesson was found in the commandments of the Decalogue, and in the New Law the essential lesson was of how to achieve grace through charity. (Aquinas 1944, 2-1.100.3; 2-1.98.1)

The moral aspects of the natural law are articulated in terms of our knowledge of good and evil. While all human actions are commissioned by reason and will, such actions are guided by nature in two ways: in terms of the natural principles that tell us right from wrong, and the fact that our desire to adopt the best means towards the achievement of the right derives from our desire to conform to these ends. (Aquinas 1944, 2-1.91.2)

Our knowledge of good and evil is a function of the conscience (or *synderesis*), which is itself a habit born out of an active intellectual life and guided by the principles of nature. (Aquinas 1944, 2-1.79) Humans are quite unlike other animals in that we have a conscience and possess reason, and hence are able to recognize the law *as* law, insofar as it governs the practice of action. In describing the natural law, Aquinas amasses an expansive and illuminating theory of action. If we are to do any justice at all to Aquinas's conception of natural law, we need to spend at least a little time appreciating his thoughts on this score.

From the law of nature it is supposed to be evident that our task in life is to orient ourselves towards virtue *as such*. According to Aquinas, the natural law has several precepts, each of which can ostensibly be discovered through the use of reason and derived from the principle of non-contradiction. (Aquinas 1944, 2-1.94.2) For convenience, I shall refer to them as the 'goodness principle', the 'conservation principle', the 'persistence principle', and the 'rationality principle'.

The goodness principle: *That the good is to be sought and evil avoided.* In the Thomistic tradition, the notion of 'good' is quite robust, while the notion of 'evil' is thin; the good is the inclination towards perfection, order, and eternity, while 'evil' is just the failure to do good. Evil does not subsist in the universe as some spooky, reified thing. Instead, it is just a deviation, a missed opportunity for goodness, almost a hole (or vacuum) where the good should be. In sum, then, this principle tells us to seek the good, and to avoid failing to do good. (Aquinas 1944, 2-1.18) Goodness comes in three kinds, which are conceptual fitness, utility, and pleasantness. (Aquinas 1944, 1.5)

Three further sub-maxims of natural law can be deduced from the goodness principle:

- (a) **The conservation principle:** *That things which are a means to the preservation of human life are to be protected, and obstacles to human life are to be avoided.*
- (b) **The persistence principle:** *That human life ought to direct itself to carry on.* Under this heading, we find directives towards the promulgation of the species, the education of children, a ban on suicide, etc.
- (c) **The rationality principle:** *That the good is sought through natural reason.* I take this to mean that intellectual inquiry should proceed according to each person's natural, independent curiosity, and that such earnestness should be cultivated and encouraged, not stunted. Hence, he gives the examples that we have a natural desire to know God, to exist in a society, to shun ignorance, avoid giving offense, and so on. (Aquinas 1944, 2-1.94.2)

Where the eternal law is the rule of the ultimate sovereign God, the human law is the rule of the sovereign who governs the state. The authority of human law is tied to a conception of the state as an indispensable means of achieving our destiny as human beings. Following Aristotle, Aquinas argues that the state is the most perfect of political communities, and so it is the only

plausible means of talking about the human law. Hence (for example) it is not proper to refer to the head of a household as the holder of “laws” of that household, because households are not perfect or self-sufficient communities. (Aquinas 1944, 2-1.90.3)

The human law is supposed to act to facilitate our innate inclination to desire virtue, in order to achieve the common good. Since virtue requires discipline – i.e., training in delayed gratification and the sublimation of desires into the right channels -- there has to be an institutional force that binds and helps the conduct of peoples in that direction. That institution is the human law. The law serves to bind people with different temperaments to different degrees: a good person only needs a bit of instruction from the law, while a bad person requires a great deal of intervention. (Aquinas 1944, 2-1.95.1) While instruction towards virtue is the function of law, the law is in fact more than just the contextually-dictated verdicts of the wise, since it is necessary to have general rules that bind many people across multiple kinds of cases, and which are dealt with in an objective (wise) manner. (Aquinas 1944, 2-1.95.1.2) Thus the human law must be relatively insensitive to context, providing direction on how to act generally.

Every human law is supposedly derived from the natural law, according to the following chain of reasoning. The force of the law depends on its connection to justice, and justice is derived from reason. Yet reason only functions properly when it proceeds from principles of nature. Hence, unjust ‘laws’ are not laws, in some sense; and it is not entirely clear to what extent citizens are obligated to follow them (an issue to be discussed below). But, to be clear, the sense in which human laws are ‘derived’ from the natural law does *not* mean that the sovereign does not participate in the creation of the human law; indeed, the distinctively *human* aspect of the ‘human law’ derives from the fact that they are the interpretations of either the public or its caretakers, deriving at least some of their force from custom (at least for the purposes of explicating core concepts that are used by those in government) or from sovereign command. Even the laws of nations (e.g, the laws of the seas) are human laws in the sense that they originate in human interpretation. (Aquinas 1944, 2-1.95.4.1)

But there is one final plot twist: Aquinas thinks that *even the animal kingdom* is ordered by laws. Now, it is decidedly peculiar to say that non-human animals are governed by laws, since (for Aquinas, as for Aristotle) they are unable to reason. (Aquinas 1944, 2-1.91.6) This is a strange thing to say, since laws are supposedly rational. All the same, Aquinas argues that the law of sensuality directly governs the kingdom of animals, not in the sense of being an appropriate rule or measure of their conduct, but rather in the sense that they “participate” in it: i.e., it guides their actions. It is in that respect that non-human animals are directly governed by sensuality *as a law*. In contrast, humans are only indirectly governed by sensuality because our primary guide is reason, and sensuality only operates upon us indirectly by influencing our bodies alongside our use of our faculty of reason. This story about the indirect influence of the animal law upon human conduct is patched into Thomistic apologetics, as humans experience the force of sensuality as “*fomes*”, the punishment levied against humankind as a consequence of original sin. (Aquinas 1944, 2-1.91.6)

While the above remarks may have made it seem like the different kinds of law operate autonomously from one another, it should be reiterated that each system of law is interdependent with the other systems. Ultimately, the theoretical unity of the law depends on the connection that each system has to the eternal law. In making this case, Aquinas pushes against the conventional wisdom of the modern day reader.⁸

⁸ And against Latin etymology, in a manner of speaking. He notes that there is a distinction between divine justice (*fas*) and human justice (*jus*), though he hopes to assimilate the two distinct species to the genus of *justice*. (Aquinas 1944 2-2.57.1)

2. The natural phenomenon of law (II-I. Q92)

There is a considerable gap between the modern sense of ‘law’ and the Thomistic sense of law. To the modern reader, ‘the law’ is just *the human law*; to the extent that we do refer to the constants of the universe - physics, and so on - we acknowledge that these sorts of laws are different in kind from the laws that govern societies. Not so for the Thomist, who recognizes no wide divergence in meaning between the two senses. Law is continuous across the whole order of things; it has its imprint across all existence. Needless to say, Aquinas was writing in a different era, working with his own historical assumptions and within very different political and cultural institutions. But he was also writing in the same world -- *our* world, at least by some rough approximation. While much of the variation between his worldview and ours can be attributed to his different circumstances, there is also a sense in which he was focused on explaining something slightly different than what we are trying to explain. His understanding of *what the law even looks like* is different from our understanding of what the law appears to be. These are the features that Aquinas addresses in (2-1.92), concerning *the effects of the law*.

As a matter of social behavior and convention, Aquinas shares with many other scholars an interest in certain kinds of social facts oriented towards the attribution of fault to actions and persons; especially, regularities of how people *prohibit* and *permit* conduct by *command* and *punishment*. (Aquinas 1944, 2-1.92.2) These are facts about negative-to-neutral social behaviors; Aquinas claims that he is distinctively *uninterested* in regularities in how people are rewarded, since anyone can reward faultlessly. (Aquinas 1944, 2-1.92.2.3) It can be inferred that one of the main aspects of law, as a phenomenon, is that it is a project of commanding and punishing persons without committing (moral, prudential, epistemic) fault. In all its doings, the law is properly conceived as the *expression* of the right, and not *as* the right. (Aquinas 1944, 2-2.57.1) In our vernacular, these are the ‘appearances of law’, i.e., the features that are distinctive to the folk.

One final effect of the law should be noted, which is that the law is aimed towards the production of the good and the rule of the good. Aquinas believes that the law functions to make the good even when it is a bad government, because it at least endeavors people towards the good *for that government*. (Aquinas 1944, 2-1.92.1) Unfortunately, Aquinas does not elaborate enough on the precise meaning of ‘the good’ in this context; indeed, recall that his concept of goodness equivocates between three prongs, of conceptual fitness, utility, and pleasantness. (Aquinas 1944, 1.18)

Effusive optimism from the internal point of view

Before moving on, we need to highlight and underline some of the distinctive features of Aquinas’s views about the appearances of law to subjects, in order to foreshadow the ways in which they contrast with more modern approaches. As we recall from the introduction, on the present approach, the ‘appearances’ of law are the broad characteristics that the untutored folk should expect of a legal system, irrespective of the broad characteristics recognized by experts.

Many of those working in 20th century jurisprudence – notably, Justice Holmes and the legal realists -- would like to be able to articulate the features of the law that could be observed by suitably informed outsiders to the system; ideally, from the point of view of the criminal and dissident. The inference is that, if it is obvious to a rogue or outsider what the law is, then it shall be obvious to everyone else as well. At the outset we can see that Aquinas will not think this is going to be a useful exercise in figuring out what subjects can know about the law, since the law is continuous with facts about its good- and right-making qualities, which owe to its conformity with the natural law. So moderns would need to amend their idea of an ‘outsider’ or ‘external point of view’ in more modest terms, if they are to have any traction with the Thomistic worldview: e.g., contemporary social

scientists who are narrowly interested in studying the law as a social phenomenon, and who set out to verify empirically the propositions set forth within this isolated chapter of the *Summa*. There are some features of the Thomistic account that such scientists would be able to explain, and hence explain on behalf of the folk, but quite a lot that might seem inconsistent, unverifiable, or otiose.

On some level, we already see that many facts about punitive social behaviors could not be attended to by someone who occupies a *purely* external view of the law. At the very least, if the phenomenon of law involves speech acts, and speech acts require interpretation, then mere behaviors are not going to describe the thing we are after. So, suitably informed social scientists cannot be *entirely outside the law* without losing a grip on what the law even looks like to the folk. The only question is, to what extent does a subject need to be able to recognize and endorse the idea that a social system is grounded in a body of good reasons in order to recognize the institution as having the appearance of law?

There are two reasonable constraints that a social scientist would have to observe in order to recognize the Thomistic account of what the law looks like. First, they must be sufficiently proficient in the language and customs of the society that they could identify commands as commands and punishments as punishments. These are potentially value-laden judgments that require the ability to recognize categories of social and economic costs as punitive or non-punitive in their form: e.g., taken purely at face value, a tax levied upon citizens is not a punishment, while a fine for parking in a no-parking zone is a punishment. Yet, they might look similar to some.

Second, they would need to be suitably in agreement with the rest of the *Summa's* theory of law, which is needed to identify the conditions of faulted and faultless commands or punishments. This theory is itself unempirical, despite the fact that Aquinas clearly considers his view of legal authority to be the best explanation of what the natural and physical evidence tells us about the operations of the cosmos. The best that a narrowly interested social scientist can say is that these speech acts are to be performed correctly or incorrectly in some vague sense, and offer no insight into what counts as 'correct' or 'incorrect', 'faulted' or 'faultless'.

It must be emphasized, in connection to this point, that unlike contemporary scholars, Aquinas thinks that a theory of law is out to explain the general order of things. Now, even by Aquinas's own lights, any and all postulates about the eternal law could not be confirmed by any mortal observer. Indeed, the eternal law is known to us only indirectly, and certainly imperfectly, through its effects. (Aquinas 1944, 2-1.91.1) Moreover, the very idea of an 'outsider' who is out to investigate the law writ large would be impossible, since *not even God* is outside of the eternal law, in the sense that he participates in it. So the eternal law is not part of the *phenomenon* of law; it is, instead, a part of the best explanation of how the other parts of the law work, and how the order inherent in law derives its grandeur from the order of existence.

These two considerations – that an outsider needs to be a participant in the customs of the land, and also needs to take a very charitable approach to Aquinas's metaphysical doctrines – creates a situation where the external point of view has no traction. In order for the law to be informally promulgated, the folk must be assumed to have a robust set of information about the facts about divine rule and scientific fact at their disposal. These are facts that, in the old vernacular, were for the most-part described as facts discoverable through *reason*.

3. The constitution of human law (II-I. Q96)

We investigate the possibility of implicit constitutions by looking at how and what he believes are constitutive norms or rules, as recognizable by experts in law.

The law is a system of general precepts that bind all who are under its jurisdiction. (Aquinas 1944, 2-1.92.2.1; 2-1.96.5) Because they are ostensibly *general* precepts, human laws have to be

made to last: they are generalizations that are created in order to apply across the majority of cases, and which can be held to exist with an appropriate degree of certainty. (Aquinas 1944, 2-1.96.1) The accent here is on an *appropriate* degree of certainty, since total certainty is neither desirable nor possible in every subject matter. The human law must do its best as an institution to moderate what is normal in the society, and direct people towards norms that improve the common good. In this way, experts apprised of the constitutive facts of law are mainly those who possess conventional social authority, but not always or entirely.

While legislators and subordinate judges should always frame the law in terms of the common good, any particular law might apply to a wide or narrow slice of its subjects. (Aquinas 1944, 2-1.96.1; 2-1.95.4) For example, some aspects of the human law might assign duties and rights only to soldiers, which we would call the military law. (Aquinas 1944, 2-1.95.4) Despite singling out particular subsets of the population for special consideration, the considerations laid bare in the law must still be presumed to be oriented towards the betterment of the people as a whole.

The task of the human law is to pave the way to the common good, with emphasis laid here on the word *common*. It is not the job of the human law to repress all vices, nor is it to directly or crudely prescribe all virtuous actions. (Aquinas 1944, 2-1.96.2) The job of the human law is to repress only the most grievous vices, which the majority could indeed abstain from. When it comes to human laws, generality is the watchword: if certain expectations of virtuous conduct cannot be directly ordained to the common good, then they fall outside of the purview of the stewards of the state.

That having been said, there is an indirect sense in which the human law *must* recommend virtue, in the sense that virtue is ostensibly directed towards the common good. So while the door is always open for the human law to proscribe virtuous actions to people, it is only in the sense that the connection to virtuous action and the common good can be ascertained (and, presumably, publicized). Moreover, the regulation of virtue in human law must also take care to avoid inadvertently creating vice. (Aquinas 1944, 2-1.96.2) Aquinas is worried about potentially overambitious legislators who expect more from a population than they could reasonably give. And in the history of law, we have seen many instances where his wisdom is confirmed, in broad strokes, as badly informed legal prohibitions only serve to create black markets for criminal trade.

It is because of this many-tiered conception of the purpose of human law that Aquinas recommends a division of labor within the judiciary. For him, the lower authorities just apply the law according to its rules, while the higher authorities are given the task of judging when cases where a guilty person can be released from punishment. (Aquinas 1944, 2-2. 67.4) Further details about the kinds of ‘release from punishment’ can be seen in the next section, when we discuss exceptions and dispensations.

The legislator and subordinate judges are fallible, only able to lay out general precepts of action with a limited degree of certainty. But they are assumed also to be agents of the right, the just, and the good, even if considerable evidence exists to the contrary. Generally speaking, in cases where the written law provides equivocal guidance for action – e.g., what Hart would later call *penumbral cases* -- the citizen must do their best to interpret the written word of the law in terms of the intentions of the lawgiver. But in cases where the intentions of the judge are still ambiguous as a guide to action, the subject should interpret the legislator’s intent charitably: i.e., to assume that the judge is directing action towards the common good.

All and for the most-part, exceptions to the law are decided by the proper authorities. It is not generally up to me to decide that ‘vehicles keep off the grass’ only means ‘motorized vehicles, not wheelchairs’; strictly speaking, it is always only up to the judge to decide whether or not the law applies to the case. That having been said, there *are* some cases Aquinas describes where no deference to the law is needed: namely, times of emergency and great risk, understood (presumably)

in terms of deprivation of natural need. Aquinas famously suggests, e.g., that a truly starving person is allowed to break property laws banning theft if s/he literally, somehow, needs to steal food in order to survive. But even during such extraordinary circumstances, the citizens do not become “jurists” who fix the meaning of the law. Instead, citizens are capable of observing that the law’s business is to cover normal conditions, and that it might not apply to very abnormal ones. After all, while the law is strictly *about* the conduct of persons, it only exerts its distinctively legal force in terms of *general* proscriptions for action, and extraordinary cases are abnormal by definition.

But for Aquinas, the conventional human authorities only determine the scope of the human law *most of the time*. The verdicts of the rulers reach their limits when they run up against the requirements of divine justice. As we shall see, the notion of justice partly constitutes the human law, both by providing it with its aim and by constraining what counts as legal.

Divine justice as an implicit restriction on human law

Aquinas believes that human rulers are source defeasible as masters of law, as their verdicts can be mooted by the expertise of divine authorities. In what follows, I will argue that, for Aquinas, justice is at least a constitutive norm of law, and at most a constitutive rule. We need to understand his view of implicit constitutions accordingly.

While the life of the law in general is nourished by the conscience, it is the *just* laws which are specially animated by it. When a law is just, we can be secure in knowing that it derives its aura of morality from its ability to satisfy the eternal law, which operates upon the habits of the mind through the precepts of nature. (Aquinas 1944, 2-2.67.4) Just laws, Aquinas says, have three broad characteristics: they are ordained for the common good, operate within the proper scope of human authority, and apply across the community equally. (Aquinas 1944, 2-2.67.4) Unjust rulings are those which fail to bind the conscience for the right kinds of reasons: i.e., for being manifestly against the common good and are opposed to the divine good. Citizens are ostensibly not obligated to obey rules that violate the common good, and have a positive duty to *disobey* rules that violate the divine good.

Upon analysis, it is unclear (on first blush) whether or not unjust human rules are strictly *laws* at all. The boilerplate statement of Thomism, after all, holds that “an unjust law is no law at all”. The contradictoriness of the slogan is sometimes thought to be sufficient reason to reject the proposal as a whole. (Hart 1961, 8) But more charity is required here, since the offending phrase does not occur in most authoritative translations of the *Summa*. “Such are acts of violence rather than laws, because, as Augustine says, *a law that is not just seems to be no law at all.*”⁹ At any rate it is Augustine, not Aquinas, who is responsible for the contents of the offending phrase. So even if you disagree with the standard translation of the text, Aquinas cannot be easily dismissed on the grounds of contradicting himself.

But even with those two considerations set firmly in the mind, Aquinas’s quote above is an eyesore to many modern readers, and lends itself to diverging interpretations. The potential for ambiguity is striking; either Aquinas means to say that justice is a *necessary and sufficient condition* for the legality of human rules, or he means to say that justice is exhaustive of law *strictly speaking*. We may refer to the former interpretation as the ‘constitutive reading’, (characteristic of Augustine) and the latter as the ‘focal reading’ (as in Finnis 2011). The difference is that the Augustinian conception of law as justice forces us to say that an unjust law is *no law at all*, while the Finnisian conception obliges us to say that unjust laws are *essentially defective as laws*. Aquinas’s intended meaning will have to be inferred from context.

⁹ Pegis p.795, emphasis preserved. Note that similar phrasing appears in the Blackfriar’s edition.

At some points, context suggests that the constitutive reading is correct. Consider this, for example: “Hence the force of a law depends on the extent of its justice... every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.” (Aquinas 1944, 2-1.95.2) Here it seems very clear that he means to say that some things that look like laws are not *really* laws, which is no longer a statement about *mere appearances*. It is, instead, about their very *nature*. Taken at face value, he is not just quoting Augustine modestly; he seems to be doubling down on the point.

But does that mean Aquinas must be guilty of believing in something like the constitutive reading? Perhaps not. According to the focal reading of that passage, unjust human laws are not laws *in their nature*, without thereby necessarily saying that they are not laws *in form*. This leaves open the possibility that unjust laws are in fact laws nominally or technically speaking, but not laws *simpliciter*, perhaps in the same way that some might regard flightless birds as not birds *simpliciter*.¹⁰ Were that so, then it could indeed be denied that unjust human laws are human laws *simpliciter*, though it could not be inferred that they are not human laws *at all*.

To say that unjust political rules are not laws *simpliciter* is to say they are not expressions of law *qua* law. For a helpful illustration, recall Thrasymachus’s entreaties to Socrates in the *Republic*: “True, we say that the physician or arithmetician or grammarian has made a mistake, but this is only a way of speaking; for the fact is that neither the grammarian nor any other person of skill ever makes a mistake in so far as he is what his name implies; they none of them err unless their skill fails them, and then they cease to be skilled artists.” (Plato 2000, 15) Not all legal systems are just, just as not all mathematicians are infallible in doing sums; but mathematician *qua* mathematician is infallible at sums, and legal systems *qua* legal systems are systems of justice.

Does it make any sense to treat the paradoxical sentence as being about the focal meaning of law? One reason to think it does not is by considering the Augustinian phrase ‘at all’ which was embedded in the initial quote, which is rather categorical language to use (especially when amplified by Aquinas’s assertions about the justice being part of the nature of the law). By analogy, if I were to assert that ‘a flightless bird is no bird at all’, I could be rightly accused of rendering an intemperate verdict about the community of penguins. Still, it could be that Aquinas means to quote Augustine approvingly, but has a subtler thesis in mind. The contours of that thesis shall have to be discovered by consulting remarks he makes in other passages.

Even if the focal reading is correct, it needs to be tempered by three qualifications. First, recall that Aquinas believes that even unjust laws truly are worthy of obedience (save the emergency exemptions already noted), and hence that they are laws. He says: “But in so far as it deviates from reason, [human law] is called an unjust law, and has the nature, not of law, but of violence. *Nevertheless, even an unjust law, in so far as it retains some appearance of law, through being framed by one who is in power, is derived from the eternal law; for all power is from the Lord God...*” (Aquinas 1944, 2-1.93.4.2) (emphasis added) So, as it turns out, unjust human laws will at least *seem like* human laws; you can indeed make the inference from ‘unjust law’ to ‘law by all appearances’.

Second, Aquinas argues that unjust human rules are *binding* upon the subject to the extent that these rules keep the common order and avoid scandal. The obligation to obey the dictates of even unjust rules can even seem to be all that Aquinas thinks a theory of law requires: a theory of law aspires to explain regularities of command and punishment. (Aquinas 1944, 2-1.92.2) In other passages, he puts an even greater accent on the idea that the aim of the human law is to provide

¹⁰ This is the view adopted by John Finnis (2011), who argues that Aquinas is telling us that unjust laws are not part of the focal meaning of law.

peace and order: e.g., when he argues that “the end of human law is the temporal tranquility of the state”. (Aquinas 1944, 2-1.98) The common order is a good by itself; the standing customs of a community count as the law of that community, insofar as those customs are assumed to be a dictate of reason that arises from the human will. These are a kind of unwritten law, because they are accessible to the public in the form of conventional deeds and not in words. (Aquinas 1944, 2-1.97.3)

Third, while Aquinas disavows the legal authority of *tyrannies* (which are manifestly ill-suited to provide for the common good, both in nature and appearance), he *is* flexible enough in his convictions to recognize the relative goodness of bad governments. For he understands ‘good *for a government*’ as one kind of the good. (Aquinas 1944, 2-1.92.1) So, if the “intention of the lawgiver is fixed on that which is not good absolutely, but useful or pleasurable to himself, or in opposition to divine justice, then law does not make men good absolutely, but in a relative way, namely, in relation to that particular government. In this way good is found even in things that are bad of themselves.” In short, subjects are made relatively better just by virtue of their obedience.

These considerations taken together may be enough to formally recognize a wide swath of unjust human rules as genuine human laws, depending upon how much we would like to infer from them, and on the relative weight we give each passage. On the most conservative and charitable reading of the text, these are reasons to think that many unjust human laws are indeed technically laws, though not laws *simpliciter*.

But there are very good grounds for supposing that some unjust human rules are not laws at all on the Thomistic account, and hence that the constitutive reading is correct. It seems to me quite implausible to think that Aquinas would have us believe that all human decrees are laws. After all, there is a categorical prohibition on following rules that violate the divine law, and so the human law is only fit to be followed when it is assumed to issue out of the divine law. Properly speaking, then, we should say that a *heretical and unjust human rule* is no human law at all. Unjust human laws are only ‘human laws’ insofar as they maintain the appearance of being just, and insofar as their observance facilitates the common order and peace. Or, to put it another way: all human laws are human rules with a halo. In that narrow sense of ‘justice’, Aquinas seems to be saying more than ‘the ideal of law is justice’; he is committed to saying that an unholy ‘law’ is no law at all. For Aquinas, unholy rulings cannot even have the appearance of being laws.

In case there is any doubt on this point, a concrete illustration should put doubts to rest. From the book on Justice, Aquinas explains: “Moses seems to have slain the Egyptian by authority received as it were, by divine inspiration; this seems to follow from Acts vii. 24, 25, where it is said that *striking the Egyptian . . . he thought that his brethren understood that God by his hand would save Israel (Vulg.—them.)*” (Aquinas 1944, 2-2.60.6) This is a bold defense rooted in divine authority. When Aquinas meditates on possible justifications for the act by analogy to a natural right of self-defence, the justifications are rebuffed: “[I]t may be replied that Moses slew the Egyptian in order to defend the man who was unjustly attacked, without himself exceeding the limits of a blameless defence. Wherefore Ambrose says (De. Offic. i.) that whoever does not ward off a blow from a fellow man when he can, is as much in fault as the striker; and he quotes the example of Moses. Again we may reply with Augustine... that just as *the soil gives proof of its fertility by proceeding useless herbs before the useful seeds have grown, so this deed of Moses was sinful although it gave a sign of great fertility*, in so far, to wit, as it was a sign of the power whereby he was to deliver his people.” (Aquinas 1944, 2-2.60.6) In other words: Moses sinned, but it is permissible because he was serving God’s purpose (of saving the Jews from slavery in Egypt). Here Aquinas could not be clearer in saying that human rulings are most powerfully overturned by divine command. And Moses’s conduct is by no means a lone blip on Aquinas’s radar; he makes similar casuistic remarks on Daniel’s condemnation of the ancient

judges by justifying it through appeal to Daniel's "divine instinct". (Aquinas 1944, 2-2.67.1)

On Aquinas's account, human rules are *source defeasible* in the sense that they are not established as law solely by their connection to the verdicts of standard social sources. It is in that sense, and only in that sense, that we may speak of laws as being 'defeated'. What the constitutive reading shows us is that Aquinas believes that human rules are source defeasible, when they run up against the hard rock of divine authority. Divine justice, not the will of persons, is what constitutes human law. Coherence in the basic picture is preserved (when it is preserved) because the divine law grants the sovereign wide discretion in determining the requirements of justice.

4. The evolution of the divine and human laws (II-I. Q97-108)

Generally speaking, the law needs to maintain consistency. Generality is, and remains, the watchword in a system of laws; a constantly changing system of law would be too confusing for people to follow. (Aquinas 1944, 2-1.97.1.2) So it is generally the case that the approach to legislation should conserve the decrees already made in order to preserve the integrity of the law. It is in this purely instrumental sense that custom is important to order, and hence to the life of the law.

But the demand for consistency should not be overstated. For Aquinas, it is important to recognize that a legal system is capable of change, depending on the needs and expectations of the time. Any kind of strictly *fundamentalist* disposition towards the law is inadvisable; laws are there for the common good of a changing populace, not a set of rituals we keep up with for old time's sake. (Aquinas 1944, 2-1.97.1.3; 2-1.97.2) In short, law *evolves*. And the evolution of law is nowhere more salient than in the evolution of the divine and human laws.

History progresses towards an ideal, for Aquinas the Christian, and the human and divine laws follow suit. Although the judgments of human rulers are imperfect, they are masters over human law insofar as they are aimed at perfection. (Aquinas 1944, 2-1.97.4) Aquinas thinks that on a long enough timeline, human laws shall constantly improve in their ability to produce the good, leading humanity away from sin. This progress is so extensive that it even guides the course of the divine law, ostensibly delivered from an infallible God, indirectly through prophets and angels. The requirements of the divine law are only revealed piecemeal, depending on the ability of the human community to successfully comprehend its precepts and integrate them into their lives as social creatures. That accounts for the supposed degeneration of the ceremonies of the Old Law and the introduction of the New.

The idea of cultural development is central to the Thomistic conception of how and when it is appropriate for systems of law to change. As we've seen, there is a division of labor between the human and divine laws: the human law is tasked with regulation of *external actions* for the purpose of satisfying the common good, while the divine law is directed towards the development of the dispositions and actions of the individual, guiding their *internal actions* towards virtue and, ultimately and hopefully, salvation in the afterlife. But some attempts at regulating internal and external actions will fall on deaf ears, the further that humankind is ruled by the *fomes* of sin; by the same logic, a community of the virtuous would require minimal laws. So both the human and divine law are, and must be, subject to change depending on our moral and religious habits.

The laws are precepts guiding us towards the good, but they are precepts that are sensitive to the needs of those who participate in it. Quite a lot depends on the character and temperament of a people, and the demands that a populace puts upon the civil order. Given that the divine and human laws are both sensitive to the development of a population, it makes good sense that human laws should be open to revision, either by admitting exceptions to the rules or changing the rules altogether, since the needs of a population are subject to shift upwards or downwards. The fact of

the matter is that we grow with time, and our institutions work better when they are able to respond appropriately to cultural changes.

Human laws change

In the Thomistic system there is a recognized difference between *dispensations* and *exceptions*. A dispensation from the law is when a subject is in such extraordinary circumstances that the law cannot be properly said to apply, arguably depending on the discretion of the judge. An exception to the law, by contrast, is when general rules are formally recognized as not applying in certain kinds of circumstances. The law can be properly said to have changed when exceptions are discovered; dispensations leave the law as the jurists found it. (Aquinas 1944, 2-1.96;2-1.97)

Ostensibly, the human laws are the only laws that can undergo change by way of finding exceptions; no human being is fit to determine exceptions to the divine and natural laws. (Aquinas 1944, 2-1.100.8) When exceptional cases arise in the human law, the rules that govern normality do not apply. (Aquinas 1944, 2-1.96.6) But if exceptional conditions become the new normal conditions, then the legislator does well when they take note of it by embedding these exceptions within the law itself. (Aquinas 1944, 2-1.97.4) In this way the old laws are gradually displaced as the new conditions of the world—e.g. technological and economic change, new generations of people, immigration, etc.—become more salient to judicial deliberation.

The first step down the road to change is when there is a customary acknowledgement that the law does not apply to some extraordinary *kind* of case. The gradual realization that some kinds of cases are not subject to a law compels a change to the law itself by the introduction of proper *exceptions*. (Aquinas 1944, 2-1.97.4) A vital normative difference between determining an exception to the rules and dispensation by way of extraordinary circumstance is that exceptions are determined exclusively by the sovereign, while dispensations in case of emergency are within the remit of all reasonable human beings (such as in the starving theft case mentioned above).

In all cases where a party is subject to some unusual exemption, all parties must use their judgment judiciously, remaining faithful to what is reasonable, but they seem to have different levels of obligation. A sovereign who decides an exception without recourse to human justice “acts badly”, to use Aquinas’s underwhelming condemnation. (Aquinas 1944, 2-1.97.4) The aim of the human law is to maintain order, which means that frivolous changes to the law cannot be sustained. Meanwhile, a citizen who is a poor judge of what counts as an extraordinary circumstance remains bound by the law.

The second step in gradual change occurs when dispensations issuing from unusual kinds of cases become normalized as customs. Since the law is supposed to provide general reasons for action, custom can be said to have indirectly modified the general guidance provided by the law, insofar as the new custom is assumed to be a rational one. (Aquinas 1944, 2-1.97.3) In this fashion, if obedience to a standing law is impossible due to the growth of a contrary custom, then the old law naturally recedes from view. (Aquinas 1944, 2-1.97.3.2) But at no point in time can it be properly said that custom is forcing the hand of the legislator, or directly blunting the scope of the law. Instead, the process of the modification of the laws is consistent with the idea that human law derives from rationality, itself bound by the requirements of divine law and nature. Custom does not by itself *constitute* law, though it can constrain the shape of the law in the fullness of time by way of influencing the reasons that jurists recognize as good guides to action.

Divine laws change

While it is not entirely uncommon for the human law to change, it is indeed quite uncommon for the divine law to change – and when it does change, it does so in an especially dramatic way. The reason that human laws are relatively less stable than divine law consists largely in the fact that human laws allow for exceptions as determined by human rulers. By contrast, the natural and divine law only admit of exceptions when mandated directly or indirectly by God. And such divine legislation is rare. Indeed, according to Aquinas, it has only occurred twice in history: first, when the ceremonies of the Gentiles were supplanted by the terms of the Decalogue, as revealed to Moses; second, when Christ arrived, and spoke as God Himself (notably, say, in the Sermon on the Mount). The Old and New Laws were fashioned and revised by God, corresponding to the relative level of moral development of civilizations.

I have suggested that Aquinas believes that justice functions as the implicit constitution behind human laws, and justice is operationalized in its clearest and most concrete form by the requirements of divine law. An affront to divine justice is no law at all, but only violence; to even have the appearance of being a human law, a sovereign's decree has got to have (at least some small kind of) a halo. When suitably understood, the divine law *is* that halo. A change in the divine law amounts to nothing less than a sea-change in the nature and scope of the human law, at least from the point of view of humanity.

But the divine law has an additional purpose than just to form the basis of human law. Human laws can only govern external actions, which only goes a limited distance in bringing people towards common happiness. When our agent-intellect fumbles its internal actions (volitions, habits, desires), it does its fair share in immiserating a public. Some kind of guidance needs to be provided to a public in order to govern their internal lives. The Old Law provided that guidance through the Commandments, which Aquinas thinks can be faithfully reconstructed by natural reason into the following maxims (rendered colloquially): (Aquinas 1944, 2-1.100.5)

1. **Be faithful to the Sovereign.** (Thou shalt have no other gods before me)
2. **Revere the Sovereign.** (Thou shalt not take the name of the Lord thy God in vain; Thou shalt not make unto thee any graven image)
3. **Do service to the community.** (Remember the Sabbath day, to keep it holy)
4. **Do no harm to men.** (Thou shalt not kill)
5. **Do no harm to women.** (Thou shalt not commit adultery)
6. **Do no harm to possessions.** (Thou shalt not steal)
7. **Do not harm using words.** (Thou shalt not bear false witness against thy neighbor)
8. **Do not harm using thoughts.** (Thou shalt not covet)
9. **Pay your debts.** (Honor thy father and thy mother)

Again, it pays to notice that these interpretations are not part of the black letter of the Commandments, but ostensibly follow from natural reason. The commandments themselves are written laws, but it may be useful to regard Aquinas's interpretation of the laws as the *unwritten* operationalizations, even liberalized widenings, of the law for the purposes of practical action. In particular, his interpretation provides us with instructions on how the legal order of a community can and must function.

According to the author of the *Summa*, the Old law needed to be changed in a few different ways. First, the Old Law was unlike the New Law in that it was different in its origins, since it was delivered by angels, while the New Law was delivered directly by God. Second, the Old Law did not confer the grace required for salvation, unlike the New Law. The strengths of the forms of law can be stated crudely, by referring to the Old as the “law of shadow” or “law of fear”, and the New the “law of reality” or “law of love”. (Aquinas 1944, 2-1.107.1-2)

All the same, the Old Law foresaw the coming of Christ, and it identified God as the ultimate sovereign, and interpreted the natural law correctly. Hence, Aquinas argues that in most respects the Old Law remains intact in Christianity, since according to him the transition from Old to New was mainly an accumulation of laws and not a reduction. (Aquinas 1944, 2-1.107.2)

However, it is difficult to see the transition from the Old to New Laws as being as altogether smooth as he seems to want to suggest. Aquinas offers a helpful schematization of the divine laws at this point, separating them into three kinds of precepts: ceremonial, moral, and judicial. The moral features of the Old law lay in the Decalogue, along with any elaborations upon the Commandments provided by faith and reason which support them. The ceremonial precepts of the divine law are mainly directed towards worship, and they include a litany of customs, including rituals for sacrifice, recognition of sacred things, and instructions for the holy sacraments or observances. The judicial features of the divine law are mainly directed towards the ways in which a subject should behave towards their neighbor, and in content they largely established the scheme of distributive justice that is appropriate for the state to adopt. The moral features of the divine law are directed towards imposing discipline upon subjects, and directing them towards virtue. During the transition between Old and New Law, the moral features of the Old laws remained unchanged, Aquinas says, while the judicial precepts were downgraded from the status of legal obligatoriness to the state of legal permissibility, and the ceremonial precepts of the Old law were outright supplanted by the New ones. The ceremonial precepts were downgraded in the most dramatic fashion, becoming both “dead” and “deadly”, as “after Christ’s Passion, it is a mortal sin to be circumcised, or to observe the other legal ceremonies” of the Old law. (Aquinas 1944, 2-1.103.4)

What does Aquinas think accounts for this radical change? It seems to owe to two major factors: first, the Old Law originated in an indirect source, the angels and the human prophets to whom they spoke, while the New Law originated in God himself; second, a change in the receptiveness of the audience to improved guidance on how to be charitable. Put together, the distinction between Old and New Laws can be articulated as a difference, and not a small one, in their distance in guiding us towards beatitude. (Aquinas 1944, 2-1.107.1)

One feature of the New Law that deserves special mention is that it is ostensibly an exemplar of unwritten law. (Aquinas 1944, 2-1.106.1) His meaning requires some explanation. Aquinas does not mean to say that the new laws are not written down; they are in the New Testament, after all. Instead, he argues (with Aristotle) that “[e]ach thing appears to be that which preponderates in it”, and “that which is preponderant in the law of the New Testament, and whereon all its efficacy is based, is the grace of the Holy Ghost, which is given through faith in Christ.” It is in this way that the law is “in the first place a law that is inscribed on our hearts, but that secondarily it is a written law”. (Aquinas 1944, 2-1.106.1) The binding force of the law, in other words, is a certain attitude or orientation towards action that is supposed to inhere in the capacity for judgment amongst the people who have adopted the Catholic faith.

5. The soul of the judiciary (II-II. Q48-9, 54-67)

What, now, about the operations of law? Since Aquinas thinks that justice is at least a constitutive norm of law, if not a constitutive rule, most of his jurisprudential wisdom will be aimed at securing justice.

The lazy author who wants to say something interesting about Thomistic jurisprudence will be disappointed once they realize that the word “jurisprudence” does not appear anywhere in the Dominican translation of the *Summa*.¹¹ Even so, the sections on prudence, judgment, and justice all

¹¹ Search of: St. Thomas Aquinas. (1947) SUMMA THEOLOGICA. (Benziger Bros., 1947) Translated by Fathers

feature strongly in their respective chapters, and the thread that runs through them provides distinctive instruction for both the citizen and the jurist in matters of casuistry. So a little throat-clearing on these more basic concepts is necessary before getting into some the main details of Thomistic jurisprudence.

Aquinas believes that *justice* is a habitual will to do right for everyone. (Aquinas 1944, 2-2.58.1) Barring trivial exceptions, justice is a social thing. To do what is just or right for everyone is to direct your actions towards others by treating them as equals, in some sense. (Aquinas 1944, 2-2.57.1) Now, to talk about treating people as equals is to regard them as *equals before a standard* of some kind. (Aquinas 1944, 2-2.57.2) There are at least two different kinds of standards we can examine, the positive and the natural. Positive standards of justice involve *establishing certain things as good by way of common agreement* about what is right, while natural standards of justice involve *doing right by bringing about what is good*. In other words, people can be equally expected to behave in such a way as to produce the good, and to respect conventional wisdom about what counts as good. Both forms of justice cut across the varieties of law by applying to both the divine and the human laws, but our primary concern is with the human laws.

In Aquinas' reckoning there are two parts of justice, the commutative and the distributive. (Aquinas 1944, 2-2.61.1) Commutative justice involves matters that involve relationships between persons and persons (e.g., murder, maiming, theft and robbery), while distributive justice involves the relations between persons and their community (e.g., permitting a starving man to take a loaf of bread without being subject to the accusation of theft). Under the heading of commutative justice fall several sub-topics, relating to their particularly morally-charged kinds of crimes: capital punishment and suicide; mutilation and corporal punishment; and property rights. The remedy for commutative injustice is restitution, as in returning money after a theft. (Aquinas 1944, 2-2.62.1)

One particularly interesting kind of distributive injustice is the idea of respect for persons. (Aquinas 1944, 2-2.63) In Aquinas' view, "respecting persons" is against the purposes of law and against human dignity. This may sound very strange to the modern ear, where the idea of respect for persons is regarded as essentially tied to respecting their dignity. For theologians and jurists working in the Catholic tradition, the idea of 'respect of persons' amounts to the law treating people in accordance with their rank, and not in accordance with their merits. (Aquinas 1944, 2-2.63.1) In effect, if the law respects *persons* instead of *reasons*, the law functions to treat persons unequally. Ostensibly, Aquinas is trying to avoid the corruption of a legal system through income inequality: i.e., granting the rich more justice than the poor. It is instructive, however, to consider whether or not his account actually succeeds at the task. So, for example, he argues that some persons have more dignity than others, and so the law has reason to treat them differently. Hence, where you need the testimony of at least *three* witnesses to convict an ordinary person for some crime, a bishop can only be convicted with *seventy-two* witnesses. (Aquinas 1944, 2-2.70.2) Aquinas believes that this is consistent with his condemnation of respect of persons, but the modern reader will probably come to other conclusions.

The end-point of this kind of justice is the verdict; and hence a vital instrument of justice is *judgment*. Judgments belong to the just authority first and foremost; those who are unjust are not entitled to judge. (Aquinas 1944, 2-2.60.2) Justice aims at *the just* (the right), while the law is the expression of the just; in this way, the law is ultimately the expression of justice. But in order to be just, judgments must satisfy three criteria: the inclination to justice, stemming from the right

of the English Dominican Province. Retrieved Nov 20 2014 <http://www.ccel.org/ccel/aquinas/summa.html>.

That said, the close synonym '*scientia legis*' (translated as 'knowledge of the law') does appear in the original. I am grateful to Corey Mulvihill for pointing this out to me.

authority, and pronounced according to the right ruling of prudence. In other words, judgments must be aimed at the right, must be restricted to the (admittedly broad, fungible) jurisdiction of the judge, and must consider evidence. Any judgments that fail to satisfy such prerequisites are forbidden by God.

A distinction is made between holding a person guilty and holding them worthy of punishment. (Aquinas 1944, 2-2.60.4) It is possible for guilty persons to be released from punishment, either through appeals or through the decision of higher courts. Such modifications of sentencing belong primarily to the sovereign, so long as the injured parties consent and the remit of punishment does not damage the public good. Meanwhile, subordinate judges must impose the appropriate sentence attached to the crime, given the guilt of the accused. For the lower courts, merciful commutation of a sentence is not permissible in matters concerning transgressions of the divine law. (Aquinas 1944, 2-2.67.4)

Justice belongs chiefly to the sovereign, whose judgments (when rational, consistent with divine rectitude, and not overturned by emergency) are the determinants of law. Justice is also the virtue that rules all other virtues; just as justice is the hub that lies at the centre of law's wheel, it also directs the virtues of the individual. (Aquinas 1944, 2-2.58.5-6) The judge who is possessed of sovereign rule both gives expression to the right, and directs the operations of the conscience. The moral qualities of the law are extensive enough to prompt us to notice that, for Aquinas, *there is no such thing as illegal justice*. (Aquinas 1944, 2-2.59.1) The halo enjoyed by the law does not extend to cover the heads of vigilantes. (Now, that halo can be stained a little bit; for it is also possible for there to be legal injustices, so long as those injustices are small, hence falling well short of the heresies that Aquinas thinks must be illegal and unjust.)

Prudence is a necessary part of good judgment. And while justice belongs primarily to the sovereign (within the constraints noted), prudence belongs to *everybody*: both the ruler and their subjects. Prudence has two objects, proper thought and proper action, with respect to some chosen end. Prudence amounts to what we now call 'duties of care' (what he calls *due sollicitudo*), and is directly opposed to the sin of negligence. (Aquinas 1944, 2-2.54)

Three tendencies

There are three broad tendencies in Thomistic jurisprudence that are noteworthy. First, Aquinas has a complicated relationship with the role of what is written. Second, he had a rose-colored originalist approach to the interpretation of the law. And, third, he felt that authority had a strong role in the process of getting the law to work.

When dealing with human laws, conservation of standing order is vitally important to Aquinas. Hence, the judge – especially subordinate judges -- must offer their judgments according to the written law, to the extent that there is any. The same expectation holds for accusers; all accusations must be made in writing, in order to be exact and precise about the nature of the accusation, to avoid prevarication, and to allow for the possibility of delayed accusations so as to avoid trying a person in their absence. In theory, transparency of legal meaning is of considerable value, and to the extent that explicit codes can be found to appeal to. That having been said, we have to keep in mind the point established earlier, viz., that Aquinas believes there is an implicit constitution that appropriately sensitive judges must pay attention to. Hence it follows that for Aquinas that any law that goes against natural right is unjust and has no binding force. He refers to such written imperatives as corruptions of law, not laws. (Aquinas 1944, 2-1.95.2) The price of having this opinion is that **the law can be tremendously opaque to the subject in those areas where the requirements of natural right are non-obvious.**

Aquinas is not a fundamentalist or strict originalist about jurisprudence. The judge should

interpret the law in accordance with a doctrine that we might call “rose-colored originalism”. In his view, it is possible for laws that are procedurally sound, emanating from the right social sources, to fail to satisfy the demands of natural equity. You can reason well on the basis of precedent and still bring about disaster. In such hard cases, the proper thing to do is to charitably interpret the law and the lawgiver’s intent in such a way that maximizes the good: **to try to balance the integrity of law with fidelity to the people it serves.** Ostensibly, the jurist is interpreting the lawgiver; in fact, they are doing hermeneutical gymnastics to assure that the law can be sustained into the future. (This theme will be mentioned throughout further chapters, and in particular, in all those doctrines that find some sympathy with internalism.)

Indeed, a recurring theme in Aquinas is the degree to which authority must influence a decision in the procedures of law. His stance on the need for a plethora of witnesses to exist in order to accuse a bishop has already been mentioned. There are two others which are of some interest, and which will have a significant impact on how judges adjudicate cases. Witnesses are permitted to remain silent if they are subject to a greater authority, ostensibly so that the witness does not render judgment on matters that are outside of their jurisdiction. Also, when accusers do not succeed in finding the accused guilty, the accuser is subject to the same penalty that was levied at the accused. (Aquinas 1944, 2-2.68.4) The visible respect for authority, and moral authority in particular, has unusual consequences of making rebellion against social sources mandatory in some cases (e.g., of Moses or Daniel). This is paradoxical, if we expect some stability in the authorities we choose, but entirely sensible if we notice a tacit feature of Aquinas’s method: namely, its advocacy of expansionism in systems of law. For him, the law is directed towards wholes, its major project being to integrate more and more parts into greater and greater wholes, and peoples into greater and greater communities. (Aquinas 1944, 2-1.90.2) Taken as a whole, **the law is an immodest institution, and the jurisdiction of any particular case of human law is both paternalistic in principle and expansive in the scope of the powers it grants.** Christ’s famous dictum of “render unto Caesar” applies as a subsidiary principle, and in its application it is thorough. All the same, God – the ruler of the world -- always has the final say, and where the human law overlaps with the divine one, the powers of the judge are correspondingly enlarged. A sensitive reader cannot help but be tempted to infer that, if a state is particularly good at making law in line with divine ordinance, then their borders must be due for expansion. Law is a power that is meant to cross continents.

The ideal of world government is hard to pry apart from the Thomistic vision, even though it was realized as problematic at the time. Consider the poet Dante, author of the *Divine Comedy*, who we quoted at the outset. Dante was one of the principal drivers behind the promulgation of the Catholic faith, and a near-contemporary of Aquinas, and was influenced by Aquinas’s works. Dante himself was a firm believer in the core principles proffered by Aquinas. In a tract titled *On World-Government*, Dante expresses expansionist sympathies in broad terms, effectively arguing that divine favor blessed the victor in a global contest, effectively giving them the right to govern: “*Now who will be so dull-witted as not to see that by ordeal the glorious [Roman Empire] won for itself by right the crown of the whole world?... Let the presumptuous lawyers now see how far they are below the lookout tower of human reason, whence these principles can be viewed. Let them be silent and mind their own business of interpreting the meaning and decisions of the law.*” (Dante 1957, 47) In this soaring rhetoric, Dante makes the stakes clear: no worldly jurisdiction stands apart from God’s.

6. There is no stepping outside

Though it is difficult to summarize the Thomistic approach to law succinctly, the core features of the internal-optimist’s point of view are both intuitive. One might hear an echo of Aquinas in the

words of one 20th century jurist, who wrote: "...what we call "the law" is, in any political society, that body of rules which springs from and rests upon the social standard, or ideal, of justice... And in respect to the unwritten law the social standard of justice is ascertained and declared by the judges, who are the experts selected by the people for the purpose." (Carter 1889, 11) It is also intuitively clear what we might say about how this approach connects to the project of elaborating on the nature and extent of unwritten law. In drawing my discussion to a close, let us examine Aquinas's work with respect to the different kinds of unwritten law from chapter 1 (fiat law, justice norms, implicit constitutions, operationalizations, and secret laws).

Aquinas **has no tolerance for fiat law**, if by fiat law we mean laws that need no formalization, follow the rules of adjudication, and are viewed from the external point of view. The reason is that Aquinas thinks – all and for the most-part, anyway -- that the idea of human law is unintelligible from the external point of view. He would like us to believe that this is true of all the laws. Even so, I think we can and should point to the dubious senses in which he thinks about the dissemination of the eternal law (to humans) and animal law (to animals) as reasons to believe that his theory was up to the task of viewing the law from the internal point of view; in the former case, the Word is unintelligible to us, though we do have rules of adjudication at hand, since we know who to consult in the divine government for advice – namely, angels. In the latter case, since animals do not partake of reason and deliberation, they cannot occupy the relevant kind of internal point of view; they participate in the law as automatons would. But it seems that we can, in all consistency, say that the *human law must* be viewed from the internal point of view. Hence, no laws can be fiat rules.

Justice norms are those rules of conduct that have no need for formal dissemination, are a function of rules of adjudication, and visible primarily from the internal point of view: law, to be law, has got to have a halo. **Does Aquinas regard moral customs of this sort as laws? The answer is essentially yes**, given the existence of limiting cases where the divine law and human law are in conflict: e.g., the case of Daniel. As we have seen, though, it would be doing short shrift to the Thomist if we therefore concluded that it is a system tailored for vigilantes. For Aquinas also believes that the human law sees the writing of the law as a vital policy in practice. All the same, it seems that the legal status of the human rules can be overridden by the requirements of divine law.

Like all constitutions, the implicit constitution is a system of rules that establishes the fundamental scope and limits of legal powers, functioning at least in part as constitutive rules for the government. This normative requirement – of stating what counts as legal -- comes paired with an explanatory requirement, namely that the constitutive rules function at least in part in our attempts to explain the mechanisms that structure and give order to any changes in the structure of government, both interregnum and intra-regnum. **Aquinas has a clear and full picture of the implicit constitution behind particular governments, and the divine government.** He tells us that the nature of a legal system is set out first and foremost by the Decalogue, whose requirements of justice established the very nature of any legal system. The laws were written by Moses, but they derived correctly from the natural law, whose precepts (the goodness principle and its submaxims: the persistence principle, conservation principle, rationality principle) are unwritten. Moreover, Aquinas pointed to the emergence of the New Law, though its purpose seemed to be primarily on how to deliberate properly on judgments, and less on how we ought to conceive of the constitution of a legal order. Finally, Aquinas thinks that the law will ultimately be coherent; its destiny is to expand.

The ultimate empirical test of a legal system is how it interacts with specific cases. Once the unwritten laws are written, they need to be put into operation by rules that include, e.g., the stance

I have referred to as ‘rose-colored originalism’, and by the rather generous—some might say enormous—latitude given to the local authorities. In this sense, the modern reader may find Aquinas’ casuistic musings to be questionable. Indeed, in some sense, one might argue that his principled prohibition of “respect for persons” was contrary to the casuistic reasoning that seemed to demonstrate respect for the personage of the bishops. His counter-argument is to make an iron-clad distinction between respect for persons and appreciation for their dignity, but the critical reader might suspect that this distinction is too precious, and has little meaning when put to practice. It is an open question whether a person of intellectual good faith who was suitably informed of the prohibition on respect for persons (complete with assurances that the rich man must not be given unequal treatment by the law) would be able to predict that the best way to operationalize that principle would be to grant vastly unequal evidentiary requirements in the process of doing justice for bishops and laypersons. If it is a surprise, it is an unhappy one. At any rate, **the characterization of intellectual good faith, and hence operationalization of law, must draw mainly from consultation of the virtues of integrity and fidelity:** what the rulers have said in the past, and what good we think they’re doing.

The most difficult form of law to evaluate in terms of the Thomistic system is the idea of secret law: i.e., those laws that have a need for formal dissemination, but which are not in fact disseminated. Aquinas argues that dissemination (promulgation) is essential to law, but as we know, he employs the word in a very wide and generous sense, depending on the form of law under consideration. At the same time, he insists that at least some sub-areas of human law need to be formalized: e.g., accusations put to court need to be put in writing along with the associated evidence, so that the accusations do not fluctuate with time, and so the accusations can be put on hold and reconsidered when the defendant is absent. Secret *accusations* are forbidden by the Thomistic worldview. However, *denunciations* do not need to be in writing; indeed, the main difference between a denunciation and an accusation lies in the fact that denunciations do not require giving of proofs. Secret denunciations, then, appear to be fair game for the Thomist: they need to be formalized in writing to be followed as law, and at least some of them might not be put in writing. While the two phenomena – the denunciation and the accusation -- might appear to be identical to even the careful social scientist who is trying to dispassionately assess the nature of the system, we know that for Aquinas there is not meant to be any escape from the internal point of view. Though Aquinas disavows secrecy, **it is tremendously difficult to think his account has the resources to disavow or undercut the most clandestine features of law.**

In any event, what has been shown throughout, and rather exhaustively, is the degree to which the notion of unwritten law is robustly present throughout Aquinas’ storied writings about the law. In fact, his account is something we might even refer to as the classical expression of the natural lawyer’s general views on unwritten law. We turn now, next chapter, to a rather different understanding of these issues -- an understanding that makes use of much the same language as Aquinas, but with rather different results -- and recommending in the end a quite different account of the law in both its written and unwritten forms. This is the picture of law proposed by Thomas Hobbes.

CHAPTER III. THE PRACTICAL POINT OF HOBBSIAN JURISPRUDENCE

“Nothing on earth is its equal— a creature without fear. It looks down on all that are haughty; it is king over all that are proud.”

On the monster named Leviathan (Job 41:33-34)

Chapter structure

1. *Paternalistic picture of law*
2. *Modest optimism from a practical point of view*
 - a. *Practicism and the divine way*
 - b. *Modest optimism and the rules of nature*
3. *The constitution of civil society*
 - a. *Natural principles of law, not natural laws*
 - b. *Codependence in the civil law*
4. *Change and statecraft*
 - a. *Self-help for the sovereign*
5. *Tacit operations and counsel*
 - a. *The counsel of the subordinate judge*
6. *Hobbes among the unwritten laws*

Some of the most striking unwritten laws are those which purport to be laws of nature. Hobbes’s uses of the phrase “natural law” and its cognates are at odds with Aquinas’s uses of them. For Hobbes’s account of “natural laws” is primarily aimed at *explaining* the nature and genesis of the commonwealth, and is not robustly normative in the sense of providing a set of rules sufficient to meet the demands of justice. In *Leviathan* the focal meaning of the so-called “natural law” was meant to refer to a natural disposition that rational actors have to seek peace and avoid war wherever conditions permit. These *principles of nature* are worthy of attention for any sovereign or subject, whether they be Lord Protector or King, rebel or cleric. But they are not binding for Hobbes as they were for Aquinas: they are not, by themselves, unwritten laws. They are, as it were, mere norms of reason and not part of the very structure of the cosmos.

Hobbes and Aquinas were separated by a large gulf of time, distance, and circumstance, yet both sought novel ways of resolving conflicts between politically charged ideas. Where Aquinas sought to integrate the divine law into the received picture of law, Hobbes sought to compartmentalize the divine law away from the human law. What is it about the lives they lived that makes their theories so different, and how did it affect their judgments on unwritten laws?

Aquinas’s natural law theory was suitable to its historical context. It was able to account for the

legitimacy of the laws in a time when many or most laws were obscure. It was able to provide metaphysical grounds for the common-law tradition, a medieval system that was characterized by the rule of precedent and deference to local convention. (Groarke 2013, 27, 38) Thomistic natural law hinged upon the rule of divine authority, an invisible caretaker that ruled in the absence of any strong worldly authority. But the world moves on. Diasporas settle; states congeal; kings rise. With the rise of strong state authorities comes a change in political philosophy.

It is against the background of greater centralization of power across towns and provinces during the so-called “early modern” period in Europe that we see a doctrinal shift away from natural law and towards positive law. Thomas Hobbes was one of those who ushered in the change.

Hobbes’s conception of the civil law was a transitional form between natural law and modern positivism and hence defies easy categorization. On the one hand, Hobbes did the best he could to provide a plausible independent basis for the legitimacy of human rulers that did not necessarily ground itself in divine right. But on the other hand, he agreed with Aquinas that *the law tended to appear just*, and admitted that the divine law was at least *possible*. (T. Hobbes 1997, 189) Moreover, his skepticism towards religion was partially occluded by some substantial overtures to divine authority.

Hobbes published his major works during the English civil war (1642-1651), and we can go some way in understanding him as writing for his time and place. Published in 1651, *Leviathan* was the last of his three major published works in political philosophy (after *The Elements of Laws* and *De Cive*). (Lloyd 2014) All of these works emphasized the absolute rule of the sovereign to decide the scope and content of the laws, while denying that they had any need to appeal to divine right. His primary aim was to bring the civil war between royalists and antiroyalists to an end for the sake of the monarchy, not to do any favors to the clergymen. After all, the insurrectionists gained what support they had by attacking the excesses of monarchs who thought they governed by divine authority. By disassociating the monarchy’s legitimacy from the opinions of the church, Hobbes sought to put the sovereign rule on firmer ground.

Hobbes’s arguments led to controversies that had a material impact on his own life. Antiroyalists during the war detested both his defense of the sovereign and his antipathy towards insurrection. As a result, Hobbes was pressured into fleeing the country. Once the civil war was ended in the favor of the parliamentarians, his fortunes changed. Supposedly, the convenience of Hobbesian theory to support the legitimacy of *any* existing government led to Hobbes’s repatriation under Oliver Cromwell, The Lord Protector (and, perhaps, self-perceived (or at least aspiring) Leviathan). (T. Hobbes 1997, 78-9) After King Charles II was restored to power, and Cromwell executed, Hobbes lived out the rest of his days as an advisor to the court. (Curran 2002, 174-7)

1. Paternalistic picture of law

Hobbesian political philosophy adopts a paternalistic conception of the organization of society. His paternalism is not subtle. We can see his paternalism both in the main features of his account and his account of how the laws fit together. It plays a role in his view of what the law looks like, what the law is, how it undergoes legitimate change, and how it works in the hands of officials. It is as if his picture of law were a fractal: if you take a step back from his picture of law, all you shall see is a portrait of the sovereign, and if you were to step closer to examine his brushstrokes, almost all of what you will see are reflections of the will of the sovereign.

Here’s the story. The primary aim of law is to allow citizens to leave a state of misery and pursue a life buoyed by peace and security. Unfortunately, the original condition of humankind is a state of war, a manifest or latent conflict that results from the absence of any overarching power to compel obedience and resolve disputes. To achieve a better life, all members of a society make

a pact with their neighbors to create a commonwealth charged with mutual defense. The aim of this convention is to subordinate the will of the folk to the verdicts of an arbiter who would resolve disputes and make a life of order possible. That arbiter is the sovereign, the eponymous leviathan whose decrees are both necessary and sufficient to establish the contents of laws.

So much of an account of law depends on appearances, and Hobbes asks us to look at the law from a *practical* point of view. For him, the reasons we have for obeying the law are based on a capacity for reasoning about a general problem with our practical social affairs. His view borrows from both internal- and external standpoints. Much like an externalist, Hobbes thinks the law is a force that produces order by way of its capacity to induce awe and compel obedience. (T. Hobbes 1997, 118) But like an internalist, he makes a genuine appeal to substantive normative rights that provide participants in the commonwealth with reason to accept the rules of the sovereign. These two points of view can seemingly diverge in some pre-theoretic sense, but I think Hobbes wants us to believe that the divergence is merely apparent.

When Hobbes uses the phrase “natural law” he equivocates between two meanings: the natural principles that guide the actions of rational people and the unwritten laws that govern them in practice. (T. Hobbes 1997, 132, 162) The difference in usage can be understood by making note of the difference between *authorship* of a rule and the *authority* whose approval makes the rule legal. Natural virtues are natural because they arise without the approval of anyone except the people who observe them, and because they are precepts of reason apt to be thrown to the winds when passions take hold. Unwritten laws derive legal authority from the sovereign, yet they are natural in the sense that their *author* is the population of reasonable people. Thus he says, “Every subject is by this institution author of all the actions, and judgments of the sovereign instituted”. (T. Hobbes 1997, 139)

The Hobbesian principles of nature are useful anticipations of how the law appears, but they need not describe how the law actually works in practice. From the practical point of view, justice is only possible in the context of the commonwealth, but is not guaranteed by it in any straightforward sense. The most uncontroversial way of connecting the Hobbesian view of law to morality is this: the law *always appears* to be an agent of *order*, and only *sometimes* seems to be an agent of morality. (T. Hobbes 1997, 166) On the other hand, the law is always necessary (and, on some readings, may even be sufficient) to meet the *actual* demands of justice. So we can say that he is an optimist about the moral status of law, albeit a modest one.

The contents of the original contract potentially diverge from the sovereign’s will. For instance, Hobbes thinks it is unreasonable to suppose that anyone would ever consent to have essential resources taken from them when entering into the original contract (like food, water, and so on). (T. Hobbes 1997, 130) All the same, the rest of his account tells us that once the sovereign office exists, it is legally possible for the sovereign to squander a body of natural resources even if that body of resources was never released to the sovereign in the first place. The original contract might have had clauses and provisos, but the will of the sovereign decides which of these clauses has sufficient normative force to be legally binding.

Barring trivial exceptions, there are no limits to the powers of the sovereign. There are two reasons for the broad and expansive authority of the office. First, *the sovereign* has never made a contract *with the people*, *i.e.*, a covenant that spells out the limits of the powers of the rulers. (T. Hobbes 1997, 138) The sovereign functions as an arbiter brought in by a contract between subjects. This is important to note because if the sovereign had ever been in a contract with the subjects – say, a contract to govern fairly, or not to usurp a certain body of resources – then it would follow that the sovereign could be legitimately usurped if they ever violated their contract. Hobbes rejects this possibility with full force. (T. Hobbes 1997, 138) Second, the nature of the contract between

all and all does not, and cannot, place any effective constitutive limits on the powers of the sovereign. After all, both the contract and the office of sovereign is preserved through thick and thin, even after conquest; and this will presumably include radical changes in the structure of governance that are implicated in any supposed provisos built into the original convention. (T. Hobbes 1997, 137) To the extent that there is a divergence between the original contract and the present sovereign office, it is the will of the present sovereign office that constitutes the commonwealth.

Hobbes makes ample use of the ‘contract’ metaphor in his explanation of where the law comes from and how the law changes. The ‘contract’ metaphor functions in Hobbes’s account to gesture at the mechanisms that give subjects reasons to trust their rulers. Hobbes thought that the reasons for trust bottomed out in the consent of the governed, but he made use of the notion of ‘consent’ in a rather expansive sense: e.g., to include consent under duress. (T. Hobbes 1997, 124) Since most of us think that *contractual agreements to act* are a different kind of thing from *coercion to act*, we might disagree with the appropriateness of the description of Hobbesian theory as a kind of “contractualism”. To lay emphasis on his unusual conception of the social contract, I refer to his theory as “crypto-contractualism”. *The law is made, and changes, from agreements made while under the gun*, which at least sometimes amounts to an agreement under coercion. Certainly, the language appears strange to us; and even moreso at the tumultuous time when Leviathan was being written. The only public events that marked a change in government involved regicide, and civil war, which are somewhat far removed from what one usually expects from contract negotiations in any era.

Whatever limits there are on sovereign power, those limits are self-imposed. The sovereign does have some *prudential* duties, namely duties to itself. (T. Hobbes 1997, 188-195) For the purposes of an investigation into unwritten law, the most interesting sort of prudential duty can be observed in Hobbes’s remarks on counsel. The sovereign is charged with offering judgment on how the political community will respond to contentious legal cases and disputes amongst subjects, and its word is the foundation of law. The subordinate judge offers verdicts on particular cases, ostensibly in the name of the sovereign’s authority, and their verdicts function as “advice” to the sovereign.

The sovereign is charged with the distribution of honors throughout the society. Indeed, this is one of the powers that is so characteristic of the sovereign that it gives the public a unique sense of the identity of the sovereign’s personhood: which physical persons are occupants of the office. These powers are themselves “inseparable” and “incommunicable”, on his account, amounting to primitive elements in the articulation of the station of the sovereign. (T. Hobbes 1997, 141)

Another prudential duty that the sovereign has is the duty to educate subjects about the law. It follows that if a sovereign fails to disclose the laws to their subjects, it is failing in a duty to itself. But there is no question about whether or not these secret rules can be laws. Moreover, there is much to be gained from secret counsel, which is absolutely required by a civil society. However, secrecy concerning the basic picture of law is unwise, and there is a general duty to educate subjects on how they ought to act.

2. Modest optimism from a practical point of view (ch. 12, 14-15)

Hobbes approaches the study of law from both internal and external standpoints. As an internalist, he thinks we should aim to produce both justice and order, and that our best strategy for doing so is to obey the sovereign. But as an externalist, he thinks we should obey the sovereign whether or not the sovereign’s particular judgments appear to be moral ones. To put a name on his unique interpretation on the task of a theory of law, I will talk about Hobbesian standpoint as a *practical*

point of view (or *practicism*). Practicism is distinctive for its insistence that we have general obligations to obey our rulers even when we don't accept the ruler's verdicts, and such obligations are legal *because of* the fact that they are normatively binding in practice.¹²

Hobbes's practicism begins from the ground up, starting with a description of human society in its natural state. In their original condition, human beings have certain inalienable properties. They are born equal in their potential powers, owing to the fact that each person possesses (or comes to possess) comparative advantages and disadvantages: some are smart and weak, some strong and dumb, some elderly and wise, some young and foolish, and so on. These comparative advantages mean, he says, that everyone is placed at the same proverbial starting line in a competition for resources. Where there is equal hope in securing resources, conflict arises.

The "state of war" is a Hobbesian theoretical description of a state of affairs where battles are to be expected, and where there is in fact a constant will to do battle. Such battles need not be at the level of full-scale dramatic engagements: the point is that all can be expected to prefer to engage in conflict than to cooperate. I say that this state of affairs is "theoretical" because Hobbes does not seem to believe that there was ever an actual state of war "of all and all" or, at least, not a uniform state of war between all parties at all times. Instead, the thought-experiment of the state of nature is something that he arrives at from three grounds: a) from an inference about the past that is based on observations of civil war; b) by second-hand observation of some pre-agricultural societies living in the Americas; and (c) observation of war between nations. Hobbes believes that the "state of nature" thought-experiment is *what you can reasonably expect* when there's no sovereign. The state of war is the problem which we need to solve in order to get the best consequences. (T. Hobbes 1997, 137)

2.1. *Practicism and the divine way*

Our first task is to look at the phenomenon of law through Hobbes's eyes, not to focus on his positive account of what the law is. However, a straightforward discussion of legal appearance and legal reality end up being mostly tangled up in one another when we examine the central features of the Hobbesian account of justice, owing to some tricky and peculiar use of language. So we will instead start by discussing an issue that is at the periphery of his views on law – the place where the knot is least tangled -- and work our way inward. And that subject is religion, the site where law and justice appear to be, and are not.

Putting aside exegetical convenience, it is enlightening to attend to Hobbes's approach to the study of religion for two reasons. First, because his discussion of religion gives us a rare glimpse into how he really thought human societies worked in the state of nature. Second, because Hobbes believes that the state has its own kind of sublime aura. He frequently describes the sovereign as a kind of mortal god, possessed of the capacity to inspire awe in the folk. These are traits clearly borrowed from religion, or imitations of religious sentiments for secular effect.

Hobbes is a modernist. He is adamantly against the rule of superstition over our lives. Moreover, he believes that religion is largely a response to the handicaps in human cognition that we usually associate with superstition: i.e., our proclivity to anthropomorphize, to be ignorant of secondary causes, to revere things that are feared, and our carelessness about making predictions.

¹² The practical point of view is only one kind of approach that hybridizes the internal and external points of view by grounding facts about law in "normative facts", i.e., about what we owe each other. Many forms of practicism serve as a kind of "near-positivism", or "almost-positivism", but differ in significant respects. For example, conventionalist theories of law (e.g., HLA Hart) are a major alternative, despite the fact that Hart also includes both internal and external elements.

When left unchecked these vices generate intense anxiety. Religion is our attempt to master these defects by appealing to accompanying cognitive virtues: our sense of curiosity, insight into the fact that there is such a thing as causality, and genuine capacity for deliberate foresight. In the absence of sufficient information, our sense of curiosity and instinctive grasp of causality creates a strong desire for certainty in terms of what we know. Since we know ourselves best, we think of the invisible forces of the world as being roughly human. That explains the tenaciousness of belief in God and why many believe humans are made in His image. (T. Hobbes 1997, 112-3)

Despite our first inclinations, we must not overstate Hobbes's skepticism towards religion. He is at pains to say that there are two kinds of religion: the true and false. To be sure, he thinks both are about control and obedience – even *true* religion involves a degree of regimentation. Yet true religion is about securing obedience to divine command, while false religion is about securing obedience by using God's name in vain. (T. Hobbes 1997, 113) Acknowledging the reality of true religion allows Hobbes to avoid the accusation that he is an unbeliever.

A clear difference between true religion and ordinary human law is that there is a difference in the dissemination of the laws. If there is any divine law, that law is promulgated by miracles and authorized by God. But miracles are usually *not disseminated*, for Hobbes, as opposed to Aquinas who thought they were manifestations of unwritten laws. Another major difference is that divine laws are presided over by charismatic authorities like Moses, Abraham, and Christ. (T. Hobbes 1997, 113-4) There is no original convention by which these authorities transfer their rights to empower Christ; they do not, or need not, take on the airs of arbitrators. In such cases, the sovereign arbiter is *God*, and these are His representatives. (T. Hobbes 1997, 116) Instead, subjects defer to these divine representatives because the authorities have a reputation for holiness: through wisdom, sincerity, and love. (T. Hobbes 1997, 116-7) Such persons can exist in the state of nature (in the state of war), but for Hobbes, these figures cannot be expected to bring the state of mutual war to an *end*. For the indirect sovereignty that is enjoyed by these rulers rely on upon miracles (the strict promulgation of the divine law), and miracles are effervescent and fade. (T. Hobbes 1997, 117)

Another thing that we have to understand about Hobbes's view on the natural principles is that he allows for the possibility that the natural principles *are* divine laws, though does not himself believe it. Thus he observes: "Princes succeed each other; and one judge passeth, another cometh; nay, heaven and earth shall pass; but not one title of the law of nature shall pass; for it is the eternal law of God." (T. Hobbes 1997, 166) Hobbes was happy to allow religion a place if needed. His aim is to show that it is not central or necessary. So all of the rest of his account of the human needs is to be understood as working on the assumption that the divine law has been bracketed out of consideration as a viable option. It's as if he pays philosophical lip-service to it—whether as an expression of sincere personal belief or not—but it's clear that, for Hobbes, divine law is of nowhere near the import as it had been for Aquinas. And in this sense, of course, Hobbes marks himself as a modern theorist on these matters. To the extent to which he does refer to God at all, it's in straightforward "supernatural analogy" to the role of the sovereign, as he sees it, in society.

2.2. *Modest optimism and the rules of nature*

In activist circles, there is a slogan: "No justice, no peace". For Hobbes, the reverse is true: without peace, there is no real justice. Success at being a moral person presupposes that you live in a properly functioning political order. For Hobbes, justice is a condition that only occurs in civil society, and (*pace* Aquinas) it is not a property of proper deliberation or personal virtue, any more than it is something that we find among nonhuman animals. (T. Hobbes 1997, 132)

This socially embedded approach to moral thought leaves a large gap in the Hobbesian worldview. We might reasonably ask: what about people who seem to be obeying moral rules in the state of nature; aren't *they* moral? For example, consider the negative formulation of the Golden Rule: *Do not do unto others as you would not have them do unto you.* (T. Hobbes 1997, 132) Hobbes shares the view, held by many educated within the Judeo-Christian worldview, that all of justice eventually culminates in that maxim. But surely can't people obey the golden rule in the state of nature, and be morally praised for doing so? And if so, aren't they moral agents?

It has to be emphasized that Hobbes says *no*. He *denies* that such actors would be agents of justice (or – what is equivalent for him – agents of morality), though they surely may appear to be just. The reason is that justice must bind both internally and externally (*in foro interno* and *in foro externo*), meaning that the rules of justice provide reasons for action both through its effects on desire, and by inhabiting a working system of incentives and impediments. (T. Hobbes 1997, 132) Since the principles of nature are only binding internally in the state of nature, they are not laws at all. We call them laws, *when* we call them laws, only because we enjoy speaking imprecisely.

A closely related point can be made here very briefly, though discussed in more detail later. *The sovereign itself may appear to be unjust*, even while it is (in fact) just. For example, he says that the only difference between an oligarchy and aristocracy, tyranny and monarchy, is how they seem. (T. Hobbes 1997, 142) This is a distinction he makes that directly acknowledges the diversity of different points of view.

Most of what Hobbes calls “the maxims of nature” coherently abide by the description he chose for them. (T. Hobbes 1997, 120-131) Here they are:

- 1. Rule of liberty.** People have the right to seek the means of preserving their own lives. (Note the similarity between this principle and Aquinas's laws of nature.)
- 2. Principle of transfer.** People have the right to lay down their liberties under certain conditions and in certain contexts. (Mutual transfer of right is a contract.)
- 3. Principle of fidelity.** When you lay down your liberty by making a promise, you must abide by the promise.
- 4. Principle of gratitude.** When somebody lays down their liberty for you without expecting compensation, you must demonstrate gratitude for the gift.
- 5. Principle of compliance.** When others lay down their liberty in certain ways, you must lay down your liberty as well.
- 6. Principle of forgiveness.** When asked for forgiveness for a transgression, you must grant it.
- 7. Principle of consequences.** When considering the appropriate punishment for transgressions, enact only those punishments that improve the state of the future, and eschew those punishments that merely react to the past.
- 8. Principle of non-maleficence.** Hold no-one in contempt, and hate no-one.
- 9. Principle of equality.** Hold everyone equal in nature.
- 10. Principle of reciprocity.** When entering into a state of peace (contract of all with all), do not reserve to yourself any rights that you would not let others have. (e.g., the right to water, food.)
- 11. Principle of equity.** If you are an arbitrator, you should not judge with bias, and treat all parties as equals.
- 12. Principle of distribution.** Distribute all divisible goods equally to all, and let everything else be enjoyed in common.
- 13. Principle of amnesty.** Do no harm to arbiters.

14. Principle of mediation. If you are in a controversy, submit your will to an arbiter.

15. Principle of representation. If you are in a controversy, you should not be put in a place where you provide your own defense. An attorney should be provided for you.

16. Principle of objectivity. Any potential arbiter must not have vested interests in favor of one party or another.

17. Principle of skepticism. In any controversy concerning facts, all parties should be treated as epistemic equals, until arguments and evidence settle who is in a better place to judge.

These principles lay the foundations for Hobbes's theory of the state, and they are lexically ordered; principles 3-17 are supposed to be derived from principles (1-2). But most of them are not strong enough to play any constitutive role in the practice of law. They cannot do that kind of work, since they are mostly just general but highly fallible descriptions of how people are liable to act. Now, they are also *normative*, in the sense that they are theorems that provide people with reasons for action, even being essential to such varied operations in government as the interpretation of statutes and a criterion for legality of the common law. (Klimchuk 2013, 171-9) But, as I will demonstrate, they are normative in only an *austere* sense, the sense of being *usually* a source for appropriate kinds of reasons. They are not robustly normative in the way that a practicionist thinks laws are supposed to be – as effective constraints on action bound by incentives.

The upshot is that the state sovereign shall always seem like the bearer of justice, at least somewhat. The natural principles provide us with a fuzzy, myopic view of what the agents of law look like. The actual law may be something else: ostensibly grounded in the natural principles, but with comprehensive discretion allotted to the sovereign to fashion practical meaning out of the principles.

3. The constitution of civil society (ch. 14-18, 26, 30)

Every hero has an origin story. This is the story of the sovereign, the *ubermensch* who rules over them all.

Hobbes argued that civil law and the laws of nature are both just different parts of the same human law. According to *Leviathan*, contracts have the power to create an artificial person who is the ultimate governor of the state. The authority of the sovereign derives from an original contract. The original contract is created out of the mere regularities or natural virtues of reasoning to be found in human nature. These natural virtues are legitimate guides to conduct for subjects of a state only just in case the sovereign regards them to be legitimate guides of conduct. Hence, Hobbes: “For though [the desire for procuring and maintaining peace] be naturally reasonable; yet it is by sovereign power that it is law: otherwise, it were a great error, to call the laws of nature unwritten law”. (T. Hobbes 1997, 165)

In *Leviathan*, natural virtues confer no legal authority -- legal authority derives from the sovereign will. So when we decide to drop the quotation marks around the phrase “natural law”, and try to refer to something that really does earn the status of law, what we actually mean to be doing is refer to the unwritten law of the sovereign, informally disseminated principles that guide. Any lingering desire to take the language of “natural law” seriously is, at best, a misleading and indirect way of referring to unwritten laws. Hence, while it is true that the law has two equal parts, these parts are not between its *natural and civil* laws, but its *written and unwritten* parts of the civil law. The natural virtues of human reason that are available to all practical deliberators are implicitly tolerated by the sovereign (and hence, are unwritten laws), and if not, they have no legal force. Unwritten rules are distinctively legal just in case they have the right kind of relationship with the

authority of the commonwealth (the sovereign), a singular voice that distinguishes the legal from the illegal. The sovereign is master of laws.

The civil laws are the backbone to any commonwealth. “CIVIL LAW, is to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or others sufficient sign of the will, to make use of, for the distinction of right, and wrong; that is to say, of what is contrary, and which is not contrary to the rule.” (T. Hobbes 1997, 161) Yet his focus is upon the law in general, not upon any specific laws or the laws of any nations in particular. Approaching the law from the general point of view allows for us to avoid making any claim that the sovereign is in fact always just in every sense.

The law in general, he believes, is issued from the commonwealth (and hence, the authority of the sovereign) –laws are those maxims and commands that are explicitly put forward by the master of the commonwealth in order to distinguish right conduct from wrong. Thus, ordinarily, civil laws must be written and must be made formally known to all who are under its rule. (T. Hobbes 1997, 161) Those instructions must provide sigils of the sovereign so that subjects can be reassured of their authenticity. And the identity of the actual sovereign is never in question, since (Hobbes believes) that it is obvious to all subjects who the sovereign is if we know the powers of the office. (T. Hobbes 1997, 141)

Despite being relatively clear on these points, there is a persistent, nagging tendency to read Hobbes as a natural lawyer, or as being close enough to a natural lawyer as to deserve the title of an ally. Actually, Hobbes was a positivist: his picture of law is about the sovereign, and the principles of nature only show up around the edges. The centrality of the sovereign can be illustrated in two ways: first, in his nuanced rejection of natural law, and second, with his insistent tendency to defer to the authority of the sovereign, even though he wants the civil law and principles of nature to be coextensive.

3.1. *Natural principles of law, not natural laws*¹³

The principle of liberty is the most remarkable of the natural virtues since it is the fundamental precept from which the rest are supposed to spring. It is also interesting because, if there is any natural rule that truly *deserves* the name of “natural law” in Hobbesian philosophy, it is the first rule. The Hobbesian rule of liberty occupies the same foundational role in his philosophy that the goodness principle occupied in Thomistic philosophy, and shared the same content. The difference is that the liberty rule is fashioned a rule of nature and not a law, while Aquinas thinks of the goodness principle as a *bonae fide* natural law. Why does Hobbes hesitate to honor it with the literal status of natural law?

There are two reasons why the rule of liberty might seem like it provides reasons for action that are *legally* binding (in some intuitive sense). First, it is granted by both Aquinas and Hobbes that the right to life and liberty can grant an exception from the sovereign’s rules in extreme conditions, though for Aquinas the exceptions are dispensations under emergency conditions, and for Hobbes they are rights to self-defense in a state of nature when threatened with death by the sovereign. (T. Hobbes 1997, 125) In other words, both acknowledge that the first principle has very robust practical normative force. Second, it can be argued (contrary to Hobbes) that the first principle is both externally and internally binding (both *in foro interno* and *in foro externo*), and therefore provides us with the *kinds* of reasons required for law. Together, these might be reasons

¹³ The distinction between principles of law and laws themselves is expensively elaborated on by Ronald Dworkin in Chapter 5.

to suppose that the first rule at least has the appearance of law from the practical point of view, if not more.

At least taken on face value, it is very hard to argue against the idea that the rule of liberty is robustly normative. Hobbes himself is quite explicit on this point: if the sovereign ever wishes to put you to death, then you are thereby placed in a state of war with the commonwealth, and can do whatever you need to do to secure your liberty. (T. Hobbes 1997, 125) Although you can place some limits on the conditions wherein the law of liberty is *applied* (since that is directly entailed by the second rule, the right of transfer), the rule itself can never be dismissed *as a rule*. Indeed, in dire circumstances, the first rule is capable of binding action in a way that can override the demands of the sovereign, at least so long as the individual is oppressed by sovereign rule to the point where it threatens his or her life.

One way of trying to deny that the rule of liberty is robustly normative is by observing the distinction that contemporary scholars make between *claim-right* and *justification-right*. (Ladenson 1980, 137) Justification-rights are reasons you give for acting that do not pretend to impose corresponding duties on other people to respect your right to act. When, e.g., I am at liberty to do something -- say, if I were to kick a can down a lonely alley -- that does not mean I am owed *any special recognition from others* to kick the can. I can say "I have a right to kick this can," and no-one is there to object and no-one in the world would care. Moreover, if someone were to ask for reasons for kicking the can, I can provide them without ever intimating that my right to kick cans be respected. Such reasons, in this case, weren't meant to be public in the first place and didn't try to be. The reasons were *contingent upon my will*, and my will is the final arbiter of their correctness or incorrectness. In contrast, claim-rights decidedly *do* purport to impose obligations upon other persons. So, I can say, "I have the right to not have a can kicked *at my head*": my words are meant to motivate both my conduct *and yours*. So we might think that perhaps the first rule is a justification-right, not binding on others, as opposed to a claim-right.

Unfortunately, this interpretation of Hobbes would be a bit forced. Hobbes circumvents this distinction when he discusses the contrast between natural rights and natural "laws", as he describes the former as liberties and the latter as carrying the strong normative content. (T. Hobbes 1997, 121) He even goes so far as to say that reason tells us that we are "forbidden" to violate the natural laws. And the *forbidder* is certainly not the sovereign, since you will have just as much right to self-defense as ever even when the sovereign declares war on you. The forbidder is presumably you binding yourself and no-one else. Yet, unlike justification-rights, you are forbidden to break the first rule irrespective of your own will.

As a practical theorist of law, Hobbes was interested in characterizing the law in terms of its *practical normative force*. That is, he wanted to use the effectiveness of a ruler in compelling recognition of their sovereign powers as the standard by which we can carve the law out as a superordinate normative category. **As far as possible, Hobbes wants us to believe that the sovereign acts as a kind of center of normative gravity, capable of marshaling prudential, legal, and moral justifications for their verdicts all at once.** Having a command over all such reasons is crucial to securing the sovereign's appearance of arbiter of conflicts between rational agents. So it is at least curious to see any deviance from that account. Natural lawyers, in particular, may find this source of theoretical dissonance to be a decisive reason to reject Hobbesian doctrine.

Be that as it may, the sovereign's rules are distinctive, not just because they have the right level of force, but also because they provide two different *kind of reasons*. Recall that the rule of liberty is a principle of nature, and Hobbes believes that such rules apply only internally (*in foro interno*). If he can maintain that opinion then it would suffice as an answer to the puzzle; since the first principle

applies only internally, then it is not properly speaking a law (natural or otherwise). Genuine laws are binding from the practical point of view, both from internal and external standpoints.¹⁴ Nature's advice binds imperfectly, and not always – she speaks in rights and principles, not commands or laws.

3.2. *Co-dependence in the civil law*

Up to this point, we have postponed any direct treatment of the knotted issue of how the natural and civil law relate. Hopefully, the discussion above has laid sufficient ground for us to think about what Hobbes wants to say. Our present task is to see how they fit together. For the more that an account relies upon natural principles as the disseminator of the laws, the more it shall be apt to call them unwritten laws.

Any genuine laws that are not formally disseminated must be consistent with the principles of nature. Indeed, all civil laws are meant to be consistent with the principles of nature, in some sense or other. To make this point, we can say that the civil law and the natural principles are *codependent* for Hobbes. However, laws may differ in the extent to which their dissemination depends upon the natural or official channels. Some may be disseminated by some mixture of natural virtues and official advertisement, while others may be disseminated solely from inference by way of the natural principles.

The distinction between natural principles and unwritten laws turns on the difference between universal and context-relative laws. Unpublished rules that are universal in scope can seemingly only be “natural” laws through-and-through, such as the principles of reason and equity; though we should either call them natural principles, or acknowledge that they emanate from the approval of the sovereign office. Meanwhile, those unpublished laws which apply only to particular persons or particular contexts may be a mixture of *both* natural and civil law: “For whatsoever law is not written... is therefore also a law not only civil, but natural.” (T. Hobbes 1997, 163)

Both nature and the sovereign's will are reason-conferring forces, and they are both essential to any characterization of the civil law. So it remains to be seen how these two sources of law connect to one another. To arrive at an answer, we need to turn to Hobbes's chapter 24, *On Civil Law*.

The basic elements of Hobbes's picture of the civil law are ones that we are, by now, familiar with. First, we know that the sovereign is the *sole* legislator; second, that the sovereign is effectively *immune to civil laws*, since it may change those laws at will; and third, that any norms or conventions only become law because the sovereign *indicates a tolerance* for them by its inaction. (T. Hobbes 1997, 161-2)

Hobbes stresses that natural 'law' and civil laws are equal and compatible, since both are simply different *parts of law in general*. To support this idea, he suggests that civil law and natural 'law' are codependent *in an extreme sense*. On the one hand, all civil laws derive from these natural qualities, in the sense that the commonwealth originates out of the natural, rational tendency to desire peace and order over war and chaos, and hence there can be no civil law except for that

14 We don't have to agree with Hobbes about this. Indeed, you could argue that the first rule necessarily applies both internally and externally – i.e., both as a guide to the conscience and as an incentive-bearing rule that can be observed by attentive social scientists. Furthermore, it may not even be possible to make the notion of ‘responding to incentives’ intelligible without this first principle, since it effectively tells us what it would mean for something to be an incentive that is sufficiently effective to bind the collective will: the threat of lethal force. If there is an account of natural law out there to be made, this seems to be the place where we might make it. At any rate, there is plenty of room on both accounts to suggest that the first rule will always *appear* to be a natural law. Hobbes's innovation is to resist the temptation to call it law as a matter of fact, in contrast to natural lawyers like Aquinas.

which is necessitated by the desire for stability. Hence, it is a natural 'law' to obey the civil law, since all subjects had engaged in a covenant during the formation of the commonwealth. On the other hand, these natural virtues become genuine laws only through civil law, either by dictate of the sovereign, or through its acquiescence. The commonwealth makes justice possible, and the natural virtues are laws only insofar as they are matters of justice.

Any categorical statement of codependence between natural and civil parts of law needs to be distinguished from the stronger thesis that the two aspects of law are *coextensive* (or, to use his phrase, “of equal extent”). (T. Hobbes 1997, 162) Co-extensivity is a strong version of the thesis of codependency. The point of the co-extensivity thesis, if I am reading it correctly, is to say that *any instance of natural law will also be an instance of civil law*, and vice-versa: if we speak properly about genuinely natural law, we must say that it is just one feature of every civil law.¹⁵ The coextensivity thesis can be contrasted with a weaker form of a codependency thesis, which holds that the natural and positive parts of law are *mutually supporting practices across time*, but do not hold in a relationship of conceptual necessity.

Both theses can be challenged. One might take aim at the coextensivity thesis, e.g., by saying that one part of the law normatively overrides the other (e.g., the dictate of the sovereign has veto power over natural virtues). Or one might reject the codependency thesis by claiming that the natural principles undermine the sovereign rule, instead of contingently supporting and nourishing it. The former claim is about the constitution of the commonwealth, and the latter is about its mechanisms for change. Our present concern is with the possibility of the former, not the latter.

It is important to notice this distinction between weak and strong codependence theses because, if we attribute the former to him, then it has the potential to cripple his theory from the inside. For Hobbes admits that any judge – *including the sovereign judge* -- that seeks to put someone to death without hearing evidence is in violation of natural “law”, and hence is – *as a matter of fact* - - an unjust judge. “For all judges, *sovereign and subordinate*, if they refuse to hear proof, refuse to do justice...” (Hobbes 1997, 166, my italics) There is no doubt, here, that the only plausible reading of this sentence is to regard it as a reference to the ultimate office of state, given that it was written by a man who conspicuously attaches special significance to the lexeme 'sovereign'. And all told, this sounds like a surprising passage. If it were true then it would turn out that the natural and civil laws are not of “equal extent”, and hence problematize the idea that they are two parts of the civil law. As a result, it would lay waste to Hobbes's commonwealth by laying the whole thing on the back of conflicting sentiments. We need to meditate a little on this point to be totally clear about what Hobbes is saying and how it affects his, and our, conception of unwritten laws.

Hobbes's bid to maintain consistency seemingly lies in his making of an important distinction between the justice of authorities and the justice of verdicts. In his view, the *verdicts* are justified (contrary to all appearances) even while he concedes that those verdicts arise out of *unjust authority* in that case. By saying that the verdicts are just, Hobbes preserves the view that the sovereign cannot *act* unjustly against his citizens. And that's fine. But elsewhere he claims that the tacit or explicit consent of the sovereign is sufficient to establish the just authority of any judge over their subjects. (T. Hobbes 1997, 166) It follows that the sovereign can *fail* to have a just authority *by virtue of its having* a just authority, which is paradoxical at best.

Perhaps we can solve this by looking at the role of the sovereign in the context of the principles

¹⁵ Another way of reading his intent here is to say that the civil law authoritatively determines the best ways of making sense of the natural law. (Goldsmith 1996, 285) This makes sense of Hobbes's claim that the civil law and natural law are two parts of the same law, as we discussed at the outset of §3. However, accent needs to be placed on the idea that the two kinds of law are extensionally identical, albeit presented in different ways.

of nature. To be sure, the moral authority of the sovereign depends on the tacit *presumption* by a multitude that the sovereign shall interpret and enforce the natural principles, which (as we've seen) include duties to adjudicate fairly and attend to evidence. But while that may be the motive force that causes the multitude to lay down their arms and create the sovereign station, the actual existence of the sovereign office only *presupposes* the original covenant, the hope of improving life, and fear at the consequences of continuing on in the state of nature. And the multitude itself is of no political or moral significance until it is unified, and is only unified when it is unified in deference to a representative (i.e., the sovereign). (T. Hobbes 1997, 134) In sum: perhaps the authority of the sovereign is *presumed to be* coextensive with the principles of nature, but may not be coextensive with them *in reality*. Whatever its virtues, this is an unhappy resolution of the paradox, since Hobbes *does* still claim that the sovereign's verdicts would be *just*. (T. Hobbes 1997, 166)

It could be the case that Hobbes means to say that a sovereign that refuses to hear evidence in the arbitration of a verdict is, in fact, declaring war on the accused; and though that would be a rather extreme reading of the situation, it would allow us to infer that *the verdict is just insofar as it bears on other subjects*, even while the *sovereign is not a just arbiter over the accused*, since they are in a state of war with the accused, and there is no such thing as justice in the state of war. Hobbes could be found guilty of being overly elliptical, but not incoherent. Unfortunately, this is a rather extreme reading of the category of cases in question. Not all refusals to hear evidence result in a death penalty, and his language is categorical in form. It seems reasonable for us to be unsatisfied with that above-stated conclusion, though it does save Hobbes from absurdity.

So much more deserves to be written about how this curio has been, and could be, treated in Hobbesian scholarship. For present purposes, though, we might consider the many different interpretations of the text. I do not propose to resolve which is best; my purpose is only to show which interpretations are available, and then note the consequences on his picture of law, so that we can conclude with some remarks on his view of unwritten law.

First, if it is helpful, perhaps one might think of Hobbes's treatment of this problem by analogy to the concept of deviant causal chains in epistemology, i.e., cases where we succeed in an action through luck. (Mitchell 1982) (e.g., if I point to a clock, it says it is 2p.m., and I have good reason to think it is right, and I say, "It is 2p.m.," but unbeknownst to me the clock is broken, then I have made a claim by way of a deviant causal chain.) An ordinary causal chain would involve an account where the sovereign is created out of an original convention on the basis of principles of nature, and the sovereign deliberates according to the same principles by which they were instituted, and generates a verdict thereby. But in this case, while a just verdict is arrived at justifiably (because it follows from the sovereign will), still, its authority is unjust, because it refused to deliberate by the principles of nature, and deliberation using those principles is a prudential duty the sovereign owes to itself in order to maintain sovereignty. This route does not seek to eliminate the paradox, and therefore amounts to a refutation of the coextensivity thesis, but as a result it is compatible with the weaker codependence thesis.

Second, we might say that Hobbes committed a "slip of the pen" in some sense or other. Perhaps his use of the word "justice" equivocated between the mere principles of nature and the robustly normative sense of justice which he prefers to associate with the sovereign will. Or perhaps he didn't really mean that the natural principles and civil law are of equal extent in any straightforward way; perhaps he was overstating his case in a forgivable way. Or perhaps the sovereign's decision not to hear evidence *was* just, after all. Hobbes was certainly known to slip back and forth between colloquial and stipulated meanings, as we've seen, so there is at least some possibility that this is going on. But if this is just a case of equivocation, it will likely pull at the edges of one or more parts of his overall project.

Third, of course, we could say that Hobbes is just plain confused about his own account. In that case, we might use this as a reason to choose a different picture of law as a guide when figuring out the contents of unwritten law. But it is too early to say *that*. Before we give up on Hobbes, we had better consider his weaker codependency thesis.

4. Change and statecraft (19, 24, 29)

Hobbes's historical legacy depends largely on the approach he took to the manner in which laws undergo legitimate change, and in particular, the ways that the office of sovereign is altered over time. There are three considerations that Hobbes wants to bring to our attention in the course of the discussion: that rules of succession cannot be relied upon except amongst the aristocracies, and that monarchy is the superior form of government as far as economics is concerned (Chapter 19); that economics is central to the business of the office (Chapter 24); and that the powers of the sovereign office must be backed by the appropriate use of force (Chapter 29). The story he wants to tell about legitimate change contains a curious blend of coercive and quasi-contractual features, amounting to a point of view that I call "crypto-contractualism".

Hobbes has some fairly nuanced views on the nature of change in the sovereign office. His views were capable of providing succor to both antiroyalists (through Cromwell during the interregnum) and royalists (through Charles II), indicating that many sides in a practical struggle for power are capable of benefiting from different passages in the work. Imagine that we were to list off elements that supported each party. On the Cromwellian side of the ledger, Hobbes thinks that the legislator is the one who sustains the authority of laws, and not necessarily those who created the laws in the first place. (T. Hobbes 1997, 137-8) A conqueror may subdue a neighboring commonwealth, and not modify the nation's laws in any way; yet still, the laws may be considered to be *the conqueror's*, since it is from their authority that law must be *sustained*. On the other side of the ledger, Hobbes's refutation of the common lawyer Edward Coke indicates that he is hostile to usurpers and insurrectionists who would seek to return to a state of nature, which we saw amounts to a prospective hostility to disorderly change, and retrospective suspicion towards their appearances as bearers of justice. (T. Hobbes 1997, 127) In short: it is illegal to kill the sovereign, and you are subject to the most severe forms of punishment... *at least until you get away with it*, and become an effective sovereign yourself, and are subject to no legitimate punishment, and a new "cycle of sovereignty", so to speak, kicks in.

It is a matter of interpretation whether or not insurrectionists should be held in retrospective contempt as a matter of fact. Despite some passages where he makes some strong and emphatic statements against usurpers prospectively, it seems unlikely that Hobbes would have us hold grudges for long. After all, Hobbes emphasizes that both written and unwritten laws derive their authority from the sovereign, and it doesn't matter who that sovereign is. (T. Hobbes 1997, 162, 165) And forgiveness and future-directedness are both principles of nature in the sense of being principles of rational choice. The Hobbesian condemnation of the would-be insurrectionist is most powerful in prospect, though after the revolution his admonitions amount to a bark without any bite. He has to hold this to maintain any logical consistency. For if it were otherwise, it would mean that the new sovereign was not the bearer of justice, which Hobbes thinks is absurd. And all of this demonstrates his crypto-contractualism: the social contract is there, but only so long as people are under the gun.

But now we might ask: who holds the gun on the sovereign?

4.1. Self-help for the sovereign

At least on the first pass, the sovereign for Hobbes is *mainly* the bearer of legal rights and powers, and not in any primary sense the bearer of duties. At least as a matter of constitutive fact, the sovereign could be a lazy, sad recluse, without lessening the degree to which subjects owe it deference. Generally speaking, the sovereign is the one who we obey; it is not the one in obedience. All the same, Hobbes is keenly aware of the fact that changes in government happen, and that some of these changes are illegitimate in prospect. Regicide is nothing less than a retreat from civil law, and hence, an assault upon the very possibility of justice; the vigilante is not just guilty of a political scandal, but also guilty of committing crimes against nature. By institutional right, the sovereign ought to engage in the form of *realpolitik* that sustains its career across time. (T. Hobbes 1997, 188-9) So the sovereign does indeed have a duty – a duty of self-interested rational prudence.

So the sovereign is obligated to self-care, and the strategies of self-care depend on the constitution of the office and its rules for succession (if any). For Hobbes, there are three and only three forms of government in the world: aristocracy (rule of a few), democracy (rule of the many), and monarchy (rule of one). (T. Hobbes 1997, 145) He thinks that none of these forms of government could be mixed.¹⁶ If we look at political reality through a Hobbesian lens we find that the only form of government that has a shot at having any stable and formal rules of succession is the aristocratic form. In a democracy, the rules of succession are unnecessary, since the nature of a democracy is to have *the people govern themselves*. And in a monarchy, rules of succession may not always appear to have any place, given that one of the powers of a monarch is to choose their successor, and hence to change the rules. (T. Hobbes 1997, 146) One might infer that, if you believe that stability in succession is of any significant importance to a legal system, then the best solution is to adopt some form of aristocracy.

Though Hobbes agreed that the sovereign office could have many different forms, he decidedly preferred the monarchy. He also admonished those who would advocate a division of powers within the sovereign, since he thought it would amount to a kind of legal abomination: legal pluralism, or the rule of multiple sovereigns. Anticipating Max Weber's celebrated formulation of the state, Hobbes's recommendations amounted to strong counsel in maintaining a *monopoly* on the legitimate use of force (where 'legitimate' is cashed out in the characteristic Hobbesian fashion as effective, and effective for its purpose of tending towards a peaceful and prosperous society). (Weber 2004) (T. Hobbes 1997, 183)

Ever the realist, Hobbes argues in his 19th chapter that the most salient differences between kinds of commonwealth depend on the consequences they have on the well-being of citizens, and that generally monarchies have the best consequences overall. (T. Hobbes 1997, 143) His argument proceeds roughly as follows. First, he argues that that the well-being of a civil society depends on its economic health, and he argues that a monarch is best capable of directing a thriving economy. Second, he argues that secret counsel is necessary for the functioning of a successful government, and that secrecy is only truly possible in monarchies, since assemblies are bad at secrets and bottom out in the rule of lobbyists. (T. Hobbes 1997, 143) Third, he believes that monarchs don't waffle, and they don't contradict themselves out of passion, while other forms of government are potentially inconstant in their decrees. Fourth, while every form of government can be capricious, democracies and oligarchies are able to do more damage by focusing their

¹⁶ Now, on first glance, the stance he takes against hybridization makes no sense of our contemporary legal and political systems. So, to pick a typical instance, the Canadian parliamentary system includes a functional aristocracy (the Senate, the Supreme Court), a democracy (the legislature), and monarchy (the Governor General as functionary of the Crown). But it is not necessary for us to agree with Hobbes on this, though, to see what advice he might have for the sovereign when looking towards the future.

personal enmity on larger classes of people. (T. Hobbes 1997, 144) Fifth, and finally, while the monarchy is occasionally forced to endure a child ruler, rule by assemblies is always childish. (T. Hobbes 1997, 144-5) Hence we can conclude that awareness of the costs and benefits of each manifestation of government is invaluable to know if one is ever in a place to change it. Though ultimately it is the sovereign who decides.

Hobbes had two aims in his remarks on the economy: first, to aid the sovereign in its rule, and second, to encourage the sovereign to allow the commonwealth to live up to its name. It is in light of these two aims that Hobbes ventures to offer some guidance on political economy, with some thoughts on property law, and other matters related to domestic and international economic policy. (T. Hobbes 1997, 157-60) Most importantly for the purposes of reinforcing the central narrative of the Leviathan, the sovereign must be wary of the possibility of internal collapse of the state. (T. Hobbes 1997, 183) There are two causes of dissolution of commonwealths that the sovereign is capable of having any realistic exercise over: sicknesses in the foundations of the institution of sovereign itself (leading to civil war), and the small infirmities or diseases that can serve as obstacles to securing the common peace and prosperity. The foundations of the state are deficient wherever the sovereign has and maintains insufficient power than that which is needed to maintain its sovereignty, and for Hobbes “sufficient power” seems to mean nothing less than cultural, social, and political hegemony in the domestic sphere. He finds fault with the rise of relativism in political morality, including the rise of seditious doctrines; freedom of conscience; beliefs that the divine law is capable of defeating the civil law; belief that the sovereign is itself subject to its own law; belief that private property is absolute, held by natural law; and belief in the division of powers. (T. Hobbes 1997, 183-7) He believes that the sum of such deformities of state will inevitably be a state of revolution or civil war, which is to be avoided at all costs. But there are also smaller diseases that leave the commonwealth in a state that is less than best, generally related to issues of distributive justice. Such diseases include rampant tax evasion, major income inequality, when the rule of the sovereign is upset by the rise of rival populists, or by the ascendancy of corporations; where there is a mass failure of morale; and where the commonwealth engages in unchecked, unsustainable expansionism. (T. Hobbes 1997, 187-8).

Hobbes’s weaker codependence thesis makes better sense of what he has to say, overall, about the rule of the sovereign and its connection to the principles of nature. These principles create the sovereign office; the sovereign office makes them law; and the law is sustained across time by the principles deployed in practice.

5. Tacit operations and counsel (ch. 25,27,28)

The sovereign’s will can sometimes be ambiguous, and this poses a problem to those judges who are charged with applying its will in practice. Hobbes is often concerned with the need for uptake of the laws, demonstrated by his insistence that signs of authority be made available upon request, and that the sovereign has a practical duty to educate its subjects about the ambit of law. (T. Hobbes 1997, 134, 189-90, 194) It is unthinkable that people in a commonwealth would be ignorant of the sovereign as the office of the law. (T. Hobbes 1997, 151) For then it would follow that no subordinate judges could ever present signs that adequately demonstrated that they possessed the honor of representing the sovereign, and hence would destroy the possibility of formal dissemination (not to mention the unwritten law). So the relationship between subordinate and sovereign judges need to be clarified.

Subordinate judges *do not themselves have the expertise* to exhaustively determine the contents of natural principles. Though judges do interpret the extent that natural law may apply in particular cases, the authority which makes those judgments legitimate does not derive from their

independent good judgment; rather, it remains under the dominion and power of the sovereign who appointed them, and who is the true expert as to how they are best applied. We are also told that we must suppose that laws (both civil and natural) are *reasonable*. However, in deciding what is reasonable or not, we must be guided, not by the letter of the law, but its spirit: namely, the intent of the sovereign. In this matter, it is not the jurist's sense of reason which matters, but rather their sense of reason *in accord with the sovereign's goals*. Such goals or intentions ought to be supplied by the sovereign as best they can. (T. Hobbes 1997, 194)

Still, the fact remains that the subordinate judges are indispensable to legal systems: the sovereign simply can't be everywhere. All laws must be interpreted by judges, who have the authority to interpret the law by the commission of the sovereign. Judges are supposed always to know the spirit of the law, and thus, the intent of the sovereign in the crafting of the laws. (T. Hobbes 1997, 165) So, the short form of the answer to "How do you know the spirit of the law?", is: you defer to the judges. If you can't, then while you might exercise your liberties, you'll need to do your best to find out what the law requires.

Having resolved the question of how any subject may know the spirit of the law, Hobbes raises a special case of the same question: "What are the rules of authentic judicial interpretation?"

Unwritten laws have the greatest need for interpretation because they are the most obscure. Still, there is a need for judges even for written laws, since either by bluntness or lengthy exposition, they can equivocate, both on their own and especially when viewed in light of surprising or complex sets of facts in certain cases. As discussed earlier, "natural law" for Hobbes is simply a set of natural principles arrived at through reason, where reason is viewed not in the way of a robust natural lawyer like Aquinas but, rather, as a (mere) calculative faculty of self-regarding prudence. Such principles would not qualify as unwritten laws if the sovereign were to disagree with them, or if not all commonwealths recognized conclusions derived on the basis of these principles to be part of law or basis of civil law. Hobbes was not a legal originalist in this sense, but an activist. If a law does not serve the common utility, then the law should be changed, so long as the sovereign consents.

To be sure, though, interpretations of the written law are themselves the verdicts of the judge – usually, the subordinate judge. These verdicts involve coming to a decision about whether or not the actions of the accused are in line with the natural virtues, i.e., reasonable or equitable. Though still, despite these powers to interpret given to judges, the laws are only laws by the will of the sovereign. Much of the meaning of "equity" and "reason" is fleshed out by thinking about how the sovereign would have us understand those words.

The principles of nature and civil law are starkly different when it comes to the issue of the judicial discretion. For if a judge wanted to make a contrary ruling to past decisions, they may do so when it comes to the principles of nature. (T. Hobbes 1997, 166) But deviation from rulings of precedent is more difficult for civil laws. Judges are bound by precedent if the rulings in precedent continue to be agreeable to the sovereign, and yet their application of the determinations of precedent to present cases may depend entirely on their judgment of whether the prior case is *the same as* the current one.¹⁷ The fact that verdicts depend on this quadruple relation between

¹⁷ My reading here issues from a remarkable section in Hobbes's Chapter 26 (p.166). (Note especially the conclusion but then recall the thin and restricted sense of "law of nature" Hobbes has here in view, in contrast say to Aquinas, who might otherwise actually entirely agree with the passage as written.) This entire page is worth quoting in full, but I will restrain myself to just this passage:

"But because there is no judge subordinate, nor sovereign, but may err in a judgement equity; if afterward in another like case he find it more consonant to equity to give a contrary sentence, he is obliged to do it. No man's error becomes his own law, nor obliges him to persist in it. Neither, for the same reason, becomes it a law to other judges, though

precedents, principles of nature, judgments of subordinate magistrates, and consent of the sovereign shall lead to the possibility of changes of mind in the requirements of civil law. In this sense, the law must be “mutable”. By contrast, the principles of nature are “immutable”, though interpretations of them may vary more chaotically, and are open to constant revision, which is why there is need of a sovereign judge in the first place.

Interpretation of how to operationalize the law thus depends upon remarkable jurisprudential skill, within these broad constraints. How does Hobbes think the subordinate judge can find success in their craft?

5.1. The counsel of the subordinate judge

Civil laws are *supposed* to be in line with the natural virtues of equity and reason, which raises a second question: How can judges go about natural judgments without *knowing* that the sovereign endorses the natural law (either as virtue, or unwritten law)? For to *suppose* that the sovereign’s goals are in line with natural equity and reason is not to *know* they are. Settling for the former instead of the latter is somewhat troubling in that it is a low standard to assure the public of the sovereign’s intent; indeed, knowledge of the sovereign will is what we would expect of a competent judge in this instance.

The relationship between subordinate and sovereign raises both theoretical and practical issues. At least on first glance, it is more of a practical issue for a political philosopher writing in the 17th century than for a modern observer. One must guess that in the time of Hobbes’s writing there were limited means by which judges who lived in far-off provinces might communicate with their sovereign. Yet the theoretical issue is wide and deep, and can be expressed in two degrees of skepticism: we can doubt that the subordinate judge has the authority of the sovereign, and we can doubt their skill in interpreting the sovereign’s will.

First thing’s first: how do we know that the authority of the subordinate judge is correct? In the preamble above, I pointed out that Hobbes mentions in passing that the marks of the sovereign are “incommunicable”, which adds an additional reason for worry. (T. Hobbes 1997, 141) Yet his meaning is not entirely clear when he uses the word “incommunicable” in this context. One might think by context that by “communicable” he means something like the communication of a disease, as a metaphor for transfer of the office of the sovereign, and that he simply means to reinforce the idea that the sovereign office cannot divest the commonwealth of the office of sovereignty. That makes sense of the main focus of his argument in that particular dialectical context, but it would be very a strange use of metaphor. Another interpretation is that he means to talk about communication in the literal sense of sharing information, and is suggesting that there is always room for doubt about the authenticity of some marks of office as being representations of the proper holder of the powers of the sovereign. For example, a savvy metal-smith might be able to print a counterfeit coin. Even so, the difference between the authentic coin and the inauthentic one shall depend upon knowledge of the causal history behind the coin came from, and strictly speaking, those causal facts can never be fully presented before the mind. If it were thoroughly communicable, counterfeit wouldn’t even be possible. This is not a point he makes explicit in that

sworn to follow it. For though a wrong sentence given by authority of the sovereign, if he know and allow it, in such laws as are mutable, be a constitution of a new law in cases in which every little circumstance is the same; yet in laws immutable, such as are the laws of nature, they are no laws to the same or other judges in the like cases for ever after. Princes succeed one another; and one judge passeth, another cometh; nay, heaven and earth shall pass; but not one tittle of the law of nature shall pass; for it is the eternal law of God.”

passage, but it is a plausible reading, and seems consistent with his wider body of views, which is why I favor it.

Second thing's second: how do we know that the subordinate judge has the appropriate skill, and to what extent do they have discretion to decide the meaning of law in unclear cases? It may be said that insofar as judges do not know the sovereign's intent (especially when said intent has to do with natural equity), they are not really judges, since the sovereign authority only extends to those persons who succeed at carrying out the sovereign's whims. But this is not a very satisfying interpretation, since Hobbes explicitly gives enough room in his argument to account for judicial error. (T. Hobbes 1997, 166) And if there is enough room to suppose that a judge can make mistakes, then there is very little motivation to say they lose their authority as judges when they commit themselves to error. So *that* won't work.

I think an attractive solution can be arrived at by appealing to his conception of the relationship between author and authority in his remarks on counsel in Chapter 25. It makes sense to regard magistrates and other subordinate judges as holders of honors, and that part of their function is to act as counsellors to the sovereign. Their task, at all points, is to apply the will of the sovereign to cases. To be sure, they purport to represent the sovereign; but whether that representation is apt or not will depend on something they ultimately do not know, which is what the sovereign would say if it was attending to the matter at hand. So the very best they can do in those cases where the sovereign's will is unclear is to offer counsel on the right verdict that the sovereign should arrive at. Though phrased as verdicts to the accused, capable of enforcing very real penalties upon them, these verdicts amount only advise the sovereign about the will of the judiciary.

Suppose that all of this is making good sense of the relationship between subordinate and sovereign judges. If that is so, then there is clear textual evidence to believe that the subordinate judges are conditionally immune to persecution by the sovereign on the grounds of natural equity, for the following reason and under the following circumstances. By setting up a system of justice, the sovereign is effectively asking for advice on how to proceed in casuistic reasoning. And whenever someone asks advice, the asker becomes the authors of that advice, just by the asking. So long as the advice does not countermand the express will of the asker (or the law), it belongs to the asker, not the giver. (T. Hobbes 1997, 133-4) So for the sovereign to persecute the subordinate judge for making the wrong verdict, would be to punish itself. And since the sovereign has a duty to self-care, this implication ought not follow. Instead, they can simply countermand the subordinate's opinion. The sovereign will constitutes the law as it always did, while the judgments of subordinates are capable of pulling legal weight without fear of the guillotine.

6. Hobbes among the unwritten laws

To know the law, you need to know who to defer to. A sufficient level of basic functional knowledge of the organizational layout of a legal system requires that the appropriate basic picture of law is known by a sufficiently large body of subjects, and that the picture leads subjects to the doorstep of experts. When those experts have presented the relevant expressions of the rules in an official venue (decreed by political authority), it is a written law. If not, it isn't.

The basic Hobbesian picture of law is paternalistic. The law appears to be a purveyor of order, and is a necessary condition for the possibility of justice. The constitution of the law is purely a function of the sovereign will, the agent that determines the makeup of its own office and the scope of its powers. Legitimate change operates through a curious (and perhaps problematic) blend of carrot and stick, and is most orderly in aristocracies. In all cases, Hobbes advises the sovereign to shake off its shackles and rule as an autocrat for the sake of the greater social good. Our general

schema for the assessment of law, as developed thus far, is able to cut the Hobbesian political ontology at its joints. Throughout, Hobbes argues that the nature and scope of the office of the sovereign is never beyond the powers of rational subjects to reckon with, and that there are definite, practical ways that a subject can identify the occupant of the role.

Hobbes also has an abundance of things to say about the sense in which subjects *need* to be informed of a rule in order to comply with it. However, the story he tells about the normative consequences of not formally promulgating these rights is complicated by the details of his account. Clearly, it is *desirable* for subjects to know the sovereign's will. Indeed, he constantly refers back to the importance of disseminating the signs for subjects to refer to, and how the sovereign has a duty to itself to educate subjects. (T. Hobbes 1997, 189) Keeping up the educational system is a prudential duty that the sovereign has in order to cement the rule of law. But if it broke that duty to itself, the sovereign would not cease to be sovereign, and the subjects would not cease to be bound by its laws.

It is also clear that if a rational subject were not able to verify the legal standing of some rule, they would not be bound by it. (T. Hobbes 1997, 134, 175) But Hobbes thinks there are no good reasons to suppose that rational people will not be capable of finding out the contents of the law. First, while Hobbes mentions in passing that the basis for inferring the true authority of the signs is "incommunicable", this fact in itself only poses practical troubles if the neglect leads to a fractured commonwealth. (T. Hobbes 1997, 141) And yet the ignorance will not be total, since there will be rational means of identifying an authority by acknowledging the powers of the sovereign. Second, he believes that the need for official dissemination of the rule can be waived in cases where the requirements of the principles of nature are obvious (as in, for example, social conventions). In those matters, the default opinion is that the sovereign delivers their tacit consent. Taken together, these two considerations might cause us to worry that Hobbes is only paying lip service to the idea that law must be truly *public*.

Are there any positive reasons to think that Hobbes would allow for informal laws that need to be officially published in order to be obeyed? In other words, is there any positive reason to believe that Hobbes would endorse secret laws? Perhaps. He believes that it is sometimes necessary that counsel be *not* promulgated, which gives the interpreter significant room for interpretation when it comes to the internal affairs of state and administrative law. (T. Hobbes 1997, 143) Indeed, one of the selling points he offers when endorsing the monarchy is that it invites secret counsel. If we think of judges as kinds of counsellors to the sovereign (as I have argued we should), then additional weight is given to the idea that **Hobbes would tolerate – if not champion – secret laws in those domains of jurisprudence and governmental administration.**

As we recall, an *implicit constitution* is a set of rules in a political system that *establish the constitutive conditions of that legal system, and which are not officially disseminated*. It is more difficult to address the question of whether or not it is possible for Hobbes to endorse the idea of an implicit constitution. Needless to say, much will depend upon the fineness of grain with which we think that rules must be represented before we decide they are invisible to the public eye. The constitutive conditions for the civil law, strictly speaking, lay only in the intentions or goals of the sovereign. Most of those rules are laws of the ordinary humdrum variety, and do not have the pretense of being foundational in the sense required of constitutional law. So the constitutive rules are those laws which establish the core organizational features of the sovereign office, as determined by the sovereign itself: they reflect the general intentions of the present sovereign about how one goes on being sovereign.

An implicit constitution would have to be a set of rules that establish the inner workings of the office, where the actual nature and scope of the office of sovereign departs from the picture that is put forward to the public eye. It is clear enough that

Hobbes agrees that the scope of the powers of the office of sovereign lies at the discretion of the sovereign itself. There are no implicit constitutions guaranteeing rights to resources, even if those rights were reserved in the original convention. (*contra* Boyd 2011) It is interesting to ask whether or not the nature of the sovereign office itself can be left implicit: e.g., if an aristocracy were to pass itself off as a democracy. I do not know if Hobbes ever addressed the possibility that the public might be radically in error about the nature of sovereign, but I see no good reason to suppose that he could not recognize this eventuality. And our thesis allows for it; for while subjects must be abreast of the basic picture in order to guarantee that they are in a position to know it, this picture only needs to be good enough to let them know *who* to defer to. They do not need to have any robustly accurate idea of *why* the authorities that they defer to are the right ones.

At any rate, those and only those would be the conditions under which Hobbes would understand the intelligibility of an implicit constitution, at least as far as our schema is concerned. What is out of the question is the idea that the original convention is the implicit constitution, as it lacks the robustly normative force that is distinctive of legal norms, as we've seen. So, for example, in those outside cases where the sovereign does not consent to principles of nature in their verdicts (e.g., when the sovereign refuses to hear evidence in the delivery of sentence), one might be tempted to say that the sovereign stands in breach of the implicit constitution. The natural lawyer would certainly say so, but Hobbes is not really a natural lawyer. For in those cases where the sovereign dissents from the principles of nature, its verdicts must be taken as just even when they do not appear to be so: i.e., even if we question their standing as expressions of justice. This owes to the mere fact that the office of sovereign itself is sole definitive master over the interpretation of principles of nature. The buck stops with the sovereign, and nowhere further down the line.

In our lengthy discussion of Hobbesian jurisprudence, we were able to make ample sense of the relative autonomy of the subordinate judge, and reconcile it with the ultimate author of the meaning of the civil laws. The key is to understand Hobbes as regarding the subordinate judges as counsellors. We recall that the *tacit operations of law* are rules in a political system *that explicate the actionable meaning of laws that are officially disseminated, but which are not themselves officially disseminated*. To the extent that these tacit implementations of law are determinations of the subordinate judges, and the judges are abiding by the express will of the sovereign, there can be no practical basis for doubting their right or ability to interpret the law. But, again, the operations of law only succeed, for Hobbes, so long as they map onto the will of the sovereign, whatever that is: **fidelity to the sovereign is the ultimate point**. While it may be a useful convenience to consult precedent, or to make laws justly, or be transparent about the contents of law, these are not essential preconditions that the law has to satisfy.

The Hobbesian account of justice norms and fiat rules depends on his account of the nature of legitimate legal change, combined with some considerations about the relative (un)importance of how the political rulers appear to subjects. Hobbes thinks of change as legitimately occurring according to a model of crypto-contractualism: stable rules of change only occur, if they occur at all, in the context of aristocracies; all other forms of change are a mixture of coercive and contractual elements.

Hobbes has unusual ideas about morality which complement his theory of law, which leads us to make some potentially head-scratching results. As we know, justice norms are *rules of a political system* where the contents or scope of the written rules *are altered in an irregular fashion, the alteration is informally disseminated, and the nature of that alteration conforms to the appearances of the law from an optimistic point of view, not from the authority of the sovereign*. Justice norms are supposed to be the sort of unwritten legal phenomena that causally affect the emergence of new written laws. They normatively bind as laws only when a suitable set of assumptions are in place about the institution of the sovereign

and their relation to subordinate judges. So understood, Hobbes denies the existence of justice norms. The sovereign is the hub of the wheel of law and master of justice; all spokes attach to him. To speak of a justice norm apart from the authority of sovereign is to revert to natural law in what Hobbes would say is an objectionable, Aquinas-inspired sense.

Recall, again, our meaning when we refer to fiat rules. Such norms are *rules of a political system* where the contents or scope of the rules *are altered in an irregular fashion*, the alteration is *informally disseminated*, and *the nature of that alteration conforms to how the law is constituted, and not how it appears from any point of view*. In Hobbes, there is little further comment to be made or offered on this point. From a practical point of view, fiat norms are laws. While it is nice when the subjects are able to recognize the sovereign as master of justice, the sovereign's verdicts are just or unjust on very different grounds than the ones we first expected.

CHAPTER IV. PESSIMISM AND EXTERNALISM

What we need, however, is a political philosophy that isn't erected around the problem of sovereignty, nor therefore around the problems of law and prohibition. We need to cut off the King's head: in political theory that has still to be done.

Michel Foucault (1980, 121)

Chapter structure

1. John Austin's command theory
2. Deeper pessimism, stronger externalism
3. Karl Marx and the ideological picture of law
 - a. Homespun Marxism in fourteen paragraphs
 - b. Two conceptions of law as ideology
 - c. Objections to such views
4. Too many metaphors
5. Foucault and the strategic picture of law
 - a. Bio-power and the strategic method
 - b. Contextualism
 - c. Ironic externalism
 - i. A note on knowledge and normativity
 - d. The field of law
 - i. Making up people
 - ii. Secrecy and judicial good faith
 - iii. Foucault in England
6. The dark and wide outside

Hobbes's attempt to find neutral ground between both internalism/externalism and optimism/pessimism will strike some critics as being altogether misguided. The aim of the present chapter is to take these critics seriously. Our task is to examine approaches to law which see relatively little connection between law and morality, and which flirt with the idea that the law has no associated rights and duties.

Pessimists would deny the Hobbesian paternalistic conception of the role of the legislator, by denying that the law is a conceptual presupposition behind the possibility of justice. At minimum, these theorists advocate a 'two systems view', where law and morality share no deep conceptual connection – so, e.g., there is no pretense that the principles of nature and sovereign decree are coextensive in practice. Such critics would downplay the possibility of justice norms as a form of unwritten law, and (depending on the extent of their pessimism) we should expect them to be more comfortable in attributions of legality to fiat rules. Externalists would reject (or seriously downplay) appeals to reasons, rights, and substantial normative concepts in an explanation of what might count as the legal part of our social reality. Talk of the law is approximately what the political powers *tell us to do*; *our* reasons for compliance, and *their* reasons for judgment, drop out of the

picture. By loosening the criteria by which we examine social systems, externalists potentially multiply the number and extent of the unwritten laws.

Historian and philosopher Michel Foucault occupies both the external and pessimistic points of view. Taken as a whole, his studies in the history of the development of major modern institutions -- the prison, the asylum, and modern medicine -- have made widely influential contributions to philosophy and sociology. (Kennedy 1979, 269) Our task is to attend to the parts of his work that bear on the political institutions geared towards punishment and training of the criminal, as exemplary of Foucault's understanding of the law more generally as a social institution. Hence the primary aim of this chapter is to examine Foucault's *Discipline and Punish*, which stands out for the distinctiveness of its analysis of the operations of systems of law and incarceration.

However, the discussion in this chapter must take an unusual route, since there are unique challenges to reading Foucault as a philosopher of law. In the first place, Foucault's work is not ready-made for presentation in the context of offering comparisons to other writers. His approach to doing philosophy was unapologetically original, beginning with worries and insights that arose in the context of his own reflections. (A. & Hunt 1994, 3-4) (Said 1972, 1-2) Not every philosopher begins their work by looking at the ongoing dialectic between Great Schools and thinkers, and trying to find appropriate points of insertion; some begin by diving into the empirical or historical literature they would most like to understand, and arrive at arguments in the process of doing the work. Foucault seems to have the latter temperament, and so it is not always clear (even after charitable reading) who Foucault thinks he is in argument with. Unsympathetic professional philosophers might then fault him for falling short in terms of dialectical perspicuity.

A second problem is that nothing by Foucault was self-consciously advertised as a philosophy of law. His interest was in developing theories of power and knowledge in order to account for wide-scale patterns of social change, and the rise of modern institutions. Many of the hard questions about the *concept* of law never received any systematic appraisal from his pen. (A. & Hunt 1994, 39) *Discipline and Punish* is one of the few works that comes close to being a focused meditation of the philosophy of law, and it is well worth attention -- actually, given the serious remarks he makes about the unwritten law, it would be a crime of omission not to explore the consequences of his work. But it has to be emphasized, right at the start, that he left us without a conceptual scheme that permits clear, tractable conditions for cooperative disagreement with other philosophers of law. (Indeed, his own theoretical inclinations were not necessarily stable across works, making those comparisons even harder to make.) Whatever he was doing, Foucault did not think he was doing was a contribution to a dialectic on the concept of law.

So far in this dissertation, I have tried to keep a close eye on the positions of the philosophers we have encountered. But that strict fidelity relies on the logical completeness and dialectical perspicuity of the text being examined. Unfortunately, in these respects, even Foucault's admirers can admit that his narrative style sometimes poses a challenge. (Rousseau 1972-1973, 238-239) So if our story is to proceed apace, this chapter will require a defter exegetical strategy than previous ones.

First, as a means of locating the place that Foucault might have in the philosophy of law, it will profit us to make a brief detour into a discussion of early pessimistic visions of law. John Austin's lectures are the next step away from the Hobbesian middle-ground in the direction of pessimism. Moreover, Foucault's position can be seen as a natural extension and exaggeration of the pessimistic tendencies that can be found in the early positivist's point of view; indeed, for some commentators, Foucault is not much more than a legal positivist, as far as the philosophy of law is concerned. So a discussion of Austin's philosophy will be the first order of business, which will then be leveraged in the latter half of the chapter for purposes of comparison to Foucault, which remains

our main objective. Second, I will briefly discuss another approach to law that is rooted in Karl Marx's theory of political economy, relying on the guidance of David Harvey's *Companion to Marx's Capital*. (Harvey 2010)

Finally, I will explain the key indisputable elements of Foucault's picture of the law, without any attempt to reconcile them: his critical orientation to the appearances of law, his political pluralism, his conception of power, and his examination of the austere role that rules and principles play in comparison to strategies. This section will end with a consideration of two broad ways of understanding Foucault's vision of how we need to draw the picture of law, drawn especially in comparison with Austin's. It is in these Foucauldian sketches that we will find the most exciting implications for the prospect of understanding the unwritten law.

1. John Austin's command theory

Much like Hobbes, John Austin¹⁸ was a champion of the ideal of legislative supremacy. In fact, for those who believe that the aim of a theory of law is to ground and embolden the doctrine of legislative supremacy, the imperfections in Hobbesian philosophy were significantly corrected by John Austin's work. Arguably, with Austin we find a more coherent extension and defense of the sovereign. The main works we shall consult are *The Province of Jurisprudence Determined* and his *Lectures on Jurisprudence*. (Austin 1995) (Austin 1875)

In so doing, Austin abandoned some of Hobbes's major theoretical innovations with respect to the appearances of law. In answer to the question, "What makes a rule law?", Hobbes offered prudential reasons based on the demands of the principles of nature, ratified by the prudential interpretations of the sovereign office. This partially informs and makes sense of his decision to treat the natural and civil law as being of equal extent, at best mapping onto the written and unwritten parts of law. Austin, in contrast, thinks that the natural or unwritten parts of a social system are generally not law, properly speaking. (Austin 1995, 21) According to Austin, positive laws are (essentially) commands, and (he thinks) commands are expressions of desires that imply penalties for non-compliance. (Austin 1995, 22-25)

To capture the difference in their philosophies, we can say that Hobbes's *practical* picture of law was replaced by a **command picture of law**. On Austin's view, all laws properly so-called are modelled on the *very idea* of commands from a superior to an inferior, and which imply both rights and corresponding duties. Like Hobbes, Austin's position implied both internal and external elements: external, because the law is wholly contingent on the dictates of rulers; internal, because the concept of a subject's rights and duties still plays a significant role in an explanation of what counts as law. But unlike Hobbes, Austin denied that *the sovereign* had anything like legal rights: actually, all legal rights belong to subjects held against one another, while the sovereign has neither rights nor duties to their subjects. (Austin 1995, 230-234)

Austin was far less sensitive to a subject's reasons for action as part of an explanation of how law works. Any supposed natural principles that guide action are irrelevant to legal explanation, as are the demands of sovereign self-care. There is only a brute fact in play, which is that there is a political superior, and they have general rules about what you should do. Here, Austin's view self-consciously neglects the practical force of law in guiding action when admonishing other

¹⁸ One must take care to note that there are two John Austins: there is *John Austin*, and then there is *the other one*. Which of the two men counts as "the other one" depends on whether you are speaking to a philosopher of language or a philosopher of law. The 20th century ordinary language philosopher John L. Austin became famous for establishing the study of speech acts. The 19th century jurist John Austin became famous for articulating one of the early canonical expressions of legal positivism. Our concern is primarily with the latter.

writers of law who assume the practical salience of laws in providing effective reasons for action. For “positive law may be superfluous or impotent, and therefore may lead to nothing but purely gratuitous vexation”. (Austin 1995, 140) Indeed, the whole Hobbesian tale of the flight from a state of nature that primes and motivates his account of fidelity to law is scrapped by Austin, who asserts that rules of morality in the state of nature could be styled as laws properly speaking. (Austin 1995, 119)

Austin was hardly the first to examine the conceptual, semantic, and pragmatic features of law, and his analysis of law as a form of command is a non-obvious substantive thesis. As we have seen, there are passing disagreements between Austin and the other philosophers we have met. For instance, Aquinas held that the law was not a system of *commands*, but a system of *precepts* (Aquinas, *Summa Theologica* 2-1.92.2; 2-1.96.5); a difference in meaning can be observed by thinking about how we talk about their uptake, as precepts are *propositions learned* while commands are *orders followed*. To take another example: while Hobbes’s picture of law resembles a command theory of law, his commands were motivated by structured reasons that were meant to appeal to subjects by their rational nature. Not even the pretense of a requirement of sovereign rationality is held in the Austinian theory, apart from the demand that the **commands apply as standing rules of conduct**. One-off orders are not laws. (Austin 1995, 26)

It is worth stressing that the ‘generality’ of laws concerns their standing across time, and not across persons. Some rules may exist which are directed to a small set of persons, or indeed particular individuals alone, and still be classed as laws. For example, acts of attainder (i.e., laws whose aim is to condemn *particular individuals*, sometimes by name) are about particulars, styled *odious privileges* from Roman law. And yet Austin claims they may continue to have the status of law. (Austin 1995, 215) They are not general commands, in the sense of binding a wide audience to action, but they apply generally from one point of time onward.

Austin was also not the first to examine the nature of law through its focal meaning, though he makes it impossible to miss the point. For him, our purpose is to investigate the law when speaking properly, and to acknowledge (and disparage) the ways in which legal thought and speech are used in ordinary speech. Hence he distinguishes between three ways of talking about law: (1) there is talk about law “properly speaking”, the focal meaning of law; (2) there is talk about law that resembles these proper ways of speaking, by way of analogy; and (3) there is talk about law that is merely figurative, operating by figure of speech. (Austin 1995, 106-109) The command theory states that the law properly speaking is a set of commands, while most norms of conventional morality are only analogous to laws, and the “laws” of nature relate to the laws of humanity in (merely) a figurative way.

In the main, Austin argues that laws are the expressed general commands of determinate political rulers held on threat of formal sanction. For example, the municipal parking sign and the statute are both expressions made by rulers to a definite political community with genuine jurisdiction. Furthermore, Austin also holds that some laws are general commands of private persons occupying roles that are invested with legal powers granted by determinate political rulers. For example, an isolated rancher’s “no trespassing” sign may not have been put up by the sovereign (or subordinate judges), nor does the rancher need to have even been thinking about the legality of the sign when they put it up on their property. (Austin 1995, 120-121 f.6) All the same, the sign will assign certain legal obligations upon passers-by, owing to the fact that the sovereign recognizes the rancher’s legal rights and powers, and it is up to the rancher’s discretion to invoke those powers.

In this way, Austinian jurisprudence makes room for decentralized approaches to governance (e.g., traditional English common-law), and potentially also for modern constitutional states. It is important to recognize that all these rules -- from the rights of the rancher to govern their own

property, to the powers of the constitution to lay out common expectations for the sovereign – are contingent upon the assent of the sovereign. If the sovereign ever wishes to alter the constitution, or revise the rights of the rancher, then she has that privilege. There are no legal limitations on the powers of the sovereign. Like Hobbes, Austin thinks the **implicit constitution is formal, not substantial – the sovereign reigns supreme, but only within their lifetime.** The form of the implicit constitution simply resides in the institutional facts about the nature of sovereignty; substantial constitutions (both explicit and tacit) are little more than rules of conventional morality. No rules limit the scope of the sovereign: there is no such thing as a decree outside the scope of the sovereign. But, by the same token and for the same reason, there are no legitimate rules of succession that bind on the operations of the executive, even though these rules would be nice to have. (Austin 1995, 132-133)

For Austin, **the norms of conventional morality straddle the line between focal law (1) and near-law (2).** Some justice norms are held by private citizens, acting in roles authorized by the sovereign, and hence are classed as laws; others are rules of honor invoked by private citizens without the right connection to the sovereign, and which have no legal significance. (Austin 1995, 119-120; 123) But while it is easy enough draw an armistice line between morals imbued with legal force by command of the sovereign, and those which do not enjoy such status, it is not terribly clear what facts actually explain how to figure out which norms of justice end up on which side. The conceptual facts need to be grounded in facts about the social structure, which assures a steadiness or constancy in subjects' habits of compliance based on sanctions. (Austin 1995, 125-6)

In *Lecture V*, Austin makes a heroic attempt to demarcate the two categories on principled grounds by appealing to an early kind of social ontology of subjects: i.e., by distinguishing between authorities over determinate and indeterminate political bodies. (Austin 1995, 126-134) Austin notices, and elaborates significantly on, the different kinds of social form. Specifically, there is a difference between those bodies that possess the power of organizing a multitude of identifiable persons into collection action, and those which do not. (Austin 1995, 136) So, to use some common-sense examples, we can observe a difference between the kind of requirements of being part of a *culture* and those involved in being part of a *club*: a club can organize and host events, while a culture cannot. Here, Austin is effectively putting the Hobbesian notion of the social union to work without appealing to either the notions of natural principles or the historical fiction of a contract of all and all.

A 'determinate' social body is a union of people with a clear membership roster. For every determinate social body, *at least some* of the subjects can be individuated as part of that body as possessing significant social influence – i.e., that at least some of the people in the commonwealth can be named and identified by some precise description that can be used to tell members from non-members. (Austin 1995, 127) For example, at any given time, there is a definite fact about who counts as the Prime Minister of Canada; at the time of this writing (2016), it is Justin Trudeau, representing the Liberal Party. Meanwhile, on Austin's view, the non-legal varieties of conventional morality apply to an indeterminate social body, meaning that it is impossible to state clearly who, and how many, belong to that collective. (Austin 1995, 126-132) For instance, the society of "gentlemen" is indeterminate, and the criteria cannot be applied uniformly for each and all members. (Austin 1995, 129) To be sure, presumably, some exemplars of gentlemen might be bandied about; but in the absence of a clear, definite description of what counts as a gentleman, presumably even the paradigms of gentleman will be suspect, and their influence over the class of gentleman shall be unclear.

Success in governing a determinate social body is not by itself sufficient to secure the existence of law. If all it took to be law was to be able to identify the person of influence in a determinate

social body, then the patriarch of a household could qualify as sovereign, and his dictates as laws; but this is not something Austin wants to say. The final condition needed to satisfy Austin's command theory is that the subjects be in the habit of obeying rulers who are likely to impose sanctions, and rulers not themselves be ruled by anyone else. They must, in short, either be rulers of an independent political society, or be a local hotshot in the state of nature. (Austin 1995, 119; 122)

Austin's positive picture of law implies that law and justice are conceptually and substantially distinct social practices. For Austin, both positive morality and positive law ought to be systematic imperatives that conform to the will of God. (Austin 1995, 14;58-60) On his view, the best way of justifying our claims to knowledge of the requirements of the divine law is through deliberation arrived at by way of the principle of utility, combined with observation of the things in life that bring either mischief or delight. (Austin 1995, 58-59; 77-78) We develop moral rules by a utilitarian process of reasoning. That having been said, our utilitarian reasoning is fallible, since it depends on empirical contingencies. To make matters worse, our normal belief-forming process is imperfectly guided by moral sentiments, finding expression in concepts of "common sense" (and sometimes, claims of divine revelation). (Austin 1995, 87-90) Since we cannot know the final verdicts that track particular instances of utilitarian reasoning to the same extent that we can know the contents of expressly stated commands from the human sovereign, our imperfect guesses about the contents of the divine law (*pace* Aquinas) have no power to override the dictates of the legislature. Moreover, it is also the case that there are simply no guarantees that the human law will be a force for justice; we might *hope* that the legislators will be good utilitarians, but they might botch the job owing to these many difficulties. Hence, morality and law do not necessarily travel in the same circles; **morality and law share no necessary connection**, except perhaps in aspiration.

Austin is sympathetic to fiat law, but his views are not entirely clear. His command theory asks us to regard laws as standing commands, set by one whom we are in a habit of obedience; and since fiat laws are not general commands, one might expect that Austin would adamantly oppose the very idea of fiat law. Hence, he explains by way of example: "[A]n order issued by Parliament to meet an impending scarcity, and stopping an importation of corn then shipped and in port, would not be a law or rule, though issued by the sovereign legislature." (Austin 1995, 26) Lacking generality, the explicit command would not be law. Yet the thing lacking from such orders is lack of explicitness about whether or not the force of precedent is actually in effect. There is always potential for the general facts about who is in charge, known in context, will simply imbue specific one-off commands with generality. However, it *is* clear enough what Austin would say about the case of French wine. A law is promulgated just in case the sovereign has an intention to make the command be followed on threat of sanction, and signals their *desire* that the thing be done. (Austin 1995, 148) Austin's phrasing in this passage suggests that the signaling of intentions to impose sanctions, in response to a particular wish, is not a requirement.

Another matter left largely untouched in Austin is the nature and extent of the duties the subordinate judges have towards both subjects and sovereign. For Austin, the main topic of exploration was *general jurisprudence*, which lays out the properties of all legal systems properly speaking. *Particular jurisprudence* would examine the operations of particular legal systems, including the fashioning of judge-made laws. (Austin 1875, 147-148) Since neither his *Lectures* nor the *Providence* give the matter much discussion, it is difficult to see what resources he would have to bring on a study of the operations of law. (Problematizing and scrutinizing the role of the judge is simply a phenomenon which comes with later jurisprudence.) At best, we can infer that Austin's conception of judicial good faith must emphasize **the virtue of fidelity to the decrees of the**

sovereign, since that is essential to his view of general jurisprudence; other potential virtues do not make much headway.

The concept of unwritten law is explicitly given an analysis in Austin's *Lectures on Jurisprudence*. In that chapter, Austin elaborates on two senses in which the phrase "unwritten law" has been used in the literature: the "juridical sense", in which the unwritten law is little more than the creation of law by non-sovereign authors (e.g., in the common law), and the "grammatical sense", in which the law is literally not laid down in writing by the legislator at the time of its passing into effect (e.g., it is spoken aloud, and the precise details are only placed in writing later). (Austin 1875, 255-6) The former concerns the originating author of the law, and the latter concerns the mode of its original expression. Ostensibly, both concern the origins of law.

Austin attempts to explain the juridical sense of unwritten law by appealing to concepts of 'promulged law' and 'unpromulged law'. According to the civilian literature of the era, promulged law is "made by the supreme legislature", and unpromulged law is law "emanating immediately from a subordinate source". (Austin 1875, 262) To help explain the difference, Austin suggests a very different distinction: between laws made known to subjects, and those not made known. These are two very different concepts: one concerns authors, the other concerns presumed advertisement or uptake. But this conceptual difference does not amount to much under Austin's theory: for him, a law is made known just in case it is passed by the legislature. (Austin 1875, 262) In cases that concern general laws, the subjects can be assumed to know the laws just in case the people who passed it are representatives of their subjects. Because of this (highly contestable) assertion, Austin denies that any laws could be secret so long as they are not secret from members of the sovereign body. (Kutz 2009, 209) **Transparency is not at all a high priority in the operationalization of law.**

In summary: Austin proposes a command picture of law. Where practical pictures of law propose that a theory of legality must explain the actual actions of persons and the felt nature of their obligations, command theories of law make no such claim: the apparent legal facts can depart quite significantly from practical facts about what rules will or will not be enforced. Repeatedly, Austin stresses that his account concerns the focal meaning of law, or law 'strictly speaking' – he is interested in providing a conceptual analysis of the proper or considered meaning of the term, not merely interested in how the word functions in ordinary language according to the opinions of the folk. Austin's account of the constitutive features of law rests, not on any basic norm or original contract, but rather on reference to the power structure of a determinate political community. (Austin 1875, 130-141) Although the rules of conventional morality may resemble laws, he argues that the focal meaning of law makes no necessary reference to morality. The legal 'is' does not imply a moral 'ought': the power of legal norms derives from their social origins.

2. Deeper pessimism, stronger externalism

After considering all the fine words spoken in favor of the sovereign power in the preceding chapters, we might be tempted to lose sight of brute facts about the legal system. It may have seemed, so far, that we have been obsessing over the blueprints of a great machine of the law, and ignoring the actual grit and gears of the legal order. What seems beautiful from afar, may take on an ugly sheen upon further examination. So as we press on in our survey, we find that the thematic drift has been, by degrees, provided us with a less and less romantic view of the legislature. Aquinas's halo has been replaced by Austin's noose. The law kills, imprisons, sanctions. It punishes and judges. If you do not conform to the law, it does not have to ask you why: its main currency is the act and the denunciation. You cannot hold the court in contempt, but the court need not return the favor.

Be that as it may, there has been a steady change in the history of law, a tendency towards leniency. The written tradition of Greek law began with Draco, whose *laissez-faire* approach to jurisprudence left punishments to be decided by grand juries that were hungry for blood. (Carawan 1998, 1-2) The Code of Hammurabi held to the doctrine of *lex talionis*: “If a man put out the eye of another man, his eye shall be put out.” (Hammurabi 2008) In France’s *Ancien Régime* (the period before the 1789 Revolution), regicide was punished by a spectacle of public execution that is so grisly it sounds as though it belongs in a Brothers Grimm tale: his flesh burned off, then encased in molten metal, then drawn and quartered, then immolated. (Foucault 1977, 2) But today, most Western countries reserve the death penalty only for the most extreme crimes, with most countries outlawing it entirely, and even the doctrine of *lex talionis* is widely derided. Instead, the default mode of punishment is imprisonment (and, even then, with an increasing eye towards criminal rehabilitation). So what happened? Has Western Civilization succeeded, at long last, in enacting Aquinas’s demand that we transition into a law based on grace, charity, and mercy?

The optimistic or humanistic view, corresponding roughly with an Enlightenment picture of social and historical development, would tell us that the law has indeed changed because of moral progress. Increasingly the circle of moral concern has widened to include larger and larger populations, corresponding to increases in the power of our sympathies and improvements in the cultivation of skills of critical reasoning. (Mill 2001, 31-34) The proponent of this view might offer some details to illustrate these trends. For the sake of sympathy, we might point out that there was some growth in procedurally based institutions of law, complete with systems of appeal; and for the sake of rationality, we might point out the development of constitutional forms of law. We can tell a story, here, about how the West has gradually undergone a moral awakening, as the law has become increasingly sensitive to moral concern.

It is hard not to toss a bucket of cold water over these warm historical feelings. Yes, we can all point to the crown’s begrudging acceptance of the *Magna Carta* in the years 1215-1225 as a great achievement in the project of civilizing of the law -- but while we do so, we should also note that it was crafted by aristocrats to protect themselves and their property, and was broadly resisted by the crown. (Holt 2015, 33) Yes, we can acknowledge that punishments have become gradually less and less brutal over time – but only selectively, and in a way that has on occasion curiously lagged well after decreases in violent crime. (Foucault 1977, 75)

Alternative explanations come ready to mind when we try to see things through the jaundiced eye of the political economists. Where Austin dared to revise Hobbes by cleaving the rule of the sovereign from natural principles, others have actively *doubled down* on the relationship between politics and the economy. These political economists argue that the demands of the market are, in fact, what is most central to an explanation of the nature of law, written or otherwise.

3. Karl Marx and the ideological picture of law

Karl Marx and Friedrich Engels are two of most obvious proponents of the pessimistic view of law. Marx and Engels argue that the law supervenes on economic relations, and is not determined by evolution in moral sensitivities. Instead, the law is an expression of interests of the relations of production: typically, the rational interests of the ruling classes, and sometimes those of the subordinate ones. Any improvements in the welfare of populations occur because of the iron first of history, not as a common contract aimed at mutual betterment.

Once the broad outlines of the Marxist picture are explained, two features of the scientific socialist approaches to law will become clear: first, the centrality of economic explanation, and second, the centrality of labor relationships to the creation of value in the process of economic

production. Morality doesn't directly enter into the picture of the law, except insofar as "morality" involves seeing the political economic facts more clearly. For the Marxist, law is an organization or institution whose most conspicuous trait is to create and maintain **ideology**, which is (roughly) a *system of beliefs held by some social group on insufficient grounds which support a power structure and aspires to achieve maximum influence in some domain*. (A. Hunt 1985, 20-22; 22-31) In other words, ideologies are conceptual schemes, held by groups, which are epistemically defective, function to legitimate institutions, and aim at dissemination by-hook-or-by-crook. (Geuss 1981, 12-22) Here, ideology is mainly understood as a term with pejorative connotations, which gives it the sting of **pessimism**. And yet, ideologies also function at dissemination of rules, making them a plausible mechanism for the informal dissemination of unwritten law.

The literature on Marxism is truly vast, with many sub-branches and forking paths. Moreover, the literature on the ideological picture of law is still in early stages of development, having been neglected for much of the early part of the 20th century. (A. Hunt 1985, 15) It is very much beyond my purposes here to do anything other than provide a homespun sketch of its grossest internal divisions in order to offer a succinct description of how approaches from political economy might proceed, by way of setting up context for Foucault. I will outline two different ways that the Marxian might approach the idea of law as ideology: either by treating legal rights and duties as little more than deluded propaganda, while the latter treats legal discourse as a complicated and unique social phenomenon. On the former view, the job of the courts and legislators is to consolidate trust in the ruling classes (what I will call the *epiphenomenal conception* of law as ideology); on the latter view, their job is to exert effective control over the relations of production (what I will call the *autonomous conception* of law as ideology). Pretty much everybody thinks that the latter is far more plausible than the former, but intellectual fidelity to Marx demands that we attend to all the options, including the bad ones.

Homespun Marxism in Fourteen Paragraphs

Marxism holds that political societies are organized into a two-tiered structure, composed of economic base and a political-legal-cultural superstructure. The economic base of a society anticipates the manifestations of the legal superstructure: any change in the economic facts ought to beget a change in the legal ones, either by constitutive fact or by obeying the causal arrow. Ambitious versions of the doctrine might go so far as to assert that any change in law must be a result of changes to the base. If a law is passed, then it was in somebody's interest for it to get passed; if the police enforce rules only on one side of the tracks, then it is because the rich own the one side and not the other; if the operators of major international financial institutions are capable of gross fraud without facing punishment, it is because the institutions of legal enforcement are powerless to act against them. Marxism is notorious for its "economics-first", and "class-first", approaches to explanation of the social and legal world.

The structure of the economic base for any given society is composed of facts about the wide-scale patterns of organization for the productive capacities of a market: i.e., the people who own and direct the uses of land, labor, capital, and technology. So, in a previous era, the era of feudalism, the land-owners directed labor and capital; but in the capitalist era, the owners of capital direct labor and real estate. Glossing over the details (and, among them, exegetical controversies in the secondary literature), a plausible story can be told about how capitalism came to ascend over feudalism: the capitalist system was better capable of dealing with an increasingly bold peasant class which was no longer willing to accede to agricultural serfdom as their condition for survival. (Katz 1993, 372-373) The law changed as the society evolved, through **demographic fiat**.

To understand how Marx understands the facts about the base, one must appreciate how he

thinks in a vastly different way from contemporary mainstream economists. To see the difference, we must put Marx on pause, for a moment, in order to give a rough approximation of a story that mainstream economists might tell about the nature of exchange value:

There are three roles involved in economic processes in the capitalist system: the role of capitalist, the role of consumer, and the role of worker. In the first place, there are wants: the consumer wants goods, and the producers aim to satisfy those wants by creating useful products. The utility of a product is a function of the desires of the society and people in it. (Harvey 2010, 16) Once goods are put up for exchange on a market we say that the goods are commodities. And we assume certain things about all the actors involved: they are all trying to maximize the amount of value they can, satisfying their own desires as best they can. Everybody is a rational utility-maximizer.

We can then assign goods economic value, or more precisely, exchange value. The exchange value of a product is a function of consumers' willingness to pay to get that product and the seller's willingness to accept that price. So if I have two sodas, and you have a cake, and I am willing to pay you my two sodas for your cake, then we can assign them a relative exchange value in that context: two sodas have the same value as one cake. That is fine enough for a simple transaction. However, in the marketplace, there will be different buyers and different sellers, each interpreting the relative value of their sodas and cakes. In the aggregate, different consumers will be willing to pay different prices for a single commodity: maybe you like sodas more than I do, and are willing to pay more; maybe a third person likes it less. But, importantly, the amount that consumers are willing to pay and sellers are willing to accept will depend on quantity of goods available. A relative scarcity or glut will drive prices up or down, respectively. So we can usefully talk about the equilibrium price of the commodity: i.e., the average price consumers are willing to pay in those cases where the number of commodities available for sale tracks the commodities on demand (e.g., there is neither a scarcity nor a glut). (Harvey 2010, 59) Here, the important facts are the humble, common-sense ones: prices are figured out by the consent of buyers and sellers over the appropriate amount to pay in a world where most goods are finite in quantity. To put it crudely: exchange value is purchasing power. (Cohen 1978, 417)

What is noteworthy about this story borrowed from mainstream economics is that it either eliminates labor entirely, or reduces labor to a different kind of relationship between buyer and seller (between laborer selling their labor and the capitalist who buys it). And, as a matter of economic fact, what's wrong with this story? On first blush, nothing. And, in a sense, Marx would agree that the haggling between buyer and seller is an important part of any account of what happens in the marketplace, in the sense that exchange value of a commodity cannot exist without potential exchanges in the offing. (Harvey 2010, 22) All the same, there are numerous potential points of criticism which Marx pursues.

First, Marx thinks this account does not explain how commodities come to have the values that they do, they only describe the process that itself needs to be explained. If we let this be the whole story, and bleach out the details about how commodities came to be, we perpetuate a kind of unrealistic mystical attitude which Marx famously calls *commodity fetishism*. (Harvey 2010, 38-47) This story abstracts away and ignores the important social facts which generate value, and in this way, fosters an ideology where nothing has intrinsic value. (Harvey 2010, 45-46)

Second, this story relies on the assumption that the consumer's willingness to pay can be explained rationally: i.e., by comparative evaluation of the utility or use-value of commodities. That is, we assume from the start that the usefulness of a soda can be compared to the usefulness of a cake. But this involves quantifying a property – utility -- that Marx thinks cannot be properly quantified. (Harvey 2010, 17) Consider: it is not obvious that we can infer that the *usefulness* of a business school dean is precisely four times greater than the usefulness of a tenured professor just in case the former makes an income of 400,000\$ per year and the tenured professor makes 100,000\$ per year, even if we assume that everyone in the market is adequately informed and rational in their evaluations. And the inference would be just as odd even if the business school dean made pennies on the tenured professor's dollar, or if we were comparing the salaries of

professors to the utility of sodas and cakes. For there is no necessary relationship between a thing's price and its usefulness, because usefulness is not an *additive* property. Usefulness is a peculiar, manifold relationship between the thing, the standards for evaluation of its quality, and the desires of human beings that use it. And, of course, the curious and complicated relationship between use-value and price can produce very strange results in capitalist markets: essentially useless things, like diamonds, may be sold for prices that are well in excess of essential needs, like water. (Smith 2000)

Third, however important these exchanges on the market might be to economic activity, such descriptions simply fail to capture the real facts about lived reality on the ground. They do not tell us anything about *the kind of relationships between persons* in a marketplace; nor do they expose the *strategies that guide the decisions* of these very different kinds of actors; nor do they explain important real-world empirical facts, like the *changing rates of work per week*. (Harvey 2010, 19, 135-137) In short, the mainstream neoclassical picture does not give us the tools we need to make sense of the difference between feudalism, capitalism, and so on, which are both high-invisible and influential facts that function as the brick and mortar in the kingdom of economic production.

So another way must be tried, and here is his proposal. For Marx, we need to make a distinction: between *exchange value* and *real value*. The exchange value of a commodity is its purchasing power. Meanwhile, the *real value* of a commodity is a function of a rational and informed estimation of what amount of labor time is necessary to invest into the production of saleable goods, such that the average competent worker is able to continue on working competently. Real value is, in short, defined as the *socially necessary labor time required to make the commodity*: the cost of the average labor time necessary to produce a useful product, once one factors in the normal conditions of production for a particular society (i.e., the average degree of skill and intensity of labor in that society). (Harvey 2010, 25) Socially necessary labor time is, if reduced to slogan form, *what the laborer embedded in a particular society requires in order to keep going as laborer*. (Harvey 2010, 103-104) And the real value of the commodity determines its exchange value, all other things equal.

What has this got to do with the relations of production? Well, in a capitalist system the commodity is sold for prices in excess of their actual value, effectively buying labor at a low price to sell it to consumers at a higher one. The considerable surplus amount of money which cannot be accounted for in terms of overhead or labor costs goes to the capitalist: it is the profit accrued by capital investment. For Marx, this is exploitation, as the capitalist "parasite" lives off of the laboring classes, who are the true engineers of value in the economy. (Cohen 1978, 82-84)

That is the vulgar Marxist story on this point, but it needs to be rounded out by a few more remarks on culture in order to be complete. Now, notice that this idea of "what is required to keep going as a laborer" is embedded in a social context where there are standards for the appraisal of what the appropriate maximum and minimum amounts of work are needed in the process of production. (Harvey 2010, 104) What counts as a day's worth of work in England may differ from that in Spain, Switzerland, or Canada. And it seems evident that the idea of what is required to keep going is open to contests of interpretation in the public sphere, where laborer and capitalist fight to persuade people in the culture about what they think *really* counts as a basic need for labor. (Harvey 2010, 149)

Here is a straightforward way of talking about how this cultural war unfolds. The aim of the capitalist is to optimize returns on investments. It follows that they must convince the average competent worker that the value of their labor *qua* laborer is relatively small. In cases where a labor pool is overpopulated (where each individual worker is replaceable), and where their place as laborer is seen as distinctively different from their role as consumer, the capitalist might even convince the worker that a reasonable price for the worker's time *qua* worker is so small that it is

less than the value of their life considered under other descriptions (e.g., as human beings, or as citizens). The capitalist is in the job of buying labor, and they would like to buy labor low in order to sell commodities high – their focus is on capital accumulation, a goal that is never entirely satisfied. But Marx thinks the political bids of the capitalists are gross delusions, whose end-game is to minimize labor from the process of production through gains in efficiency and improvements in technology. (Marx 2011, 257)

Meanwhile, the rational aim of labor is to convince all hands to appreciate a more robust interpretation of what is required to survive as workers, appealing to minimal requirements of a good life for a laborer: e.g., medical insurance, education, hope of social mobility, ability to sustain a family, and job security. The role of organized labor is to secure a satisfactory salary in accordance with their needs as laborers. They are, and must be, satisficing in some sense; the end-point is to get useful commodities that they require to live and go on as laborers. What it means to survive as a laborer is relative to the standards in a society. (Harvey 2010, 20) And one of the main sites where this political contest takes place is over the length of the working day, which is the major empirical concern of *Capital: Vol. I*. (Marx 2011, 163-203)

Two conceptions of law as ideology

So what does all this have to do with the law? One idea launches itself off the page: that the Marxists acknowledge the importance of economic metaphors of negotiation, contract, competition, and exchange between and within social classes in their explanations of the base, but emphasize the unequal power relations between the classes in determining how those exchanges go. But another thing to notice is that the exact nature and extent of that link between economy and law is not at all clear. And Marx himself is no help, as he makes use of the term ‘ideology’ in multiple ways. (A. Hunt 1985, 13) Alternatives must be spelled out.

- (1) When reduced to its grossest form, Marxian philosophy could be interpreted to hold that the constitution of law is determined by vital political facts about the economy: the facts about who owns what. On that view, the changing incentives for action based on ownership and exchange of commodities themselves *exhaustively determine* what the law is and shall be. The job of the courts and legislators is to regulate action for the purposes of convincing subjects to acquiesce to the rulers, and we should expect the institutions of law to map discreetly onto the ebb and flow of the class war. This is one-way economic determinism from the economy to the law, and it implies the view we have dubbed *legal epiphenomenalism*.
- (2) Alternatively, we could rest content with the idea that big facts about economic production only provide a *defeasible indicator* of how the law works. On this view, economic determinism is entirely off base (no pun intended); and so, we should be indifferent as to whether or not systems of law operate in a relatively independent fashion from the major facts about the political economy. This is what we have called *legal autonomism*.

Only the latter view is capable of endorsing the idea of legislative supremacy in any cross-contextual sense, and hence **only the latter is capable of endorsing a formal conception of the constitution of law.**

To see what is at stake between the two forms of explanation, let’s consider a concrete example of a historical event that the concept of “law as ideology” might be fit to explain: namely, the Constitutional enactment and subsequent repeal of Prohibition in early 20th century United States (1919-1933). Levine (1985) offers a roughly Marxist explanation of this event, leaning heavily on the naïve delusions of the ruling classes about the causes of crime and poverty. In its early years, the Prohibition worked in reducing alcohol consumption – by one estimate, it was down by about 70%, compared to pre-Amendment levels. (Tyrrell 1997, 1406) The reason

for the popularity of these naïve views owes, in part, to persuasive arguments offered by the ruling and business classes (operating through lobbyists) to convince people that drug abuse was the cause of social ailments like crime and poverty. (Levine 1985, 63-68) The ruling classes (or, anyway, the business classes) had a vested interest in reducing crime. The idea that Prohibition was a panacea was hard to maintain, however, after the Great Depression in 1929. (Tyrrell 1997, 1406) The delusion was no longer credible, and so the upper classes withdrew their support, and the constitutional amendment was repealed. (Levine 1985, 69-74) In this account, the delusions of the ruling classes dictated the form of the Constitution, and when the delusion was dispelled, the law was altered. And here's the upshot of the story: if we take Levine's account at face value, then the epiphenomenal concept of ideology will seem compelling; but if we think it is at best only part of the story, then we might prefer the autonomous one.

The epiphenomenal conception of ideology relies on an economic determinism that is now broadly rejected. If modes of production are essentially property relations, and property is itself a legal construct, then it doesn't seem at all useful to try to explain legal facts solely in terms of economic ones. (Norman 2003) (A. Hunt 1985, 14) The economic determinism of Orthodox Marxism suggested by foundationalist metaphors of "base" and "superstructure" is an overdrawn caricature. Serious social theories must concede that *at least property law* is central to explanation of the operations of political economy. *Law really does affect how things work in the economy.*

Still, a Marxian theorist can do away with the idea that the law is determined by the base economic relations, and instead argue that it both supervenes on and potentially regulates the operations of the base. If the Marxian is prepared to take seriously the idea that the law is substantially contingent on the dictate of something like an autonomous sovereign power, and is willing to acknowledge that political-economic facts depend upon prior legal relationships involving contract and exchange, then that will amount to recognition of the force of legal rights and duties. Some such view appears to be the trend. (A. Hunt 1985)

On both views, however, one lesson is clear. Law is the author of ideology, and ideologies are meant to be evaluated critically. At least sometimes the law is a product of false consciousness, class-based delusions, as the judges who are charged with the task of playing King Solomon over participants in the culture war have to cheat in favor of the power elites. This style of explanation does not make inroads into Austin's theory, since norms of honor are thought to be norms of conventional morality, and hence irrelevant to a theory of law; in Marx, the opinions of the reputable classes cannot be coherently neglected, though he would balk at calling this morality.

What must the Marxian say about legal secrecy? We know that law distorts the reality of social and economic relations, since in the Marxian tradition, ideologies are usually thought to be *epistemically defective*, resting on illusions about how the economy works. The existence of ideologies, however, can be entirely consistent with the expectation of *legal* transparency. For the law can misrepresent economic facts in a certain way – say, by defining ordinary words in extraordinarily ridiculous ways, or by relying on anti-scientific premises – while being perfectly *legal* in its blunders. Secret laws, in contrast, are secret *as* laws: there is contextually insufficient information to allow a rational actor of good faith to follow them, even if they wanted to. So we are concerned with the conditions that the Marxian would expect that the facts about the operations of law would – and perhaps must -- be systematically hidden from the public. Clear answers depend upon which interpretation of Marxism we would like to entertain, and how these views might be refined.

But whatever else we say, we must put central emphasis on the demands of the dialectical, or competitive, forces in the base. Consider, for example, the issue of legal standing: i.e., whether or not subjects have the power to have their rights recognized by actual institutions. If a sub-population is in fact being treated as a second-class citizenry, then it is plausible to expect ideology

to distort and hide these facts. A primary task of the law, at least under capitalism according to Marx, is to convince subjects that they possess equal legal standing *no matter what*: that claims made about one's rights (say) to *habeas corpus*, or the right not to be tortured, or the right to not be subject to unreasonable search and seizure, will (at minimum) always play a role in grounding verdicts made in deliberation over cases. But we might expect the actual facts about legal standing to be compromised by the exercise of judicial bad faith during deliberation, distorted by class conflict (as, of course, judges overwhelmingly come from the ruling class and have had a lifetime of indoctrination into its habits). Moreover, Marx speculated—and there's much contemporary evidence—that wealth and class membership powerfully affect one's ability to hire the best, or at least superior, legal talent, and this can indeed materially affect the outcome of a given case. These kinds of behind-the-scenes forms of economic power and class ideology may inform a loosely “Marxist”, or “neo-Marxist” understanding of unwritten law, or something operating to similar pessimistic effect.

Objections to such views

We will not spend any more time on Marxian approaches, understood in this way, despite the fact that they are of great interest. The main point I would like to make is as follows. On a revised Marxian approach to the political economics of law, we have real legal rights and duties, and these normative qualities are *precisely the reason* why one ought to be pessimistic about the connection between law and morality. The ruling classes largely dominate the political conversation, and hence determine the range of acceptable opinion in the legal culture. Since the economy is unjustly weighted in favor of the ruling classes, we ought to expect the law to broadly follow the same structure. The Marxist is pessimistic, not just in the sense that they conceive of law and morality as conceptually distinct, but in the sense that the law should be actually expected to be an instrument of oppression (at least under the historical epoch of capitalism).

To be sure, even the heterodox Marxian is not immune to either criticism or revision. One area of frequent complaint is the (justifiable) sense that the Marxist's ‘class-first’ approach to social explanation is guilty of *explanatory hubris*. It is thought that the Marxist would like to explain *everything* in terms of their economic theory -- offering a “theory of history”, to use one remarkable phrase; inventing our modern “species-being”, to offer another. This tendency has been resisted in at least three ways: first, that it is either unfalsifiable or false (Popper 1994, 689 n14); second, that his dismissal of the account of exchange value in terms of use-value is dogmatic and unmotivated; and third, that its “class-first” approach to an explanation of ideology offers only a coarse-grained explanation of fine-grained cultural, institutional, and psychological change.

One strand of perceived weakness in the ‘class-first’ aspects of the Marxist tradition is that it insufficiently explored the dimension of culture, that area where ideology is grown and made, and hence is incapable of explaining certain varieties of predictable oppression that are inherent in law. It is at least unobvious how particular manifestations of cultural oppression, like racism and sexism, can be explained in the Marxian worldview. The problem is not that economics has no role in the explanation of, say, why East Asian actors were systematically barred from occupying major roles of East Asian characters in Hollywood up until the latter half of the 20th century (and, perhaps, beyond). (Ono 2009, 45-54) The Marxist could always say that the hiring pool was compromised by a false ideology of white supremacy, insufficiently attentive to the facts about what laborer *qua laborer* needs in order to get by. Still, it seems clear that this kind of explanation has to be made more sensitive to the details of racial oppression if it is ever to have any hope of success.

4. *Too many metaphors*

Over the past few centuries the crude Enlightenment picture of moral progress in law has suffered a major downgrade. We saw it in Austinian positivism when he asserted that there was no conceptual connection between law and morals. We saw it in Marx, who argued that there was not even a robust causal connection; indeed, if law is an epiphenomenon, then morality is doubly-so. Their attitudes were both contagious and reflective of a wider political mood, a prevailing tendency to paint a grim picture, and to shy away from Aquinasian or Aristotelian ideals that the law's function is to serve as guardian and even enabler of the virtuous community.

Even so, as we have seen, these bleak modernist approaches to jurisprudence still treat legal rights and duties as bearers of distinctive normative force and content. No matter who you talk to, there is a story to be told about how subjects have reasons to obey the dictates of their rulers as a matter of law. The reasons for compliance are political and not moral, but they are politics of a certain special or attenuated kind with its own internal logic. The law has internal dimensions, and can be conceived of as a *system of reasons linked together* which provides guidance on how to act. The law is coherent and monolithic, not a patchwork of contradictory statutes and uncertain verdicts.

But there are many different ways of making a coherent system, different conceptual schemes which carve up a single legal reality. And the mode of explaining how and why our legal rights and duties work in the ways that they do depends on the philosopher's favorite metaphors, used to describe the source of legal validity. For Aquinas, the law was a *precept* to be taken for granted, and which attributed intentional design to any *patterned, law-like activity*. For Austin, the law *strictly speaking* is the *general command* of the sovereign. Hobbes and Marx make use of economic metaphors. Hobbes prefers the language of the *social contract*, i.e., that the law is a contract between all and all; Marx prefers the language of class competition and conflict over exchanges.

There are a few reasons why we might think that these governing metaphors might be misleading in an account of political reality. First, there is the *sheer inappropriateness*: Aquinas's design stance might have been consistent with the best natural and social science of his time, but the very nature of our picture of legal obligation – and hence, the rules for figuring out to whom to defer – changed with our changing picture of how the world worked. Hobbes's particular vision of the sovereign as an external arbiter entrusted with the authority to resolve social conflict, has given way to a time where the government seems to serve a subtler and broader role in the regulation of our civil lives. Second, there is a worry about *narrow explanatory scope*: we might worry that the dynamics of contract, competition, and coercion are *themselves* political phenomena that need to be explained. Third, there is the related suspicion, that coercion, competition, and exchange might be distinctively useful in explanation of broader trends in the arrangement of large-scale social institutions only insofar as these metaphors reflect the exercise of *power* – what we might call the worry of *misplaced explanatory priority*. And, fourth, we might think that an over-reliance on these metaphors creates a political science whose central aim is to explain artificial constructs (imaginary contracts, tacit yet omnipresent conflicts), and hence, relies too much on *unnecessary unobservables*. What we need is a science of observable human behavior, concrete observable facts about bodies in motion. And so into this background picture steps Michel Foucault.

5. **Foucault and the strategic picture of law**

A Foucauldian picture of law can be drawn from the man's account of politics and government. We could just as easily begin with his earlier work, *Discipline & Punish (D&P)* as we could concentrate on his later lectures on governmentality at the *Collège de France*. Most attention will be paid to his remarks in *D&P*, as it is the most sustained of his reflections on a clear branch of the law.

As an exercise in table-setting, we'll consider his methodology in *D&P*, and provide a rational reconstruction of how the book proceeds in its analysis of political and social **institutions** in general. Having trod this general ground, we return to more familiar pastures: a reconstruction of how Foucault approaches the basic picture of law. There we will return to themes introduced at the outset in greater detail. First, Foucault treats the appearance of law from a point of view which combines critical analysis of modern institutions with a dose of **ironic detachment** from mainstream moral discourse. This approach is startlingly different from all the theories we have seen so far, in that it does not motivate its analysis in moral questions: e.g., concerning the source of our obligations to the government. Second, Foucault does not have any ordinary theory about the constitution of law. Instead, he is not interested in the question of what the law *really is*, and instead asks how our idea of the law changes and persists across time. We will describe his approach as **contextualism**. Third, while he is interested in those strategies and techniques involved in the *management of power at the local level* which clothe themselves in the language of right and duty, he does not think these normative valences are effective in managing whole populations (nor even to make sense of what is ultimately going on). To manage whole populations, you need to be able to socially construct different "kinds of people", we might say. We shall refer to this messy process of legal change as the **field of law**.

In the course of the study of this Foucauldian sketch of law, we will discover some rich and important insights on the role of small-scale unwritten rules in a legal structure: namely, secret laws, operationalizations, fiat rules, and justice norms. Our observations will, however, be inconclusive when it comes to the idea of an implicit constitution, since his approach is an open invitation to displace the sovereign power as normally understood. Foucault's external point of view both enlivens the theoretical imagination, even while it makes a satisfactory explanation of the demands of law more difficult.

5.1. Bio-power and the strategic method

Foucault has many different axes to grind across many different research projects, with history and philosophy of science, medicine, sexuality, and government being perhaps his central concerns. But in *D&P*, he has one overriding thesis statement: he seeks to explain changes in the institutions of law on the side of enforcement through growth in institutions of incarceration. (Foucault 1977, 22)

In point of method, it is generally the case that Foucault begins with the historical facts, or (anyway) the facts as Foucault sees them, and tries to respect the use of concepts in their historical timeframe. In this respect, he is a historian of ideas. So, e.g., you do not find in *D&P* a study of the *concept* of law, or a sustained meditation on what makes a system of rules *really* legal. (A. & Hunt 1994, 39) Also, it is rare to see him explain changes in institutions by focusing only on changes internal to the institution itself – e.g., that the law is to be explained only in terms of what judges and legislators say. (Foucault 1977, 131) He is not a narrow-minded disciplinarian, in this respect. So, e.g., he does not explain changes to law *only* through changing orientations to jurisprudence; instead, one must attend to the whole field of social and cultural forces (and this, clearly, is evocative of Marx.) These are two vital, non-optional parts of Foucault's thoughts about law.

Foucault is frequently, if not always, obsessed with the history of institutions: institutions of science, law and incarceration, and medicine. Often, his methods are retooled according to the aims of whatever research project he is working on at the time. If methodology implies a strict sequence of steps by which one explains one thing in terms of another – a strict *explanans* and strict *explanandum* – then Foucault does not seem to have a stable methodology. That is to say that, in the process of explaining "the birth of the prison," he seems to cheat: e.g., he conflates

methodological priors with facts to be demonstrated. (Foucault 1977, 23) He does, however, have certain conceptual tools and clear patterns of analysis that are characteristic of the plenitude of methods that he does use, which I will refer to as a toolkit.

In D&P, Foucault makes use of **the bio-power toolkit**. All institutions, including institutions of incarceration, must be explained in the following fashion:

1. Any institution is a pattern of *behaviors belonging to moving bodies*. (Foucault 1977, 24-30) *Nominalism* is inherent in this approach. So, e.g., law is nothing more than a *word* in a *discourse* that gets used in order to describe some kind of movements of bodies. (Hacking 2004, 39-50)
2. *Facts about interpersonal power* are centrally important to the phenomenon of bodily movement, as power is ultimately a technique that affects bodies and behaviors. (Foucault 1977, 10-11)
3. Interpersonal power describes *strategies for justification of action and belief in a constantly changing environment*. For example, different attitudes towards prudence, and different results in the social sciences, lead to entirely different patterns of action. Central to this process is the emergence of *discipline*. (Foucault 1977, 23)
4. One essential mechanism emerges out of the dynamic interactions of interpersonal power (3) which results in the pattern of behaviors described in (1): *the process of making up kinds of people*. Both individuals and collectives are quite literally *made up* by changing the *discourse around them*, which in turn affects how they are treated and how they see themselves. (Hacking 2004, 99-114) (Foucault 1977, 170)

The bio-power toolkit, as enumerated in (1-4), cannot be reduced to a single programmatic statement in *D&P*. Instead, it has to be drawn from the structure of his whole argument, which includes both his explicit methodological claims at the outset of *D&P* and the actual claims he makes as he proceeds in the course of the book. The bio-power toolkit, understood in this way, is consistent with a variety of different methods for going about explaining social and legal phenomena.

This is not enough to draw a picture of law. We need a method, if only to establish provisionally the difference between things we take for granted and the things that need explaining. So, for the sake of simplicity, we will attribute the following method to Foucault. We will say that Foucault's *explanandum* is human behavior described in terms of a particular word: that bodies in motion are the thing to be explained. He is, on this view, a *phenomenological behaviorist*: bodies and behaviors are the mystery to be explained. He approaches the law as an extreme outsider, trying his best to divorce observations from their unempirical meaning. The *explanans*, here, are interpersonal exchanges of power (what he colourfully calls "the micro-physics of power"). (Foucault 1977, 24-30) On my reading, by 'power' Foucault means something like *strategic justification for action and belief*. (For more on this choice of phrasing, see §5.3.1.) We justify our beliefs and actions in terms of a common fund of tacit reasons, and when these reasons are taken for granted, they produce discourses. In this way, knowledge and action are united by a third variable: power, and in particular, power over discourses. Since power is the central explainer in any theory of social reality, we can give him a **strategic methodologist**.

Ultimately, every social phenomenon needs to be explained by appealing to some indeterminate set of actors making use of strategies that guide their actions and beliefs: strategies can exist without strategists. (A. & Hunt 1994, 30) Plausibly, we can think that what he is saying here is that these strategies are potentially used by an *indeterminate* population, a morass of people

who are not strictly countable, but who act in various ways that can be observed in the aggregate. Where Austin saw shifting sands, Foucault sees a sandbox.

Hence, in a manner of speaking, the strategies have a force all their own. For sometimes these exercises of power emerge from populations without having a clear author: e.g., in the same way that a useful “life-hack” or neologism might arise seemingly out of nowhere and spread across a culture like a virus. These strategies for action arise and spread as technologies or tools, and what makes them used is that they are useful to changing conditions in the world. And they arise and flourish, not *necessarily* because they correspond to prior conventions, or because the government said they were a good idea, or because they were in the interests of the ruling classes. (A. & Hunt 1994, 14-20) The least misleading, most general explanation of how bodies behave is to see them as a complicated result of a population of strategic actors thinking about how to act and what to believe.

In short: for Foucault, social explanation is *messy*, and it *starts small*. (A. & Hunt 1994, 18) With that having been said, much of the content can be unpacked, in such a way that the form of explanation being offered might provide a clear insight into how we might picture the law.

5.2. Contextualism

Most approaches to the philosophy of law have rested on the assumption that the law is a distinctive kind of social phenomenon. Everyone has assumed, in one way or other, that the law has context-invariant constitutive conditions. For Aquinas, that structure is an essence of reality, the divine providence -- a phenomenon so pervasive that you can't step outside of it. For Hobbes, the law is a fact about political societies, grounded in practical principles of nature. For Austin, the law is a fact about political societies, grounded in a social ontology. These are three very different approaches, but each of them share a single conviction in common: that there is a way of speaking properly about law, a *focal meaning*, and this tracks some interesting observer-independent facts. All our theorists so far have been, in an important sense, *structuralists*. (Flynn 2003, 30-32)

There are two respects in which Foucault would like us to move beyond structuralism. First, he is a kind of dynamic nominalist. (Hacking 2004, 48-9) On Foucault's view, when we talk about categories of things, we are not talking about some self-evidently unique phenomenon that has a clearly distinguishable essence that we can represent faithfully. Nor are we talking about arbitrary, static, context-invariant definitions that hold for all time. Instead, we are talking about a word (or close cluster of words, including *ius, jus, law, legality, justice*), along with the pattern of usage associated with these words. These patterns of use can change over time, and the concepts can change, and those changes need to be taken into account in a story of what counts as law.

Second, Foucault seems to accentuate the ways that meaning evolves in terms of *what people want to accomplish*, not just in terms of what they want to represent. In this way, the social, cultural, and political context of the pattern of usage of words is of paramount importance in establishing the conditions of satisfaction for those words. It is crucial to see the role that words play in constituting performances, especially with respect to socially-directed actions (e.g., ceremonies). (Foucault 1977, 57-58) The stability of the referent is not uniquely or centrally important. This is a marked contrast to the rest of our pantheon. Most theorists so far have assumed that the meaning of words depends on, and is dictated by, some states of affairs that we are going out of our way to represent faithfully. For Aquinas, this meant that facts about the law could be found out by explaining certain regularities in the world by appealing to its hidden *essence*; for Hobbes it meant explaining those regularities in terms of the *practical habits of rational actors*; for Austin, it meant looking at macro-level facts about *modern political societies*; for Marx it meant either looking at *the nature of the economic base itself* and/or how self-interested *ideologies justify the state of the base*. These are

all bids at *representation* of some observer-independent reality. Each of the proposed theories could, in principle, apply across all contexts in history, though with drastically different verdicts.

Because of Foucault's disinterest in merely *representing* some inert, prior structure, as opposed to diagnosing how structures are established and change through time, he is often referred to as a 'post-structuralist'. He himself refers to his approach in this part of his career as *genealogical*. (Flynn 2003) But for the purposes of talking about his approach to the constitutive norms of law, I would like to suggest that we refer to him as a *contextualist*: meaning that, for Foucault, the very constitution of law depends on the historical context. In Aquinas's time, something like natural law may have been the law; but in Austin's time, something more like the positive command theory was more appropriate. Foucault evidently has little interest in arguing in favor of any context-invariant focal meaning of law -- focal meaning is always relative to a historical period, culture, and political system. The constitution of law is arrived at through consultation with contexts, and needs to be examined in the fullness of its particulars.

Now, strictly speaking, a contextualist approach is not itself a picture of the constitution of law -- it leaves an important part of a picture of law incomplete and unaccounted for. There is a reason why many theorists have begun the study of law by putting the concept of law, and the focal meaning of law, in the foreground: it allows us to demarcate law from related social phenomena, like morality or politics. In other words, a theory about the concept of law also tells us something about what counts as a promulgated *law*, as opposed to a promulgated *rule* of an uncertain variety. This is a problem that we will revisit after looking at the details of Foucault's account of the development of French penal law. What we shall see, however, is that one theme runs clear and true through Austin and into Foucault: discipline, sanctions, and implied penalties are central to theories of law.

5.3. Ironic externalism

Foucault's approach to the appearance of law can be roughly described as *ironic externalism*. Externalist, because he refuses to commit to a 'one size fits all' account of the constitutive conditions for every system of law, which translate into an instruction manual for reading off the contents and limits of legal rights and duties. And ironic, because Foucault acknowledges moral or ethical discourse, and even acknowledges that the whole point of doing any critical analysis is to make sense of contemporary moral and political issues -- but nevertheless brackets these worries out of an explanation of legal phenomena. (Foucault 1977, 30-31)

The **method of bio-power asks us to occupy an external point of view**. Law is enmeshed in a whole field of power dynamics, not relationships based on some prior conception of what it is reasonable for subjects to ask of each other and of their rulers. This approach largely replaces the question of *what people are owed* in their actions with the question of what claims actors can and do *get away with*. And the output of such dynamics of power is observable in how it affects bodies moving in space: how they are confined, controlled, and how individual and joint actions are made possible. (Foucault 1977, 26)

The contrast offered with other theories of law is potentially striking, because it offers a more robust commitment to objectivity than its competitors. If we look back at the different pictures of law we have surveyed so far, we see that they depart significantly from one another, not just because they *represent* some definite kinds of facts in different ways, but because they also *empower and legitimate* different kinds of institutions in various ways. For instance, a cynical reader might say, with some justification, that Aquinas favors the devout king, Hobbes the savviest statesman, Austin the statesman full stop, and Marx the state socialist government. We might worry that these political theorists have been, at best, *relatively inattentive* to the level of investment they have in the times,

morals, and political period in which they live. If we get suckered into the naive idea that these pictures of law are simply representations of reality, it will be because we naively abstracted the authors from their historical context. Foucault, in contrast, is quite attentive to the fact that he is writing in a particular historical moment, and generally resists any attempt to offer legitimacy to either governments or their critics. (Foucault 1977, 30-31)

Foucault's approach to law is to situate it as just one way of speaking, among others, about how actors influence actions in a particular historical context. First and foremost, law is a *discourse*: that is to say, it is a social tool with its own unique vocabulary, conventional scripts, favorite tropes and standard challenges. (Flynn 2003) And discourses can be examined as an outsider: i.e., with the keen attentiveness and data-obsessiveness of the linguist. But we also care about how words work to effect a wider social reality – the reality of how bodies get moved, behaviors get trained. So, Foucault asks us to pay attention to historical observables – time-tables, bodies, walls, reports, schedules. Foucault wishes to push an external point of view, viewing political change as little more than bodies and behaviors – for lack of a term, we might call him a *phenomenological behaviorist*. The behaviors get explained, at least in part, by the discourses that prompt responses, both locally and over time.

For similar reasons, his model of power **pushes towards moral detachment**, divesting itself from any necessary link to domination or control. That is, Foucault tries to account for change and stability in social systems (e.g., reform in the penal system) without assuming that moral progress is the source of that change. Instead, he likens it to a change in strategies and tactics useful for the management of populations. (Foucault 1977, 31) We can think of improvements in strategic acumen as a kind of technological progress, albeit a progress in the ability to move bodies. And technological progress should certainly not be simply *conflated* with moral progress.

One needs to take special care to note that Foucault's conception of power implies moral *detachment*, and so it is not a *vulgar* pessimism. So, a more commonplace concept of political power implies relationships of domination and control *being able to do what you want to do in spite of resistance*. (Lukes 2005) This conception of power, in legal theory anyway, lends itself readily to theories based on sovereign control. In contrast, when we talk about 'power' in Foucault's sense, we are talking about something that exists in a field across a whole population (perhaps somewhat analogously to something like gravity). Everyone has power, everyone participates in the maintenance of large-scale power relationships, because these relationships emerge out of the smaller ones. Moreover, power can be exercised in such a way that does not just overcome resistance, but *makes resistance impossible in the first place* by stunting agency by manufacturing docility. (Foucault 1977, 135-141) And yet, frustratingly, power also liberates people, making a whole new field of action possible in the first place. Power is morally gray or even neutral, and again it's hard not to think of an analogy to an all-pervasive physical force like gravity.

Foucault would like us to examine social reality by use of the language of tactics and strategies, as if political life were a war between numerous parties along indefinitely many fronts. (Foucault 1977, 168) (Foucault 1980, 90) Here, Foucault's use of wartime metaphors invites contrasts with other candidates. Where Hobbes asked us to imagine the state as *an escape* from a war of all against all, Foucault asks us to think of civil society as the *transformation* of the conflict supposedly inherent in the state of nature into a conflict of a different kind, with different stakes, using different methods, and yielding new results. (Yet still, in its own way, remaining of "all against all", as we are all enmeshed within the inescapable web of bio-power through time. In this sense, and unlike with Hobbes, for Foucault there is no escape from war.)

Foucault's places strong accent on the role that discipline and regimes of punishment have on human behavior. Many of those tactics and techniques in governance are gotten from the

developments of the sciences, and from the regimentation and discipline inherent in the developments of those sciences. The social sciences, in particular, are singled out for their ability to provide rulers with advice on how to manage populations – in his study, the management of the population of offenders. It is a recurring theme in Foucault that knowledge and power are, for this reason, deeply intertwined. (Foucault 1977, 23) Power is a social technology, and technology is a function of what we learn; there is a sense in which our representations of people are capable of moving bodies (albeit at some remove, and in an indeterminate way).

The authors of history like to tell a story of moral development, growth, and progress. And yet Foucault knows, as many do, that many of these humanizing narratives are either distortions of the facts, or so partial as to be inapt. (Foucault 1977, 7, 23) And there is no mystery to why people often get the facts wrong – why, for instance, it is held that Christopher Columbus discovered America when he didn't, or that the medieval period was intellectually sterile when it wasn't. Our stories, our grand narratives, help to provide a sense of meaning and purpose to contemporary social life. Hence, they are Whiggishly retrofitted to tell a story about where we collectively ought to go next.

Foucault argues that the humanist (romanticist?) historian is guilty of such jingoisms. But he is not utterly indifferent to the moral sensibility. The point of his exercise is to do a critical theory -- that is, to examine the injustices of today by looking at how they come about in a historical, social scientific way. (Foucault 1977, 31) (Flynn 2003) (A. & Hunt 1994) That attempt to develop useful accounts for present moral purposes will always be, in the end, inventing fictions – some distortion is inevitable. But all the same, this does not excuse any indifference to the very stable and very amoral mechanisms that are responsible for the current state of things, and should not knowingly allow moral projects to distort our picture of the facts.

It is quite hard to offer a thorough defense of Foucault's moral sensibility. He only makes sparse and subtle references towards his own ethical beliefs, despite the fact that he is not shy about making controversial remarks. (A. & Hunt 1994, 5) Still, his moral projects are bracketed out of an explanation of the causes (and hence, contextualized constitution) of law, for the sake of offering a critique of moral or humanistic explanations of legal institutions. (A. & Hunt 1994, 28)

A note on knowledge and normativity

Foucault's contextual approach to law pervades his thinking about all concepts and choices of language, including his thoughts on *knowledge*. In philosophy, truth, justification, and belief have always been widely seen as necessary for propositional knowledge; one corollary is that there can be a difference between the opinions of the powerful and true opinions, between providing actual evidence and issuing sophistic proclamations. Yet it sometimes appears that Foucault does not take care to distinguish between the *truth* of a claim and the *appropriateness* of the claim at the time it was held. (A. & Hunt 1994, 11) The exact causes of this seeming ambiguity are themselves unclear: it may have been intentional, or may have been a consequence of an ambiguity that is inherent in the original French words, or some combination of these. (Kennedy 1979, 271) But whatever the actual causes, some readers have been led to think he is a naïve social constructionist whose theory entails that the representational power of science is on all fours with palmistry. Though in fact he does think that there is a distinction between truth and social acceptability, the distinction plays very little critical role in his approach to these issues in *Discipline and Punish*.

Foucault's inattentiveness to the distinction between *truth* and *claims of truth* has led to worries that Foucault is a relativist in epistemology. (A. & Hunt 1994, 11) Many of the critiques strike me as both reasonable and important. However, since these debates will distract from a discussion of how to reconstruct his views on the philosophy of law, I am going to exercise some editorial

discretion making the following substitutions. First, I will substitute any contentious references he makes to “truth” with the idea of it being *appropriate to hold as true*; and, second, any references to *evidence* will be substituted with *strategic justification for belief*, with the understanding that such justifications will also be tracking justification for action. So when Foucault argues that the spectacle of punishment *is* evidence of the guilt of the offender in the context of a particular legal regime, I will present him as saying that the spectacle of punishment *gives reason in context to believe* in the guilt of the offender. And when he talks about making up *truths* about such events, I will present him as saying that the *appropriateness to hold the truth* about the events is being made up. Such claims will nevertheless be controversial: one may quite plausibly argue that, *even in context*, the tyrant’s punishment of the offender provides *no reason at all* to believe in the offender’s guilt. But then that is a matter one must take up with Foucault.

External theories of law can attend to normative language with varying degrees of suspicion. Foucault is not especially radical in his doubts, as he does not question the intelligibility or apparent utility of the language of right and duty. At no point does he doubt that people speak intelligently about rights and duties, of permissibility and obligation, and normative valences in general. But the force of such claims is *local*: i.e., at the micro-level of personal interaction. (Foucault 1977, 26-27) For Foucault, the normativity of law – the supposed obligations of subjects to law, holding in a larger historical context – does *not* have a central explanatory role. Foucault’s task is to explain the politics of social institutions that are related to punishment and incarceration of offenders, to explain changes in the law in legal policy with respect to punishment of offenders. The push-and-pull implied by our normative discourses are mechanisms of power, having explanatory value only insofar as they can answer questions about historical observables. And their power to answer such questions is altogether modest.

5.4. The field of law

With all that preparatory work out of the way, we are brought to Foucault’s history of penalty in the *Ancien Régime*. Foucault would like to tell the following story about the development of law in this context. Early punishments were visceral, fatal, and public (the public execution); later, punishments were ephemeral, relied on threat of corporal punishment, and private (imprisonment). What changed? The humanist story is that the populace became more enlightened, but the real story, Foucault submits, is that the institutions of government were getting better at figuring out how to control political subjects.

In all cases, punishments are enacted in order to secure the legacy of the sovereign on behalf of his subordinate judges, the magistrates. However, on Foucault’s view, early punishments were markedly cruel because they were effective in exerting control over the purposive lives of subjects. As it became increasingly obvious that these techniques and strategies were not as efficient as they could be, new institutions developed. These institutions nominally arose for the purpose of shoring up the sovereign’s control over the population, but grew laterally and independent of sovereign attention. And the evidence of this can be found in the fact that the avowed humanistic goals of the prison system are regularly disconfirmed by facts about the prison system that are known by government. To use the language of sociologist Robert Merton, the *manifest function* of the prison – the rehabilitation of the offender -- is at odds with its *latent function* – which is to create and train a subset of the criminal class. (Merton 1967)

Foucault breaks the examination of the mechanisms of law into four kinds. First, he tacitly takes it for granted that there is a *focal meaning* of law *in that context*. In the context of French penal law, that focal meaning is roughly Austinian positivism, satisfying a kind of formula: [law *qua* French law = habit of obedience to sovereign]. Though the concept of law has no context-invariant focal

meaning, the focal meaning of French law, of the time in question, is the habit to obey the commands of the king. Second, Foucault recognizes the existence of *counter-law*, which is the set of institutions of criminal punishment that function in their day-to-day operations in a way that is relatively independent from the demands of the judge and sovereign, and which subtly and comprehensively affect the enforcement of law. (Foucault 1977, 223) Third, there is the *infra-law*, which is the ways in which law rules over the minutiae of lives, whether through explicit statute or tacit consequence. (Foucault 1977, 221) Fourth, there are *illegalities*, which amount to regular non-application or inattentiveness to focal law by the subordinate social class (i.e., through abeyance, resurrection of old law, or engaging in quasi-legal action). Effectively, illegalities are contrarian **fiat rules that emanate from the ultimate real-world arbiter of power: strategic success.** (Foucault 1977, 82)

All of these are part of a broadened scope of investigation, which can be jointly described as *the field of the law*. While Foucault seems happy to concede that the concept of French law was sovereign design, he does not seem to think that this fact is sufficient, or even central, to the study of every system of law. We need to examine law as one way of speaking about a single political reality. Adequate theories of what actually happens in the social system, and how attitudes towards punishment change, cannot be confined to the investigation of theories based around the focal meaning of law. So, he stresses the importance of counter-law and the new illegalities in the role that they play in explaining changes in law, by virtue of the pressure that these forces exert on the system. We can represent the field of law in the following way (Fig.5):

<i>The field of law (Fig.5)</i>		
	Actual operations in practice	Normal rules
Consistent with focal law	Infra-law <i>(e.g., actual verdicts of judicial system, operations of system of incarceration based on orders of judiciary)</i>	Focal law in context <i>(e.g., in France, the decrees of the king)</i>
Inconsistent with focal law	Counter-law <i>(e.g., the carceral, operations of system of incarceration operating autonomously from the courts)</i>	Illegalities <i>(e.g., abeyance, insurrection)</i>

In all cases, punishments function as “proof” of two things: first, the guilt of the offender, and second, the authority of the sovereign. The function of torture is to display power and thereby “reveal” the truth about the law. (Foucault 1977, 47-54) In this way punishment functioned as the core mechanism of law, disseminating the constitutive conditions of law in the context of French rule. Along the way, it was made known what classes of actions -- and kinds of people -- are forbidden. In that respect, the guillotine was that century’s equivalent of a billboard.

The point of the spectacle is to “prove” to the public that the sovereign is the one in charge. In some cases, the “proof” is especially dramatic owing to the severity of transgressions: e.g., as when

Damiens's regicide is punished with public torture and execution. (Foucault 1977, 3-6) But the same aim, of "proving" sovereign rule, also applied to less dramatic crimes, where there was a perceived "contest" to sovereign rule that was based in class conflict. On occasion, it became necessary to punish a whole class of people, particularly the poor and impoverished. In that context, government adopted the view that *any* crime is injury to the sovereign, echoing Hobbes (and, perhaps, the Sheriff of Nottingham).

All of these observations would be grist for Marx's mill: law is ideology, an instrument used to bludgeon the subordinate classes by the ruling ones. What makes Foucault distinctive is his attention to the fact that, by degrees, there was a change in strategy for the promulgation of law (and hence, his greater relevance for the concept of unwritten law). Increasingly, subordinate judges – magistrates, local officials – came to recognize that the sovereign's glut in power was inefficient, as was the demand for stark appeals to Manichean mechanisms of legitimation like brute force and appeal to convention. (Foucault 1977, 78) Such penalties require constant enforcement, manpower, and in this respect they are expensive. Moreover, by placing the offender on a stage, one gives them the opportunity to hijack their own execution by condemning the sovereign and becoming martyrs and anti-heroes, which is a risky proposition. (Foucault 1977, 65)

Temporary solutions were found. For instance, there was the practice of limiting witnesses to executions, and by anonymizing the condemned by forcing them to wear a hood. (Foucault 1977, 7-16) However, these techniques were context-sensitive, and their effectiveness depended on the public mood. The overriding aim of the courts is to remind people of the depth of the crime and to shore up a sense of confidence in sovereign rule, and gradually the public was more interested in seeing punishments be proportionate to the crime. (Foucault 1977, 57-65) So the need for public spectacle transferred gradually away from "loud", graphic punishment and more towards more quiet, merely verbal condemnation in the courts.

As time went on, there was a gradual realization that the aim of punishment all along has been to control the legacies (soul, dynasty) of persons – that *this* was the source of their political (and, perhaps, legal) authority. (Foucault 1977, 93) Moreover, it was realized that control over such things depended more on being able to threaten people with the use of force, less with the actual torture and dismemberment of the populace. And, finally, this terror could be accomplished quite efficiently by the use of *hidden* punishments: those exerted upon people in prison, away from prying eyes. (Foucault 1977, 9; 109)

For Foucault, these changes to "the carceral" (one of his favourite terms of art) are epitomized by the invention of the Panopticon, which was a prison designed by Bentham. The Panopticon's cells are constructed around the circumference of a circle. At the center of the circle is an enclosed guard chamber whose interior is occluded. The design of the Panopticon has three remarkable features: first, the prisoners are not able to see or interact with their immediate neighbors; second, the prisoners are under constant threat of surveillance, as they cannot see the direction of the guard's gaze; third, the number of guards required for surveillance is quite small. By tightly controlling information given to prisoners about the location and attention of the guard, the threat of punishment could be constantly exerted on prisoners in a highly efficient manner. (Foucault 1977, 200-209)

So in their capacity of administering local justice, these judges experimented with new mechanisms for legitimation: namely, enfranchisement and popular acquiescence. (Foucault 1977, 89-93) The great reform in the prison system happened, in short, because the instruments of government did not want to spend so much time and resources in killing people when it was easier to just terrify and surveil them. And it worked quite well, as emphasis shifted away from obsession with combating acts of insurrection, and towards the management of peoples. (Foucault 1977, 200-

9) Here, disobedience and deviance by themselves were viewed as things to be punished. And so the delinquent was born, a creature intrinsically in need of education, correction, and ...discipline. (Foucault 1977, 100)

Making up people

The division of labor between science and government is getting more and more complex. It is a fact is that the operations of government have been increasingly (albeit selectively) deferential to subordinate judges and other members of the legal apparatus -- away from the legislature to courts, to state bureaucracy, to think-tanks, policy-makers, and even to experts in the social sciences. When technicians in the *Ancien Régime* advised against the infliction of pain, and in favor of threats, the subordinate judges followed suit. (Foucault 1977, 7-16) When eminent psychologists from the American Psychological Association did the opposite, advising the Bush administration on how to use torture effectively, the state found itself of a parallel mind. (Independent Review Committee 2015) While it is unlikely that scientists can convince governments not to do something they want to do, they certainly can and do enable and embolden pre-existing policies, and sometimes provide focus and direction to policies that would otherwise have been left nebulous. In this way, science and government are independent institutions, but there is no doubt that they can overlap, both in light and dark places, in a kind of irreconcilable co-dependence.¹⁹ And the complex details of such daily overlap can certainly serve to give resonance and proof to notions of “unwritten law.”

The new division of responsibility, and increased mixing of social science with mechanisms of enforcement, is what led, Foucault says, to the “taming” of law. In fact, power over bodies and behaviors was changed by increased knowledge of how to get actors to do what you want. Throughout the process, the social sciences helped to improve the mechanisms of enforcement of the law. Where before the “proof” of the guilt of the accused had to be gotten at through public confession, experts at the administration of the law felt it was increasingly necessary and even quite desirable to go without it. (Foucault 1977, 38-47; 57-65)

Testimony in general, and coerced confessions in particular, have dubious evidential value. (Foucault 1977, 38) However, this fixation on testimony held stable even when it was obviously unreliable -- as when, for instance, the subject is in the process of being flayed, drawn and quartered. Why? The simplest explanation for this fact is that confession and testimony are important in establishing not just who did a crime, but in establishing that *the accused* is responsible for the crime, and the sovereign is in power over everyone. It is important to convince the condemned to confess, and so to “prove” that they were fit for punishment. Confession and absolution are ways of establishing legitimate jurisdiction over a public. (Foucault 1977, 29; 38; 47-48)

Government managers increasingly came to believe that the lower classes only recognized the use of force or the absence of the use of force. If left to their own devices, illegality was their “condition of existence”; but permitting them too much practical independence led to the threat of growing defiance, including the evolution of new claims of rights. (Foucault 1977, 83) Now, when those illegalities were benign to the ruling classes, they were tolerated. For instance, it was useful to tolerate certain crimes, like peasants’ claims of ownership over public property, as it encouraged in the popular mind a respect for private property. But when these illegalities crossed the upper classes – e.g., when the peasants started to challenge aristocratic property rights in a way that actively thwarted commerce – the push for humanizing penal “reform” collapsed and reverted into repression. (Foucault 1977, 85) So the “humanizing” of the law has to be explained as a jointly

¹⁹ I am grateful to Dr. Eric Hochstein for giving me this evocative and useful turn of phrase (in conversation).

strategic decision, a function of the benign indifference of the ruling classes from the social order, combined with the sovereign's need to mitigate organized resistance to their rule.

Along the way, subordinate judges discovered one effective strategy in the management of populations: to stop punishing mere crimes, and start punishing kinds of people. The key to effective punishment is to use the system of incarceration to educate and train the subordinate population and, in the process, to impose an identity upon them. One must give the subordinated classes a reputation, a legacy, a *personhood*, that can be easily captured by a label and quick, pejorative description: the delinquent, the deviant. Foucault argues that this feat was accomplished by recognizing the rights of actors in the subordinate classes, and he asserts that these rights were only enforced insofar as such play a role in the effective management of their behaviors. (Foucault 1977, 16-22) Thus gave rise to the doctrine of reform, the doctrine of "leniency". The reformer's playbook would look something like this. Pay close attention to people, how they act, why they act; put them under closed conditions, and supervise them in private; control their movements, their actions, their lives, the spaces they can and cannot walk, who they can talk to. Ideally, the supervisor should have complete, uninterrupted control over the delinquent by way of constant surveillance; here, the important thing is to train movements, intentional and otherwise. (Foucault 1977, 135-141)

As a matter of fact, the project of reform amounted to a project of imposing discipline. The key is to at all times mark the condemned as *defective*. (Foucault 1977, 141-169) Then direct your institutions to manage such defects, in particular, by developing a system of hierarchical observation through systematic examination. (Foucault 1977, 170-194) Then, crucially, bind them to the *incarceration system*, not the society at large; convince everyone that there is no other place for the deviant to fit in. (Foucault 1977, 126-9) The subclass can then be managed in police and military contexts for political purposes (or even used as a cheap labor pool). (Foucault 1977, 278-284)

In short, by the time the 20th century rolled around, the use of prisons was the default mode of punishment. The centrality of the prison over the life of punishment had achieved a level of comprehensiveness that was both complete and efficient: a big, well-oiled machine. (Foucault 1977, 231-248) And the evolving function was to make up a category of people, the delinquents, which the carceral system is uniquely competent in managing. Hence the punchline: the incarceration system is a relatively independent institution, a "counter-law"—indeed, in many ways a nearly comprehensive picture of a kind of unwritten law in action—that operates and grows autonomously from both legislature and judiciary. (Foucault 1977, 223)

All of this may sound quite incredible, perhaps bordering on conspiracy theory. How can the prison be an autonomous system? Such doubts are not necessarily sustainable, however, when one looks at the theory in terms of Foucault's strategic picture of law. The important thing, for Foucault, is to remember that institutions often evolve mindlessly, as a result of strategic actions of generations upon generations of individuals working in charge of "the carceral," adjusting their behaviors according to the accrual of patchwork adjustments to their prudential and scientific programme. It may very well have been true that some policy-makers thought they were doing a very good thing by the maintenance of the prison system, it being preferable to slaughtering in the town square. But though these good intentions may have been real enough, that does not change the fact that failures of the prison to re-integrate criminals into society have always been known, and the management of the prison doesn't actually line up with the judicial ideal of what the prison is supposed to do. (Foucault 1977, 264-270)

One might also wonder if the prison system, so conceived, really is efficient by its own lights. For instance, it's unclear whether or not this form of policy actually works in the management of

populations at all. It has some downsides: e.g., it mobilizes resentment in the form of cultural oppression, and creates confusion amongst humanitarian citizenry about the development of this alien class. (Foucault 1977, 285-292) Foucault recognizes that these are very real counter-forces, and that they might come to a head, forcing the adoption of novel strategies.

Secrecy and judicial good faith

Foucault, clearly, is fascinated by the secret life of law, by the secret rules and hidden mechanisms that guide the path of enforcement. And although his central concern is the rise of “the carceral” as a relatively independent force in the field of law – as a counter-law – he also has significant interests in the role of the subordinate judge in creating this state of affairs. After all, the genesis and development of “the carceral” could not have come about if the justice system had not participated in its growth.

The bio-power toolkit emphasizes the importance and centrality of three distinct phenomena: bodily behaviors, discourses, and power. Our approach is to treat bodily behaviors as the phenomena to be explained; to treat strategic orientations towards action and belief as the ultimate explainers of such facts; and to treat manifest and latent discourses as intermediate mechanisms that moderates the relationship between the strategies of persons with the actual movement of bodies.

If this approach is set out as a method, then we must proceed in this manner. First, look at institutional patterns of the judiciary, their words and their deeds, their arguments and verdicts. Second, assume the judiciary is full of skilled, informed people who are trying to sort out how to control the management of bodies and behaviors of populations. Third, take stock: compare the manifest discourse (words) and its latent effects (deeds). If they usually coincide, explain it in terms of strategic convergence upon what is required by the manifest discourse; if words and deeds do not coincide, then explain the dissonance as a failure of individual strategies of judges to align with the manifest discourse; and if they never coincide, then infer that the manifest discourse is at least a partial distortion. And, as always, recall that when we talk about strategies, we are talking about strategies for both action and belief: e.g., towards the rightness of organizational policy and adequacy of evidence.

Many of Foucault’s explanations of the emergence of “the carceral” in *D&P* can be usefully reconstructed in this way. First, he notices all kinds of peculiar facts about “the carceral.” As a matter of fact, “the carceral” had an effect of ghettoizing a population, of exerting control over their movements, of making up a set of people, and that there were political pressures that led to this development. It is also a matter of fact that alongside the manifest discourse around the development of systems of incarceration was the policy of enlightened humanization, of leniency and rehabilitation into the community. (Foucault 1977, 269-270) Now, notice that these seem to be totally inconsistent stories. So, the effect of putting children who have committed no crime into quasi-internment alongside convicted offenders, of sending their families into destitution, and teaching children the tools to become better criminals, is not consistent with humanization or leniency. (Foucault 1977, 264-268; 296-297) Notice, in other words, that there is very strong reason to believe that the manifest discourse is empirically false.

Now, we need to reconcile the difference between the fine words of the manifest discourse and the actual deeds of the system of enforcement. As part of the strategic method, we must assume that the disconnect is not fully irrational: it is always strategic, in some sense or other, reflecting some odd feature of the system. So, it must result either from *failure* of subordinate judges and managers of “the carceral” to successfully align the institutions of law with the ideals of manifest discourse (humanization) -- or from *success* in coordinating along the lines of a totally different

discourse that is out of joint with the manifest one. This need not mean that there is a conspiracy: it may mean that subordinate judges engaging in partial, strategic action have stumbled onto creating a perverse institutional reality, despite possessing perfectly moral and humanitarian aims. But the more pervasive the disconnect between words and deeds, the more we can suppose, with some justification, that some tacit discourse is picking up the slack, on the assumption that reason does not take a holiday. And in the relevant examples, Foucault argues, the “defects” of the prison have always been known from the very beginning. (Foucault 1977, 270-271)

Now, there are many different ways of telling stories about what kinds of strategies were used, by whom, and at what points. Foucault indulges in a liberal amount of literary interpretation of historical facts, and it seems fair to say his narrative is tinged with themes borrowed from Marx (minus, of course, the optimistic promise of a better social condition at the “the end of history”). All the same, we are obliged to speculate about how best to answer why it is that the institution has arrived at the state it is in. A certain amount of armchair story-telling is needed in order to answer questions about why judges came to the verdicts they did, and why certain effects followed. (Foucault 1980, 193) If we care to explain the facts of law, there is no alternative to provisionally proposing hypotheses about the underlying ethos of the judiciary.

Foucault’s method involves uncovering *discourses*. By modern lights, a discourse is a kind of structured conversation that makes truth-claims possible. (A. & Hunt 1994, 8-11) Implied by a discourse are conditions under which, ostensibly, some cooperation is thought possible; discourses are conversations which follow certain standard rules. Some discourses are specially fitted to the jurisprudential context. So, e.g., at court, there are norms that lay out the standards for the *quality of evidence* required to arrive at judgment, the *quantity of evidence* needed for a verdict, the *manner in which deliberation is to be done*, and the *relevance of different kinds of reasons to judgments of guilt*. Put together, we call this discourse the rules of jurisprudence, and we have previously styled the tacit rules of jurisprudence *operationalizations*.

Here, Foucault’s examples of deliberation in the *Ancien Regime* are instructive. On his recounting, not all forms of evidence had the same quality, as evidence comes in different degrees of suggestiveness: “full proof” (roughly, *prime ultima* evidence), “semi-full proof” (*pro tanto* evidence), and “*adminicules*” (circumstantial, or *prime facie*, ‘evidence’). (Foucault 1977, 36-37) Evidence is also *cumulative* – a high quantity of *prime facie* evidence may be sufficient to function as a *pro tanto* evidence. And the final sum of evidence provided has an enormous impact on the kind of sentence delivered: if full proof is provided, then any sentence might follow; if a semi-proof is provided, then the accused cannot be subjected to capital punishment; and if mere clues are provided, then the accused can only be given a fine or a writ. (Foucault 1977, 35-42)

Though this all sounds like something that approaches a just system based on principle, one should not be fooled. Admittedly, there is a kind of “arithmetic” involved in arriving at a verdict and sentence. And yet this arithmetic is done casuistically, and permits a significant amount of judicial discretion, including the following of secret rules of jurisprudence known only to specialists. (Foucault 1977, 37) Rule-skepticism thrives in the presence of casuistry, when there is a threat of intuition, guesswork, prejudice, and whimsy. So, for example, a collection of circumstantial evidence might be treated as a “semi-full proof” whenever the accused occupies a subordinate class background, and treated as mere *adminicules* when the accused is part of the ruling classes. Under such conditions, there are secret rules of jurisprudence which depart significantly from law according to its focal meaning.

It seems to me that the norms of jurisprudence cannot be *justifiably* thought to be *rules under the right description* unless they are deployed by actors who we assume to be acting and thinking with some kind of intellectual seriousness. For we must suppose, not just that *some* rule is being followed,

but that *a precise rule* is being followed; and such assumptions are only appropriate just in case we also assume that the rule-follower (e.g., the judge, the administrator) is in a virtuous epistemic state of the appropriate kind. This assumption can be entirely off-base, to be sure; some courts are hopelessly corrupt. What is needed is the assumption. For the idea that the judiciary is taking itself seriously is a kind of necessary illusion that is required in order for the subject to have any hope of engagement in a cooperative exchange with the system at the level of the courts, insofar as law is conceived of as a discourse with public rules.

On Foucault's recounting, the strategic deliberation of justices in the *Ancien Regime* followed at least four lessons, as reflected in historically-situated discourses and behaviors:

- 1. First, when deliberating towards a judgment, the subordinate judges aimed to keep faith with the will of the sovereign.** As we have already discussed, Foucault infers that positivism really is the dominant discourse in the context of French law. Whenever judicial policies are crafted, or adjusted; whenever verdicts are offered; wherever, in short, the subordinate judge engages in their craft; their aim is to smooth out the dictates of the sovereign legislature, and to centralize authority. This is reflected, not just by the manifest discourse offered at trial, but also in the behavior generally: they effectively aim at managing (and dismantling) illegalities. (Foucault 1977, 78-82)
- 2. Second, the actual communication of the rules of jurisprudence oscillated between being gruesomely transparent and utterly opaque.** Early on, Foucault argues that the mechanisms of enforcement were painfully transparent, in the sense that the very spectacle of punishment and torture functioned to advertise the law. But as the spectacle of the scaffold became less public, the onus of propagating the rules transferred to the trial. This, too, is consistent with judicial transparency, so long as one assumes that the laws being enforced are the ones advertised; but if Foucault is right in saying that the law was invested in the process of making up delinquents in order to control the population, then so long as they kept up the pretense of humanization, the law was correspondingly opaque. There's even the intriguing inference that, contrary to the self-image of modern systems of law, there has actually been *a growth in unwritten law over time*, corresponding to the growth of "the carceral." (Foucault 1977, 7) One cannot codify every practice, and much less can you codify the practices of an institution that functions and operates at some remove from judicial oversight.

Still, the opacity of law, even for Foucault, has never sunk to the level of the Kafkaesque. Foucault notes that the punishment must be non-arbitrarily connected with the kind of crime, and the law must be advertised in a way that makes the crime undesirable. Moreover, punishment (or, at least, the verdict of guilt) must be a public affair, in such a way as to mold the behavior of onlookers. (Foucault 1977, 104-114) Operationalization of the law could not be done without *some* amount of candor, though only in small doses, and only strategically.

- 3. Third, there were very few checks on the limits of judicial authority, as subordinate judges adopted an experimental attitude towards enforcement.** In the pre-Revolutionary context, the judicial aspect of law sought to expand the power of the sovereign, to make law more efficient. In this way, jurisdictions were obeyed only out of political necessity, if then. As Foucault put it, the task of law is to invest punishment verdicts with legitimacy by "amassing all forms of justification"; whatever it takes to present verdicts as true. The task of the judge is more than just to administer law -- it is to tell you who you ought to be. In this respect, the platitude that law is about the punishment of crimes, not persons, is a misrepresentation of what is happening. (Foucault 1977, 16-22)

4. Fourth, while a great deal of care was taken to ensure the internal rational integrity of law, this happened only when it made a difference. There was some wide agreement amongst Enlightenment philosophers that there was something wrong with having messy, inconsistent precedents. This was as true in Civil France as in Common-Law England. In this respect, justices were deeply concerned with following precedent in such a way as to maximize their intelligibility, and interested in maintaining chains of evidence when going through prosecution of offenders. Be that as it may, the court was never fully on the side of the codification programme, as actual sentencing was conventionally modified by status and context. (Foucault 1977, 93-101)

If these general statements, especially the second, are true, then it would go a long way towards showing why Foucault does not hesitate to say that **legal secrecy was so prominent as, in fact, to function as a kind of principle.** (Foucault 1977, 37)

Foucault in England

Foucault applied this analysis to French penal law, but the contours of his approach of law as strategy become much clearer when we can apply it in other contexts. So let's consider a very different story that could be told about the development of penal law in Victorian Kent. (Conley 1991) What does Foucault's contextualist picture oblige us to say, once he is extracted from his favorite historical and social milieu?

As we have seen, Foucault has suggested that emerging understanding on how to best use techniques of surveillance and punishment in the French penal system were used in order to increase efficient control over populations. The changes were incremental and strategic, evolving over time at the behest of subordinate judges, magistrates, and officers of the prison. And these changes operated through the force of the *infra-law*, a set of professional and disciplinary institutions that operated in a relatively independent fashion from the judiciary and legislature. By the time of the opening of the Mettray in 1840, the 'humanization' of "the carceral" had reached completion, and the invention of the delinquent had come to fruition. (Foucault 1977, 293-308)

Similar patterns of development in systems of enforcement eventually showed up in England. By the mid-19th century the British government showed more interest in promoting a central control over the means of punishment. As a matter of practice, however, the centralization of surveillance and policing was a long time coming, at least in the case of Kent. (Conley 1991, 23)

The differences between French and English institutional trajectories owes in part to the fact that the French system of law is historically quite different from English common law. The pre-Revolutionary French system of law was based around the Roman Civil Law tradition – an Austinian picture, where crimes are pictured as injuries against the sovereign, and offenders suffered penalties administered by a central body. In England, by contrast, much of the enforcement of crime was left to municipalities and at the discretion of local officials; on this view, the sovereign is a Hobbesian arbiter, and crimes are mainly seen as offences between subjects. (Conley 1991, 15-16) In England, then, some kind of **practicism** was the contextually appropriate picture of law. This is to say: where subordinate judges in the French system felt it necessary to change strategies towards leniency in order to better secure compliance to the sovereign, subordinate judges in the English assizes (supervisory courts who oversaw the operations of local law enforcement) were often split in their opinions. Much organizational labor was downshifted to local judges -- justices of the peace and juries in the common-law system -- who preferred to grant wide berth to the norms of the community. (Conley 1991, 15-20)

So in Kent, the prospect of a professionalized and disciplined police system was seen as a kind of invasion, to be met with open opposition. (Conley 1991, 30-33; 40) Such opposition would be

an example of Foucault's *illegalities*, albeit in the form of abeyance. Yet for its part, the government tolerated punishments that were allocated by amateurs: justices of the peace, administered either by community police or even by mob justice. Yet these local civil servants were not at all autonomous from the community: frequently unpaid, and usually embedded in their communities, they could not be relied upon to weigh issues in a disinterested way. (Conley 1991, 41-42) So, in stark contrast to the story that Foucault tells about the development of French penal institutions, there is a sense in which the Kentish community *was* the counter-law. If Foucault were asked, he might say that "the carceral" did not need to be invented: *it could already be found in the community*.

For from the start, enforcement of justice depended asymmetrically upon the testimonies and expectations of "*respectable people*", echoing an implicit class structure. (Conley 1991, 173-201) Moreover, communal humiliation of deviance was already conventionalized, as, e.g., a suspect or offender was by tradition subjected to public shaming by a community. (Conley 1991, 22-28) This tradition of group harassment goes by the name of "rough music", and generally involves following the accused around, ringing pots and pans, burning effigies, and drawing attention to their supposed transgressions. (Conley 1991, 23-25)

Although such populist excesses annoyed the professional police forces, they were often tolerated by civil servants. In some cases, crowd intimidation was treated as blameless violations of legal rules (dispensations). (Conley 1991, 17, 20-23) In other cases, however, the judicial irregularities were more obvious. Carolyn Conley recounts one memorable case, which is worth quoting at length:

"In June 1864 William Webber, a seventy-year-old retired physician, wrote to the Secretary of State complaining that the sewage system in Tunbridge Wells was inadequate and that typhus and scarlet fever were epidemic in the area. Since Tunbridge Wells was a major summer resort and June was the beginning of tourist season, Webber's complaint created serious problems. By the time a public health inspector had arrived from London and pronounced the area perfectly healthy, tourists had already heard about Webber's letter and cancelled their reservations. By early July Tunbridge Wells was very hygienic and very empty. On July 4 a thousand local residents marched on Webber's home, burned him in effigy, and broke the windows of his house. The next night they returned with fireworks.

"The police made three arrests... At their hearing Webber angrily accused the police of doing nothing to stop the riot, and claimed that local tradesmen had provided free beer for the participants. Webber's household included his elderly wife, their invalid daughter, and another elderly couple, but police constables swore there was no evidence that anyone had been frightened or disturbed when bricks and lighted fireworks were thrown through the windows of Webber's house. The defense attorney summed up very neatly: "They all knew that in a country like England public safety must be preserved. One would not like to travel into matters that certainly would not influence their worships and to point to an existing cause and one which he might say had deprived many persons of their daily bread (loud applause in court) but he was sure they would not take that into consideration..." Finally, he argued, there had been no riot. "There was not a particle of evidence to show that a single person had been annoyed or disturbed." Despite the rousing cheers, the magistrates committed the defendants to trial, though, to Webber's dismay, they released them on bail.

"Frustrated, Webber had [rioters] summoned for providing beer for the mob and for orchestrating the assaults on his home... On the day of their hearing Webber asked for a delay, as he was afraid to leave his house because the crowd outside was still threatening. The magistrates denied his appeal for delay "as there is so much right feeling in the town that the law should take its course and that no violence would be done to anyone who appears here to give true evidence. Case dismissed (cheers)." The defendants then led a triumphant process through the town accompanied by a brass band. After ordering Webber to pay court costs, the magistrates joined the procession." (Conley 1991, 24-25)

Most of us would regard this as a farcical distortion of the judicial process. But Foucault's model of bio-power asks us to consider a different possibility: namely, that we treat such apparent

deviations as crucial evidence for the actual operations of the process. People are manipulating one another, exercising their powers strategically, and their behavior is partly conditioned by obnoxious appeals to ‘evidence.’ It is also worth noting that, quite clearly, economics has dictated the outcome of the trial; but one need not rely on a grand historical Marxian story about the ruling classes in order to get here. This was a story of power, based on reputation the coarse-grained interests of the *community*. Justice had nothing to do with it.

6. The dark and wide outside

The conception of unwritten law put forward in the first chapter asserted that there is a positive relation between the varieties of unwritten law and the basic picture of the law under analysis. All unwritten laws lack publication in a formal venue, but are nevertheless informally disseminated. Informal dissemination involves either the availability of reference (billboards, street signs), or by way of deference to legal authorities (barristers, justices, lawyers, locals). Which legal authorities one must consult is suggested by the picture of law under consideration.

The nature of deference is largely dependent on specific contents of the picture of law under review. Whether a particular implicit constitution exists and is disseminated depends upon the constitutive features of law and rules of change. Fiat rules depend at least partially upon appreciation for the external point of view; justice norms depend upon an optimistic point of view. Operationalizations draw from norms of jurisprudence, and in particular, from (potentially defective) regularities in expression of judicial good faith; and secret laws are those operationalizations that need to be disseminated according to some ideal sense of good faith, and are not. That, anyway, is the *a priori* structure that I have proposed; now it remains for us to see if it holds up to the facts about what the philosophers in this chapter have said.

As we saw in §1, Austin thinks of the law as the general commands of the sovereign. Such commands are not constrained by any substantial considerations, like rules of succession. For that reason, any implicit constitution of a particular legal regime can only be found in sections of law that serve faithfully to pursue the sovereign command: e.g., administrative law. Since the law imposes no rights or duties upon the sovereign, fiat law is indeed possible, so long as it is phrased in such a way as to imply generality. Law is also distinct from morality, and for that reason, justice norms have no legal force. The actual function of law is to ensure faith with the sovereign decree; it is not committed to transparency in either its machinations or its verdicts, to either subordinate judges or to subjects. Moreover, the value of jurisdiction and process seem to be fully optional characteristics of the Austinian theory. For that reason, Austin’s picture of law seems to be consistent with the existence of secret law.

For Marx, whom we examined in §3, law is a device for creating and securing ideology, or false consciousness. There are two ways of making the point: either by saying that law is epiphenomenal (where law’s rights and duties serve an empty or merely nominal role), or that it is autonomous (where there are some legal rights and duties, especially in the domain of property law). In the former reading, since subjects have no legal duties, it follows that the sovereign does not really exist except as a chimera, chained to uphold dominant class relations; in the latter, the sovereign exists to some extent, though is constrained by material economic facts. The implicit constitution of law for a given society must share a non-trivial relation to the expected interests of the ruling classes. Morality does not enter the story at any point, even contingently; at no point when reading Marx does one ever get the impression that justice norms are laws. No conception of judicial good faith is ventured, and so the issue of legal secrecy is left unresolved.

In our discussion of Foucault in §5, we found that the constitution of law was largely determined by discursive context. In pre-Revolutionary France, the law was constituted as roughly Austinian

in character, as habits of obedience to the sovereign. But that is just a historical situation; it is highly contingent, sensitive to change. There are such things as legal rights and duties, but they are localized to the micro-level. Foucault is not in a position to recognize, in any serious way, that the law is constrained by the demands of either the legislature or extra-legislative constraints (e.g., conventions); at best, there are discourses which are subject to constant re-negotiation. Fiat rules are rampant, both on the side of the subject (some illegalities) and subordinate judge (counter-law). His ironic stance stops him from claiming moral rectitude on the side of any cause, and so, he does not believe in justice norms. Judicial good faith, at least in the *Ancien Regime*, was remarkable for its attempt to keep faith with the sovereign, for its expansive, experimental attitude towards the manipulation of peoples, and for its ambivalent attitude towards the value of transparency and due process. For these reasons, Foucault goes out of his way to claim that secrecy operates as a kind of principle of jurisprudence.

What we can see, I think, is that the proposed model of unwritten law holds up rather well. Where there are exceptions, they owe to defects in the picture of law under consideration: e.g., pictures that mix internal and external points of view will result in potentially strange verdicts (e.g., Austin on *ex post facto* acts of attainder, eschewing generality in the scope of commands). And pictures that are radically incomplete will not fit the model in obvious ways (e.g., at the moment, there is no such thing as a Marxist philosophy of jurisprudence). But these partial results only demonstrate the strengths of the model, which has all along been conceived as dependent upon the contents of pictures under review.

It seems evident that some of these defects owe to the nature of the approaches, as they have been framed by their authors. The tendency of philosophers in this chapter has been to conceive of the law in broadly externalist and pessimistic terms -- to push towards the dark and wide outside. Under these conditions, it is hard to concentrate on particulars in judicial reasoning, in much the same way that it would be difficult to read a book from a distance, through binoculars, in the dead of night. Closer attention to the ethos of law is required in order to bring light to dark places, and that is where we turn next.

CHAPTER V. CONVENTIONS, PRACTICES, AND PARTICIPANTS

...[S]o long as there remains any, the smallest scrap, of unwritten law unextirpated, it suffices to taint with its own corruption — its own inbred and incurable corruption — whatsoever portion of statute law has ever been, or can ever be, applied to it.

Jeremy Bentham (21-22)

Chapter structure

1. Two black sheep of jurisprudential philosophy
 - a. Legal formalism and mechanical jurisprudence
 - b. Legal realism and the predictive theory of jurisprudence
2. The united front
3. The divided front
 - a. Law is a game with sanctions (HLA Hart)
 - i. Disunity and the limits of sovereign power
 - ii. Secondary rules and the basic picture
 - iii. The conventional point of view
 - iv. Moral neutrality
 - b. Law is a wheel worth reinventing (Lon Fuller)
 - i. Norms of adjudication and reciprocal obligation
 - ii. Legal power implies legislative skill
 - iii. The practical point of view, revisited
 1. *Procedural justice*
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 - c. Law is a branch of political morality (Ronald Dworkin)
 - i. Rights enforceable on demand
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 1. *Charity and coherence*
 2. *Integrity and the community of principle*
 3. *Objectivity and Hercules*
4. Practices and participants

In the course of our explorations into the history of the philosophy of law, we have found positions that contrast sharply from one another: where Aquinas thought the human law was essentially united with morality, divinity, and nature, Austin believed that the law was little more than the dictates of the political governor backed by threats and obeyed by force of habit; Foucault took the external orientation to its amoral extreme, arguing that the law is essentially coercive exercise whose purpose is to manipulate and move bodies. All three of these orientations to legality had ample room to permit unwritten laws to flourish: dispensations for Aquinas arise out of the

demands for mercy, fiat law occurs in both Austin and Foucault, and Hobbes's first principle of nature serves as a (perhaps problematic) legal exception to the sovereign's otherwise comprehensive rule.

The accounts captured our interest and were posed in sharp contrast with one another because they concern some of the most rough-grained features of the legal picture. The basic pictures aspire to answer the question: "What is law, *period*?" In contrast, the rules of *jurisprudence* are proposed and upheld as part of what I have called the *sophisticated* picture of law, which attempts to cast light on the smaller, finer shadows. We strive to tell a story about how lawyers, judges, and legislators accurately know what the *particular* laws are, and what policies they adopt in interpreting these specific laws. Ideally, having a sophisticated picture of law is to have a master guide to the laws of the given system, a decryption key that could look at any given action and tell us whether or not it is legally permissible to do. Our primary explanatory target in the sophisticated picture of law are legal "operationalizations," which attempt to coordinate abstract statements of laws with concrete instructions on how to act.

As yet, references have been made to the sophisticated picture. Indeed, we have seen some broad-brush approaches to jurisprudential philosophy. To choose three examples: Aquinas's rose-colored originalism, and his ecclesiastical conception of dignity; Hobbes's subsidiary principles of nature, and prudential self-care advice to the sovereign; and Foucault's epistemic and power-theoretic conception of disciplinarity. Admittedly these policies have not been the locus of our concern so far, but it was necessary to postpone our questions here in order to develop our account in a logical sequence, from general to specific. After all, the first task in our project is to give subjects a means of finding out who to defer to in cases of uncertainty, and knowing who to defer to is of little moment in the universe of Kafka's *Trial*. Moreover, answering these essential questions is of primary importance when diagnosing the legal standing of three of our "big-picture" unwritten rules: the fiat rules, justice norms, and implicit constitutions. With a rough understanding of these matters, we are well-placed to attend to the operationalization of law, and in so doing to understand the contents of the other unwritten rules in practice.

All along, we have presumed as part of our account that there is some useful sense in which we can talk about the genuine expertise of some subset of the population: people who are both in touch with the correct account of the nature of law in general and the detailed requirements for particular real-world legal systems. But these experts have got to be the *right* people to talk to (whatever that means), and they have to be *deliberating correctly* (whatever that means, too); they are not experts in mere story-telling about what the law demands, but experts in telling stories that are *grounded properly* in the right basic picture (whatever that is).

At no point in the theory of dissemination have I suggested that the average subject who defers needs to know much (or anything) about these details of the basic picture of law, except perhaps for the appearances of law and attentiveness to those who claim to know what law is. There only needs to be a stable subset of the population that is educated about the basic picture, and who in turn can defer to experts when precipitating conditions arise. This austere criterion abides by Hart's observation that it "does not matter which side of the road is prescribed by the rule of the road, nor (within limits) what formalities are prescribed for the execution of a conveyance; but it does matter very much that there should be an easily identifiable and uniform procedure, and so a clear right and wrong on these matters." (Hart 1961, p.134) The kind of procedure *is* always rational deference to experts. But this procedure is only rational on the assumption that the legal expert is an expert on something, and not stand-ins for the *Wizard of Oz*. Should it turn out that they lack a sophisticated picture, they will languish in guesswork and lose credibility with everyone involved.

So much for the sickness; now for some hope of a remedy. The aim of this chapter is to elaborate on the ways in which the experts know, discover, or decide the contents of laws. This leads us to a discussion of the philosophy of law in the twentieth century, centering mainly around Herbert Hart, Lon Fuller, and Ronald Dworkin. Much of their research has profound importance on the development of the law and the Anglo-American conceptualization of how the law works. In short, this is a chapter on the sophisticated picture of law, where we start to move beyond the basic picture in earnest, and explore the rules of jurisprudence that both restrict and guide the expert.

But we cannot leave the basic picture behind entirely. The grounding problems of law are pervasive, tricky business; if the basic picture changes, then so do the details. Each of the cited figures craft their own basic pictures of law that are worthy of close scrutiny: Herbert Hart's inclusive positivism differs in important ways from Lon Fuller's procedural approach and then also Dworkin's interpretive approach. The difference between their basic pictures will be discussed, and must be, with some emphasis on where they do or do not echo patterns of thought we have already seen. But this aspect of the discussion (section 3) must be relatively brief in comparison to earlier chapters, as more time must be spent on the question of how legal theorists believe that judges and legislators succeed in their craft (section 4). It will be exceptionally important to observe that Hart is a proponent of what we will call *conventionalism*, Dworkin is a proponent of one kind of *participationism*, and Fuller is best thought of as an advocate of *practicism*. The basic picture matters when we talk about how it affects the interpretation of law in practice, but their views on the nature of adjudication will be most important when we think about the operationalization of law.

But before we begin, I have to add a note of caution. When scholars and philosophers argue over details and interpretation over details, there is always a non-trivial possibility of arriving at verbal disagreements. Verbal disagreements are most difficult to diagnose when interlocutors are separated widely in time, since rich conversation is a criterion for discovery of empty quarreling. It is our luck that Hart worked contemporaneously with Fuller and Dworkin, and there are many profitable exchanges between them, in the course of which it is discovered that there were both substantial and trivial disagreements at stake. In my discussion I will pass over the disagreements that I consider merely verbal and recast the debates so that questions of substance rise to the top.

1. ***Two black sheep of jurisprudential philosophy***

Suppose I show you a sign that says "No vehicles on the grass", and suppose it reflects a municipal ordinance. Now you see me on a Segway, and I'm on the grass. Question: what does the law have to say about the situation -- am I subject to formal sanction? The question we are asking is about the operationalization of law, and it involves two factors. First and foremost, it is a question of language and invites a theory of what makes for a correct general interpretation of *the sentence*; second, it is a question of correct *legal* interpretation of the *statute*. Our task is to find an answer that meets both constraints.

In every interesting question that we pose in philosophy there will always be two black sheep, as it were: two radical positions that stand in diametric opposition which function as the generator of conversation. In the philosophy of jurisprudence, two of the most frequently-seen black sheep are *legal formalism* and *legal realism*. Formalism is the view that rules possess definite and exhaustive conditions for application which give us verdicts on what to do, based either on the definite meaning of the words or else the principles involved in statute or precedent. So, if we think that formalism is correct, then there must be a definite fact of the matter as to whether or not my Segway is a vehicle, and that the illegality of my riding the Segway on the grass depends upon whether it qualifies as such. Formalism is a rule-oriented doctrine and, as such, makes sense only

from the internal point of view. Legal realism, by contrast, takes the position that “rules” are disguised predictions about the verdicts of competent judges. So, if we think that legal realism is correct, then if we think a judge will not care about me and my Segway in the park, then the illegality of the Segway depends upon the existence of that judge’s disposition or lack of it. Legal realism occupies the external point of view.

If this example does not animate our sense that these doctrines are radical, let’s add a little incentive to the discussion. Suppose that transgressors of the no-vehicles rule face the penalty of death. What, in each case, makes the difference between my dying and staying alive? Mechanical jurisprudence tells me I will die because of the meaning of a word *and nothing else*; legal realism tells me that I will die because a judge says so *and nothing else*. Here’s the absurdity: while it might indeed be a matter of fact that the law here demands that I be put to death, *it seems reasonable to think that these considerations in isolation are not sufficient reasons to make it so*. It seems as though each view involves the crudest kind of deference – deference to the judge or to the dictionary – which is unmediated by any reasons whatsoever.

Legal formalism and mechanical jurisprudence

Legal formalism argues that the law is a formal system, which possesses determinate right and wrong answers as to the verdicts that the judge could have. According to this view, the business of the law is to follow the rules. The vision of law is *procedurally objective*, treating the vocation of the judge on the model somewhat of mathematics or formal semantics. (Douglas 2004) By the correct application of the rules, one may mechanically derive the correct verdict, whatever that verdict might be. It is through correct inference that we may administer the laws; the law is, or appears to be akin to, clockwork.

Formalism is inspired by the oldest traditions of law, with the mechanistic form of jurisprudence fit to approximate the methods used in Roman Civil Law. There is some attractiveness to the formalist approach to jurisprudence, in the fact that it conveys coherence and certitude -- two valuable commodities in the life of a normative system. In modernist legal systems, the formalist’s vision reflects the aspirations of diverse modernist figures, ranging from Coke to Langdell. (Groarke 2013, 153, Wilson 2012, 154) Formalists insist upon the existence of determinately correct verdicts that hold true because they are the result of an objective decision-procedure, like a form of mathematics or science.

The mechanical jurist asks the judge to follow something like the following procedure. (A) Take some self-described sentences from the book of the law that concern what counts as legal or illegal (be that statute or authoritative interpretation of precedent), and interpret them according to some suitably powerful model of natural language, and you will get a set of propositions; (B) take those propositions, and interpret them according to rules that provide definite verdicts for all occasions on what can or cannot be done without fault; and (C) in consideration of the facts of a case, apply the rules to determine a verdict. On this view, no judicial discretion or prudential wisdom is invited, desired, or required. (Pound 1908)

On first blush, the merits of this model are clearly shown when thinking about how it makes its application to statutes, and are not quite as obvious when thinking about judicial deliberations in the common law tradition, where the demands of law are to be uncovered from case-law. Yet some suitable supplements to (A-C) have been proposed to fill this gap. The widely influential legal formalist Christopher Columbus Langdell proposed and made use of a method where (A) is replaced by rigorous systematic review of precedent. (Langdell 1871) Starting with the most recent case and working backwards in genealogical fashion, the student of law must uncover the underlying principles that led to the decisions made – say, for example, the principle of equity.

Then the jurist should treat those principles as axioms of the full legal system from which further principles are to be deduced. Finally, one must apply these subsidiary sub-principles to the present case as in (B-C). What follows is the single, unique, correct verdict that is fit for the case at hand.

When it comes to the enactment of statutes, a successful version of mechanical jurisprudence must reflect a certain kind of view about the character of meaning in natural language. It operates against the background assumption that there are these things called rules which possess necessary and sufficient conditions for application, and that our assignments of meaning can be appropriately diagnosed according to these rules. Langdell's formalism could not be accused of *that* defect, since his method proceeds inductively through the examination of cases and not decoding of statutes. But it must share a similar defect if we think of it as producing the determinate, definite, unique results that it is advertised to have: i.e., by thinking that the *concepts* embedded in the legal principles have necessary and sufficient conditions.

Legal realism and the predictive theory of jurisprudence

Since the formalist takes it for granted that rule-following is central to both how the law is and how it ought to be, one way of refuting the formalist would be to deny the very existence of rule – or, at least, to describe the notion of rule-following in such a way that is not easily available to the formalist. Legal realism is the family of positions that significantly cast doubt on the idea that the law is a matter of rule-following, either in principle or practice. Dramatic doubts are cast on the notions of legal right and duty. (Hart 1959, 233) Instead, the realist emphasizes the creative and “daily practice” aspect of the law, arguing that the judge is in some important sense legislating the law and not just applying it.

Accordingly, legal realism holds that the law is little more than the ethnography of judges. On this view, if you want to know what the law is, then ask the judge or predict what the judge will say; do not attempt to derive the verdicts from a set of rules, as you will not find any that will return determinate verdicts for all occasions. Since the law is obscure on the inside, the legal realist holds that the law is best studied scientifically by the sociologist, psychologist, or anthropologist. Because of its emphasis on the legislative role of the judge in the process of determining how cases are to be judged, legal realism has some affinities with legal positivism. That said, the approach in general is promiscuous between basic pictures; recall that even Aquinas felt that the judge should be expected to exercise powers of discretion, albeit restrained by a kind of originalist instruction. In all of these respects, legal realism complements Foucault's strategic analysis of the law, with the exception that they put most emphasis on the effective decisions of the judiciary, while Foucault studies populations more broadly.

It is sometimes said that legal realism occupies the external point of view. There is a sense in which this is correct, since for the legal realist rules do not play a necessary part in an account of what constitutes the reality of law. The final (and enforced) verdicts of the judge are where all the action is. The legal realist typically wants to arrive at a dispassionate, scientific account of what the law is, what the “real rules” of a legal system are, and do away with any misleading pretenses that might lead us astray. Legal realism is supposedly a view about the legal “is”, not the legal “ought”. The central aspiration of legal realism is to describe the life of the law without illusions, not to tell the judge how they ought to decide cases. As one legal realist explained, if he had his way, then “...statements of “rights” would be statements of likelihood that in a given situation a certain type of court action loomed in the offing. Factual terms. No more.” (Llewellyn 1930, 431-65)

Now, if the theory of legal realism were wholly divorced from normative concerns, it would not be much use in telling us about how we ought to put the law into action, and hence provide us with no means of discovering the precise unwritten contours of the written code. But intellectual fairness

requires us to note three respects in which the legal realist is, and must be, doing *some kind of* normative work.

First, some legal realists make use of bold statements about what *constitutes* the rules of law: i.e., that the law *simply is* the enforced verdicts of judges, and apart from that there is no such thing as law. (Groarke 2013, 207-8) But actually, these claims are normative in a non-trivial sense, providing standards of correctness for diagnosing what the law “really” is. It would just be a mistake to say that the legal realist is not making any kind of substantial normative claim, if we recall that normativity is the expression we use to describe ought-claims, grounded by reasons, and held against some standard of correctness. If we want to say that the legal realist’s attempts to spell out the “real” rules are not normative, then by the same inference, one might just as well conclude that the Scot who opines about the nature of the true Scotsman is only offering conclusions based on a body of research.

Second, there is a thematically important sense in which legal realists seem to advocate for judicial discretion. An insistence upon the autonomy of the judiciary recurs throughout their work. One realist argues that the ideal function of the judge is a mediator of conflict, not someone applying determinate machine-like rules: “The judge, at his best, is an arbitrator, a “sound man” who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case.” (Groarke 2013, 221) (Frank 2009) The value of acknowledging judicial discretion arises from the plain fact that the judiciary engages in a creative legislative activity that substantially alters the law, combined with the plain fact that actual decisions concerning operations of the law end up drawing from extra-legal policy considerations, can sometimes imply (though not entail) that the judge’s autonomy ought to be given a measure of tolerance.

And, third, the legal realists do not deny that judges are obligated to follow rules. They attempt, instead, to draw attention to the fact that legal systems are geared for action and not mere belief, and so any aspects of the law that merely cash out how the judges deliberate shall only function as preludes to the main thrust of what goes on in law. “...[T]he trend of the most fruitful thinking about law has run steadily toward regarding law as an engine... have purposes, not values in itself; and that the clearer visualization of the problems involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behaviour...” (Llewellyn 1930, 464-5) Moreover, there is no outright denial that judges follow rules; it is just that the realist’s core aim is to downplay the utility of ineffective or obsolete rules and, even then, to claim that effective rule-following is of secondary importance in comparison to the actual decisions of judges. So even the most ardent supporter of legal realism must occupy an internal point of view, in at least an austere sense. When these three considerations are held in tandem, we can appropriately say that the legal realist occupies a soft form of the practical point of view, like Hobbes, since the legal properties of some set of norms are a function of their ability to guide action (though no answers are offered to the question of whether we have moral duties to obey the law).

Karl Llewellyn and Jerome Frank were two unequivocal proponents of legal realism. Both were mainly interested in the question of how the judge deliberates as a matter of fact, and appealed to developments in the budding social sciences in order to ground their work. Each investigated different aspects of the judicial process: Llewellyn focused on the sociological dimensions of the law, and Frank on its psychological dimensions. As a corporate whole, their body of work cast doubt on the idea that rule-following was the dominant factor in the practice of developing and enacting a sophisticated picture.

Their observations were diverse in kind. Llewellyn emphasized that the politics of social groups and social networks generated both the stability of legal verdicts across time, and the ways in which those verdicts changed with the times. In this way, he cast doubt on the notion that context-

invariant rules and principles were essential constraints on the operations of law, amounting to a kind of “rule-skepticism”. In contrast, Frank argued that, while rules and principles did play a role in deliberation, judges were subject to biases of human frailty that affected their ability to interpret the law objectively, and lessened the power of the rules to govern their conduct. His view is sometimes called “fact-skepticism”, owing to the emphasis he placed on the ways in which the outcomes of trials often rest upon the faulty interpretations that judges make when it comes to the evidence put before them. (Groarke 2013, 218-9)

Now, all legal realists acknowledge that there are, as a matter of practical fact, norms that regulate judicial decision-making, including those norms of the political system that decide who counts as a judge in the first place. Benjamin Cardozo is the central example of this tendency. On Cardozo’s view, the decisions of the judge can be adequately described as having been made in accordance with the forces of custom, history, philosophy, and communal welfare, for example. (Cardozo 1946) Still, these considerations have a contingent theoretical status, in that they only present the judge with *prime facie* constraints. The judge might be apprised of full knowledge of custom, history, philosophy, and yet still find areas where the law is not informative enough to provide stewardship concerning the common good. In such cases the judge must legislate and can do no other. And if the judge is plainly a legislator, and if they need to exercise discretion to do their jobs properly, then it follows that we owe it to them to recognize a healthy amount of judicial discretion.

(Some readers might think that this entire dissertation is based around some version of the predictive theory of law, since the notion of *deference* is a conspicuous part of my account of unwritten law, which is a conspicuously sociological concept. And, to be sure, they *do* share in common a commitment to the social scientific study of ideas in the legal domain. But it would be a mistake to conflate the two projects. The predictive theory of law holds that the right picture of the law is just what the judge says, and which results in actual enforcement; the facts about law are found by following a chain of deference that ends at the judge’s desk. My approach is to say that the law is *disseminated* when it fits what the judge says so long as what they say *fits the right picture, whatever it might be*. The theories seek to explain entirely different things.)

2. *The united front*

Herbert Hart, Ronald Dworkin, and Lon Fuller are usually presented in light of their mutual disagreements, since those disagreements served to establish the contours of much of 20th century legal philosophy in the Anglo-American world (and even beyond). These disagreements were productive, colored much of their scholarly life, and cemented their reputations as giants in the field. Yet when one examines the nature of these disagreements with a dispassionate eye, and subtracts the verbal elements, one finds a surprisingly robust amount of common ground. Now, to be sure, they find controversy with each other in many ways, and both the significance and scope of their debates should not be downplayed. But before we see where they diverge in opinion, it is vitally important that we should first notice the areas of concord.

(1) *No black sheep*. Each of them thought that both legal realism and formalism were excessive, and that a more nuanced view should be offered as to how judicial deliberation works and ought to work. We might say that all of them can be classified in a general category which we might call “organic jurisprudence”, which involves a commitment to both *taking rules seriously*, with the added concession that *rules are, and ought to be, applied in a content- and context-sensitive fashion*. Hart makes the point by referring to what he calls the “open texture” of law and natural language, which is the idea that uncontroversial usage of a law (its “hard core of settled meaning”) gives rise to a plenitude of interpretations at the periphery of practical application. Hart acknowledges that rules possess

exceptions, meaning that they need not be absolute in form. (Hart 1961, 123-153) Fuller agrees that the law is fungible, owing to certain properties of natural language, and owing to the fact that norms are mediated by context. (Fuller 1971, 23) Dworkin argues that non-strict legal principles have a vital place in the law alongside and above strict rules. (Dworkin 1977, 14-80) So all of them were sizably concerned with how the law appears from the internal point of view, though we will see that they differed in important respects.

(2) *Against semantic theories of law.* Each of them believes that the aim of a theory of law is to *explain some facts about law*, and not to engage in a mere explication of the meaning of the word “law”, and all the subsidiary words within a given legal code. This requires conceptual analysis *of a kind*, but not the kind of conceptual analysis that pretends to lay out the necessary and sufficient conditions required to speak rationally and meaningfully when we use the word. None of them are trying to police the boundaries of words. Hart explicitly claims that he is not analyzing the conventional usage of the word or policing its boundaries. (Hart 1961, 213) Fuller explicitly acknowledges that borderline cases exist, and does not think that our linguistic conventions ought to exclude them. (Fuller 1971, 79-82) Dworkin argues that, as a matter of fact, we are capable of rationally disagreeing on the grounds of law without entering into a merely verbal dispute, which itself indicates that we are not debating the meaning of the word “law”, but are offering and disputing *interpretations* of the concept. (Dworkin 1986, 93-4, 43-6)

(3) *Focused on exemplars.* Instead of directing their efforts to find the classic category structure that is needed to establish the contours of the meaning of “law” or “legal system”, they instead try to fix the *paradigm cases* of law, and then develop a concept that broadly describes the kinds of features which make sense of what is most interesting about those cases. For Hart, the paradigm case of the law is the familiar hydra-headed institution which includes contracts law, criminal law, the law of torts, the higher courts, and the decisions of legislature. (Hart 1961, 3) Other kinds of legal systems might exist, and be broadly explained by the sorts of considerations that we pack into our favorite theory of law; but this needs to be shown. For Fuller the paradigm case is what he calls “healthy law,” which abides by sensible procedures that tie legislation to enforcement. (Fuller 1971, 13-16) But Fuller does not deny that there are technically legal systems that lack those kinds of procedures, e.g., the army courts of his day (or, as some would say today, many aspects of international law). (Fuller 1964, 170-1) For Dworkin, the paradigm cases of law are our own institutions of political morality, insofar as they engage in a project of legitimation which involves providing an institution whose purpose is to enforce rights on demand. (Dworkin 2011, 405-13) The paradigm cases of law are clearly sufficient cases of law, just as “robin” is clearly sufficient for “bird”. In this way, they all have concrete starting points that produce robust theories which (they think) establish the grounds for speaking about general truths about the law from an internal point of view.

(4) *Beyond the extremes of natural law and legal positivism.* Our description of the “basic picture” of law has often made reference to two old favorites, “natural law” (associated with Aquinas) and “legal positivism” (associated with Austin). There is a noticeable tendency that people will try to untangle the threads of each legal theory in such a way that our triumvirate fits squarely in one camp and not another: owing to their descriptions, Hart belongs in the positivist camp, Fuller in the natural lawyer camp, and Dworkin sitting on the armistice line. But this debate becomes much less interesting once it is conceded that all of them have much more in common with each other than any one of them have got with either Austin or Aquinas.

It is a fact that all three believed that law must abide by some rational restrictions based on their substance. For instance, Hart echoed both Hobbes and Aquinas when he argued that there are some minimal respects in which natural law must be true. (Hart 1961, 193-200) As he says in a famous quip from *The Concept of Law*, “[O]ur concern is with social arrangements for continued

existence, not with those of a suicide club”. (192) If his witticism were taken seriously, then it would seem to indicate that the systems of order involved in a self-styled suicidal community are, at best, at the borderline of legality. This is not usually emphasized as a logical consequence of Hart’s perspective, since Hart’s philosophy is associated with the notion that the legal status of a social system owes to its connection to its social or political acceptance – he thinks the law is a matter of genesis, not content. But since he was careful not to overstate his case, neither should we; and if his concessions are sufficient to count him as a natural lawyer, then we might as well agree. And, for what it is worth, Fuller agrees that the aim of community survival is a necessary constraint on the legality of social systems. (Fuller 1964, 184-5) Dworkin argues that the law aims to personify the political community in the right kind of way, and (more controversially) adds that this very fact means that the law is stuck with describing the demands of law by borrowing from the community’s moral vocabulary. (Dworkin 1986, 167-175)

But all of them were also deeply sensitive to the role that history and custom played in fixing the contents of law, and hence cannot be coherently described as variations on Aquinas’s vision of natural law. Hart’s self-described positivism stresses the fact that moral restrictions *inform* the norms of a community, but are not constitutive of the community *as law*. All candidate moral norms are either too weak to regulate the conduct of persons in practice (e.g., the principle of treating like cases alike), or fail to be distinctive *as* moral norms (e.g., the idea of justice as mere obedience to the law), or which in fact only help to shore up the moral credibility of amoral social systems (e.g., principles of “dignity” and “equality” were recognized in slave-owning societies). (Hart 1961, 157-167) Fuller self-identifies as a kind of natural lawyer, but (apart from the minimal content of natural law) denies that legal systems have any special connection to any particular moral ends. Instead, legal systems are best thought of as *instruments* or means to an end, and they succeed or fail depending on whether or not they rationally succeed in fitting the ends for which they are made. (Fuller 1964, 96-7) Dworkin insists that convictions about the grounds of law are generated ethnocentrically in connection with our own political regimes and, in that way, are fully embedded in the community, not in nature. (Dworkin 1986, 167-175)

(5) *Powers vs. duties*. All of them agreed that there is some kind of distinction to be made between the *powers of the law-makers* and *duties of those subject to the law*. The exact nature of that distinction, and the words used to describe that distinction, were subject to debate between them; in particular, it is unclear whether or not the distinction belongs to differences in rules or to differences in contexts. These details, such as they are, depend on disagreements over how we might draw the basic picture. But there is no disagreement over whether or not rights and duties can be usefully contrasted with the possession of legal powers: e.g., the powers of governments to create legislation. (Hart 1961, 79-100) (Fuller 1964, 134-7) (Dworkin 2011, 406-407) Moreover, and most importantly for us, *there is broad agreement between the three that the powers of the governor ought to be publicized*.

In short, it seems to me that the triumvirate agree with the following points. They all believe that the aim of a theory of law is to describe and explain the institutional mechanics of legal systems, not to regulate the use of the mere word; that our discussions over the concept of law are mainly about the paradigmatic kinds of law, and hence a wide agreement that there *are* borderline cases of law; that our basic picture of law has to include some considerations of the contents of the rules with considerations of where the rules came from; and that there is a difference between the language of rights and duties with the language of legal powers. In the discussion that follows presently, I focus on the above-numbered features 1, and 4-5, as they will be most important in the analysis of operationalization, and its eventual impact on advancing our understanding of unwritten law.

3. *The divided front*

I have deliberately primed the reader to acknowledge the similarities between Hart, Fuller, and Dworkin in order to avoid accentuating their differences to the point of caricature. This has been done also in order to see how they together have more in common with one another than they do with some of the other philosophies of law that we have seen. Yet their overlap is not so generous that they amount to mere variations of a single picture. We will proceed by examining the salient features of each basic picture: its account of the *constitution and jurisprudence* of the law, and its view on *how the law appears*. Usually we have looked at appearances first and constitution second; but now we proceed in the reverse direction, since the most important areas of theoretical and practical disagreement concern the former, while the latter captures the motivational spirit that accounts for the force of those disagreements.

3.1. *A game with sanctions (HLA Hart)*

Herbert Hart's basic picture makes some broad departures from the basic pictures of law we have surveyed so far, and I will concentrate on the three following aspects of Hart's view. First, he believes in the disunity of the laws, which is a function of his belief that the sovereign can be held to the standards of the law. Second, Hart articulates three kinds of secondary rule, each of which is typical of the modern social order. Third, he thinks the internal point of view that characterizes the perspective of the judicial expert can be appropriately portrayed in terms of abiding by conventions. As a result, and as he understands these terms, he does not think there is any necessary connection between law and morality.

Disunity and the limits of sovereign power

We recall that Hobbes and Aquinas both regarded the law as being unified. For Hobbes, the natural law was a system of rules that were *coextensive with* the civil law, and for Aquinas the human law was a system of precepts that were continuous with the divine, natural, and eternal orders. The ascription of unity to the laws of nature and humankind was a natural extension of the desires of both philosophers to develop a system from which the edicts of law flow from the commands of the sovereign, be it terrestrial or divine. For when one is tempted to set up a unified account of the binding force of legal systems, a reasonable first attempt would be to identify the law with the commands of a single supreme entity who offers verdicts that serve to guide general conduct. But as we have seen, one of the costs of this approach is that it seems to follow that the sovereign is not necessarily subject to their own legal rules. In Aquinas, God's law is simply a function of Him meditating upon Himself, not an attempt to *bind* Himself; and the Hobbesian sovereign cannot offer an unjust verdict, even when their authority *is* unjust.

Quite unlike those thinkers, Hart offers a vision of law that is essentially *disunified*. For Hart, the law is separated into two distinct and equally supporting halves, which he calls *primary and secondary rules*. Primary rules are the "command-like" rules that attribute definite rights and duties to persons, allocating praise or blame. Primary rules are "command-like" verdicts on what you can and cannot do within a system of law: e.g., a municipal sign that reads "No vehicles on the grass" is a primary rule. All primary rules issue from some known authority, but it is not always obvious who that authority is. Hence we need rules that establish the limits of the scope of the authorities who create the primary rules. (Hart 1961, 78-98) For instance, "a motion on the floor of the legislature is not law until it reaches a supportive two-thirds majority" is a secondary rule – it does not threaten to punish anyone for non-compliance, but just lays out the criteria by which a rule counts as law. Secondary rules can be thought of as "second-order" rules or "meta-rules", in the sense that their point is to explain the definite, unequivocal legal authority of the primary ones by

specifying who counts as legislator. Instead of being like commands, these secondary rules are more like promises. (Hart, 33-44)

Though the primary and secondary rules sound similar, they are quite different in their normative characteristics. The primary rules are fraught with concern over our specific legal rights and duties, while the secondary rules are not; secondary rules only establish what counts as law and what does not. So, if the sovereign breaks a secondary rule by offering verdicts on matters which they are not fit to judge, then they have no legal force. The decrees are *ultra vires* (outside of their jurisdiction) and the subject may ignore them without *legal* penalty. The analogy to promise-keeping is very useful here. You might be able to get away with breaking a promise, and circumstances might be set up to require that you get away with breaking your promise, and even be blameless in doing so; all the same, the promise is broken. Members of a legislature might think that a bill has passed into law even though it only gets a minority of the vote, and they might even get away with it, but that does not mean the bill is law.

The two kinds of rules are essentially distinct in their normative properties, and cannot be defined in such a way that they are just two expressions of the same concept. Legal realists deny that there is any difference, claiming instead that rules are just predictions of how people will behave. The functional difference can be illustrated by thinking by analogy to the game of baseball. The game depends on the verdicts of the umpires, since they are the ones who (e.g.) decide which players are 'out' and which are not, what counts as a strike, and so on. But it would be absurd for us to think that baseball *just is* the verdicts of the umpires, or predictions of the verdicts of the umpires, because this explanatory strategy does not provide sufficient explanation of how the conventions of baseball work from the umpire's point of view. (Hart, *The Concept of Law* 1961, 9; 33-42) Now, it is a fact that wide discretion is given to the umpire to decide when some primary rules have been violated and some not, and so in practice a person is "out" when the umpire says so; these all sound like the kinds of thing that a 'baseball realist' might want to say. All the same, there is an internal structure to what the umpire is doing. It is a fact that the umpire *qua* umpire is following the scoring rules of baseball, and is bound by *something like a promise to follow those rules*. She might misjudge the facts of the game every so often, and as a matter of practical fact everyone must live with the 'bad call'. But that fact alone does not stop her from being umpire, nor does it stop her verdicts from determining the progress of the game. In this analogy (to make a gross oversimplification), the umpire is analogous to the subordinate judge whose business is to decide who is guilty or not-guilty in the courts.

Secondary rules and the basic picture

There is nothing stopping our communities from being governed by primary rules alone. You don't need a threat of formal sanctions for some warning signs to be persuasive (say, "Beware of Dog"), any more than you need robust rules of recognition to tell you who counts as an umpire in a friendly game of baseball. For much of our history (and still today), communities have been governed by what we might call a conservative vision of social mores: i.e., that involve little more than adherence to primary rules. In this way, the rules of the society are learned by rote and habit, not by rational inference based on principles. Such societies are inhospitable to the external point of view; the newcomer has quite a lot of homework to do before they can even think about earning hospitality.

That said, the unreflective form of social organization typical of traditional communities cannot serve the actual needs of a community that is in a state of growth, which requires an evolving division of labor in order to counteract certain collective problems. There are three recurring problems in the social practices of any conservative society. First, there is the problem that the primary rules are on the whole unsystematic or *ad hoc*, bearing no rational relationship to

one another. A conservative community might develop a whole range of customs and taboos—a zillion commands, so to speak—and forget entirely what the rationale is behind them. Second, there is the problem that primary rules are static, based primarily on habit; hence, taboos cannot be changed in any easy, deliberate fashion. Third, there is the problem of inefficiency, as violations of the rules do not always translate into reliable praise or blame. (Hart 1961, 91-3)

In order to solve these three defects of communities whose internal life is structured entirely by primary rules, we invent three kinds of secondary rules, meant to capture the inner life of those whose task is to implement them. They are, Hart says, the rules of recognition, adjudication, and change. (Hart 1961, 94-9)

The rules of recognition are conventions in the community that lay out the criteria by which a social norm counts definitely as legal (as opposed to non-legal). In the simplest form, rules of recognition just specify an authoritative list of primary rules: say, the Ten Commandments. In more complex societies, the rules of recognition specify certain features that primary rules may have: i.e., whether or not they have been authorized as legal by the right kind of social body. These rules of recognition are both *ultimate* and *supreme*. Ultimate because they are foundational principles that put an end to the question, “Why is this law?” They are *supreme* because they override the other rules of the system, if there is any conflict. *The rules of recognition are the constitutive conditions for Hart’s basic picture of law.* The rules of change or succession tell us how governments can be legitimately altered: who gets to be the new king when the previous one dies, and what procedure the king has to follow to authoritatively confer legal status upon their rulings.

Rules of adjudication provide both the criteria by which subordinate judges in government are placed into office, and the scope of their offices, and how they are meant to carry out their duties. In this, the judge’s role is to determine once and for all whether the defendant in some case stands in breach of the primary rules; they are the final bridge between the word of law and legal deed. In the exercise of their office, Hart encourages us to acknowledge two facts: first, that the task of the judge is to consult the demands of *standing conventions*, which together make the settled or core meaning of law; second, to exercise *discretion* in the application of such conventions to cases in order to arrive at salutary verdicts. (Hart 1961, 132-147)

Under Hart’s heading of ‘rules of adjudication’, we include the sophisticated picture of law which lays out what we have called ‘rules of jurisprudence’. For various reasons, Hart tended to shy away from discussion of the practical complexities involved in the exercise of discretion, and preferred to keep his eye trained on the broader conceptual issues involved in demarcating law from politics and morals. But it would be a mistake to suppose that Hart believed that the judge who is tasked to interpret the law with discretion is engaged in straightforwardly *making up* the law in a way that makes the judge a plain-faced legislator who weaves law out of thin air. In a long-lost but recently discovered essay, Hart stressed that judicial discretion is a rationally chosen interpretation, not a choice made of whimsy, arrived at under conditions where there is a cloud of relative uncertainty surrounding both the aims of legislation and the facts that bear upon its successful application. The very idea of discretion implies that an appropriately defensible decision has been made by consulting principles, and which can be defended either by appeal to the rigorousness of the process of deliberation and/or to the successful outcomes the verdict produced. (Hart 2013)

Hart’s postulation of secondary rules is an innovation in the philosophy of law that distinguishes legal theory sharply from what we have seen in Hobbes. This is nowhere more evident than in Hart’s discussion of the theory of law as sovereign and the American system of law. (Hart 1961, 74-6) He points out, quite reasonably, that the republicanism of the American constitution effectively makes the People of the States the ultimate legislator and, hence, that the People must

be its sovereign. But this poses problems for a Hobbesian or Austinian conception of the sovereign as one to which the populace must obey, “unless we give to the key words ‘habit of obedience’ and ‘person or persons’ a meaning which is quite different from that which they had when applied [to monarchy or government].” (Hart 1961, 75)

If we think that the American Constitution has appropriately represented its own legal aspirations, it is going to be difficult to understand how Hobbesian legal theory – and, by extension, Austin’s theory of law – are going to account for one of the most formidable legal regimes on the planet. As a result, we may directly contrast Hobbes and Hart on the distinction between formal and substantial implicit constitutions: Hobbes recognizes the formal root of law in the office of the sovereign as legislator, while Hart recognizes it in the substantive social rules which make such an office possible. The point can be made using our previous vocabulary: where Hobbes offered a crypto-contractualism (and one with complexities of self-reference, notably when the sovereign commands unjustly), Hart offers a more credible approximation of a genuinely contractualist relationship between sovereign and subject.

It is vitally important to note, for our purposes here, that *Hart’s secondary rules of recognition, when tacit, are the paradigm of substantive unwritten constitutions, as he lays claim to the existence of a normative force that is capable of binding conduct both intra- and inter-regnum.* Accordingly, the Hartian has enough room to recognize the powers of the American judiciary to argue that the right, say, to privacy is part of an implicit constitution, even if no such right can be found explicitly written in the founding documents. To be sure, if an advocate of Hart wanted to make this case, then they would be the ones bearing the burden of proof. Specifically, they would need to make the case that the American people accept the norm of privacy, and expect it to be treated as a condition of their participation in the American form of civil society.

Hart needs these rules of recognition to be grounded in social and political norms in order to provide legal powers with determinate scope. But his commitment to both aspects of law potentially allows him to help us understand the legal quality of fiat laws. Consider, again, the case of wine and the French king. There are two readings we might make of the situation. Suppose, for the sake of argument, that the rule of recognition active in that context acknowledges that the law *just is* the standing rule of the king. It would seem, then, that the monks have a duty to obey. But all the same, loyal subjects of the crown can still ask the question, “what made the king’s one-off *request* a standing *rule*?” One can accept the law of the land and accept the absolute authority of the king while still being unsure about what is to be done when the next season comes around. What is needed is a secondary rule of adjudication that elaborated on the idea that the king’s one-off decrees are prejudicial, and that must be a function of the knowledge of experts in the political game of manners who could provide the subjects with assurance that the command is a rule after all. Without such experts, the fiat rule could only be grounded in a nebulous authority and hence would fall short of legal status. That, anyway, is a move that Hart can make when set to consider the legal status of fiat law. In contrast, from the external point of view that we ostensibly find in Austin and Hobbes, there is no choice in how to interpret the case -- the request of the sovereign is law once it signals his expectations.

It is not altogether clear how Hart would have us think about the case of secret rules, in large part because it is not altogether obvious whether or not the expectation of publicity plays a necessary part in the secondary rules that ground a commonwealth. Hart is mainly committed to the idea that the secondary rules are known to the experts, less to the subjects. (Hart 1961, 114) The dearth of detail that Hart gives on the subject of publicity is one of the areas that one of his critics, Lon Fuller, exploits to full effect.

The conventional point of view

We referred to Hobbes's perspective as "practicism", exemplifying the practical point of view of the law. The practical point of view is distinctive because it insists that we have general moral obligations to obey our rulers even when we don't accept the ruler's verdicts, and such obligations are legal *because of* the fact that they are binding in practice. The practical point of view is one way of trying to reconcile the internal and external perspectives, and we suggested that there are other ways of blending them together. HLA Hart's *conventional* point of view is perhaps the most effective alternative to the practical point of view. For Hart, we do not necessarily have any general moral obligations to obey the law; civil disobedience is a live option, morally speaking. Our moral obligations are simply a different sort of thing from our legal obligations -- law and morality are separate normative systems. Moreover, the legislator does not have any legal obligations, *qua* legislator -- there are no legal conditions that effectively bind the sovereign's behavior in obligation. A standing rule of recognition might advise us that a legislator's decree has no legal force, but that fact alone may not have any effect on the political and moral realities, e.g., in the case of tyranny.

First and foremost Hart was working at cross-purposes from those who place accent on the external point of view. As we have seen, the 19th century jurist John Austin held that the law could be and must be described in terms of habits of obedience to the sovereign's general commands, and as such was a proponent of the external point of view. Though Hart did not directly address Foucault, the latter can be thought of as the 20th century's version of John Austin, since Foucault examined the law as an adaptive practice whose purpose is to discipline and control the bodies of whole populations. To be sure, Hart agrees that the law often (but not always) provides sanctions for non-compliance, and that this fact is characteristic of effective law. (Hart 1961, 249) But for Hart, the whole edifice of law depends upon *acceptance* of norms that govern the political community, which he calls rules of recognition. These norms must be accepted both by the jurists and by a stable subset of the population. (Hart 1961, 114) And the language of "acceptance" is not exhaustively characterized in terms of habits of obedience or issuance of commands. It is a concept that involves reference to the internal point of view.

Moral neutrality

Hart is a proponent of viewing the law from the internal point of view, and requires that the judiciary regard it in that fashion. (Hart 1961, 114) This entails a rudimentary acceptance of the rules of recognition and other secondary rules -- effectively, being cognizant of the basic picture of the law. But the rules of recognition are *conventions* with no particular ethical valence, and so the judge does not need to have any conviction in hand about the moral utility of the laws they are applying. The judge does not need to see the law as continuous with morality; the legal 'is' is distinct from the moral 'ought'.

In principle, the conventional point of view is neutral about the moral status of law. The populace at large may regard the law from any point of view whatsoever, without there being any threatening its status as law. For all along the way, Hart wants to argue that the distinctively legal features of human law owe to its connection with social sources, either to the norms of political institutions or to a political culture, and not to the contents of some yet-to-be-specified substantive morality. While both law and morality provide general guidance for the conduct of persons, and involve granting and depriving people of rights and duties, it is a fact of the matter that some laws can both appear to be (and in fact be) evil. One of the facts that requires explanation is the plain historical fact that systems of law constantly subvert, exploit, and enslave whole populations. (Hart 1961, 268) If there were a tight, necessary conceptual connection between the rules of recognition and the rules of morality, such that substantive moral doctrines were a non-optional part of the

basic picture, then we would not be able to explain how it could be that whole legal systems have been consistent in their iniquity. The law *qua* law (and contra Aquinas) has no halo.

One might reply to all this by granting the point, that perhaps the law is not constituted by moral norms, but it should *necessarily aspire towards* the enforcement of morality. This view sounds more plausible, at least when taken on face value. Moreover, it seems to be a better fit with the conventional point of view, since (unlike the practical point of view) it goes out of its way to deny that we necessarily have any general duties to obey the law. After all, aspiration to morality does not imply success in being moral. Even *Thrasymachus* knows the value of *seeming* virtuous; that does not make him much of a spokesperson for the moral life. (Plato 2000)

Historically, many of those who have denied the connection between law and morality have been moral skeptics, working under the idea that moral discourse is not sufficiently sophisticated to function as a general guide to action. Hart does not fall under this tradition, as he believes that there is cognitive content to moral discourse. In his view, morality is characterized in terms of four features that are sometimes lacking in the law: moral concerns are characteristically important to us, are resistant to deliberate change, are typically concerned with holding people responsible for voluntary faults, and are cashed out in terms of reasons and not commands. (Hart 1961, 155-184)

But he also notes that there is a pernicious ambiguity to the notion of “morality”, at least in common discourse: the difference between *community* morals and *critical* morals. The morality of the community involves the accepted moral norms, while critical morality involves the actual demands of the true moral system. In Hart’s view, enforcement of communal morality is not even an aspirational ideal where the law is concerned – the law’s aim is nothing more specific than to provide general standards of conduct for subjects, full stop. Hart reasons here that J.S. Mill’s principle of harm demands that we be vigilant against populist majoritarianism. (Caron 1969) Hart also implicitly holds that the law should not aspire *only* towards the enforcement of critical morality, since that would (at least factually) displace the fact that the task of the judge in general is to interpret and apply precedents and statutes as best they can.

To be sure, Hart does not deny that some legal norms can also be moral norms. Quite often (and certainly historically) our moral codes function as a kind of ‘first draft’ of legal norms, functioning as suggestions on how a judge might render their verdicts. The vital difference is that there is no supposition that the law *must be* rooted in morality. The justice or injustice of the rule is not by itself the law-making quality of the rule – the *law-making quality* of the rule, for Hart, is that it was sanctioned by the people designated by the rule(s) of recognition and succession. This is not to suggest that there is no relationship between the rules of law and the rules of morality: both provide desire-independent reasons for action, and purport to give context-insensitive conditions for guidance. It is just to say that legal norms are distinct in kind from moral ones, and that there is no *necessary* theoretical dependency of law on morality.

According to Hart, none of these considerations are mitigated in the slightest by the concession that legality is substantially rooted in facts about human nature. A legal theory cannot simply float in the void, unmoored from any suppositions about the human endeavor. Like Hobbes and Aquinas, we must recognize the importance of platitudes: that humans are vulnerable, that they are approximately equal, that altruism is limited, that resources are limited, and that often people are limited in their knowledge, skills, and willpower. (Hart 1961, 193-9) It is also a plain fact that there are certain objects of moral concern that do double-duty as objects of legal concern: notions like property, violence, personhood, and so on. If such concepts were not in effect, then the life-blood of the law could not flow. Hart is thus often seen in a complex way as both a kind of modern positivist, since he makes clear distancing comments regarding the law and morality, as seen above, but also as a critic of Austinian positivism because of his robust references to “extra-legal” social

convention, and noting functional- and even conceptual commonalities between the law and morality. Hart resists easily labelling, in other words -- and this is just as well, as any such act would do injustice to the sophistication of his thinking. And that would be a pity, since his analysis proves to be uniquely helpful in understanding unwritten laws: treating implicit constitutions as secondary rules, and inviting us to see justice norms and fiat rules as the complex extra-legal forms of social acceptances and conventions which give life to the secondary rules.

3.2. *Law is a wheel worth reinventing (Lon Fuller)*

Lon Fuller was well known for his disagreements with Hart on the nature and character of law. Though both were influenced greatly by the legal realists, Fuller's philosophical investigations stemmed out of relatively more sympathy for the realist tradition than Hart felt. This divergence broadly describes the force and motivation behind much of Fuller's dissent when it comes to a number of concrete issues. His disagreements ranged from concerns over the constitution of law and the manner in which it is properly adjudicated, to the paradigm cases of what we ought to be explaining in a theory of law, and beyond.

Fuller's writings contain a treasure trove of insight, and so it is a matter of interpretation as to what the most salient contributions to the philosophy of law might be. Certainly, the best known part of Fuller's philosophy of law concerns the connection he draws between law and morality. Styling himself as proponent of "procedural natural law", Fuller insisted that there was an important connection between morality and the operations of law. (Fuller 1964, 95-106) Understandably, this sticking point attracted enormous attention, as it led to a famous dispute with Hart over the case of the grudge informers (to which we have already referred). But the degree to which he took issue with Hart's articulation of the morality-law (dis-) connection should not draw our attention away from the ways they crossed swords on equally significant issues in the philosophy of law proper. In broad strokes, his philosophy aimed to develop an alternative to Hart's conventional point of view, and sought to see the law as a practical institution with a vested interest in successfully securing certain aims. In order to secure those practical aims, he demanded that jurists be faithful to a set of procedural constraints that provide structure to the legislator's craft.

Theoretical unification is a *virtue* of an account of law, not a definite intellectual *programme*; we can unify the law in different senses, with different aspects in mind. As it happens, Hart took issue with two unification programmes: the attempt to unify morality and law, and the attempt to inter-define primary and secondary rules in terms of their normative qualities. Fuller serves as an effective contrast with Hart when it comes to the second programme, as Fuller straightforwardly denies Hart's claim that primary and secondary norms have the features that Hart believes they have. So our first task will be to understand how, and why, he thinks that this is a useful or illuminating corrective.

Along the way, Fuller also offers a distinctive principle, which he calls the "rule of reciprocity", which undermines the Hobbesian idea that the sovereign is a mere arbitrator (or even arbitrary dictator) who has no duties to subjects. Fuller also has some things to say about the law-morality connection, but in this area he seems to think that the relationship is one of resemblance, not identity. For us, the most distinctive point that he makes is that legal processes, and practical enforcement of political rules, overlap significantly with the law. In the best case scenario, this results in fidelity to procedural justice; in the worst case, it results in fiat law. These points will be explored in roughly this order.

Norms of adjudication and reciprocal obligation

In his famous diagnosis of the difference between primary and secondary rules, Hart made ample use of contemporary philosophy of language, and in particular he drew from the classification of different kinds of speech acts. Hence, Hart argued that the law was essentially heterogeneous because primary rules are command-like, and secondary rules are promise-like. This intuitive contrast was helpful in cashing out Hart's views on the limits and extent of legislative powers. So, intuitively, promise-breaking does not imply anything quite like legal blameworthiness (sanction-worthiness) for derelictions of duty, while the flouting of a command does seem to imply a stronger connection to legal blame (sanction). Hence, the sovereign might offer decrees beyond their legal powers and face no political repercussions, but that is no reason to say that their legal powers have been extended by fiat alone. They broke a promise to stay within their bailiwick, which they were legally *obliged* – but not legally *obligated* -- to respect.

Yet these comparisons to different kinds of locutions should only help to suggest the real nature of the difference between power-imposing and duty-imposing norms, and should not be used to distort the facts about the best method of explaining how the norms function. Fuller argues that Hart's style of explanation of primary and secondary norms in terms of differences in rules has mischaracterized the facts about the typical legal situation. For while Fuller (following Hohfeld 1917) agrees that there is a division between the duty-imposing features of law and the power-granting features of law, Fuller thinks that the distinction is derived from *contextual features* about what the legislator has to do to make law properly, and has not necessarily got anything to do with a division we might want to make between *a difference in kinds of rules*. (Fuller 1964, 133-8) So, under some conditions, a single rule of law may seem to merely grant powers to a sovereign, and in other conditions it may seem like it imposes significant duties on the sovereign to craft their decrees carefully. And, we might note, if the difference is contextual then the dissimilarity that Hart notices between the primary and secondary facets of law is not so considerable as to threaten the aims of theoretical unification.

A concrete illustration would be helpful here, to tell us something about the practical point that Fuller is inviting us to consider. Suppose we are tasked with deciding whether some rule is either primary or secondary in its normative qualities: i.e., whether some rule is merely power-conferring or if it imposes genuine obligations. Here is the rule: "If a trustee has paid out of his/her own pocket expenses that are properly chargeable to the trust estate, he has a right to reimburse himself out of trust funds in his possession." (Fuller 1964, 134-5) Is this a power-conferring or a duty-imposing rule? Well, Fuller observes that:

"The word 'right' suggests a corresponding duty on the part of the beneficiary, yet the trustee has no need to enforce this duty; by a species of lawful self-help he simply effects a legally valid transfer from the trust funds to his own account. Accordingly we may conclude that we are here dealing with a power-conferring rule, rather than a duty-imposing rule. But suppose that the instrument creating the trust gives the beneficiary, in turn, a power on coming of age to effect a transfer of the trust estate directly to himself. Suppose, further, that the beneficiary exercises this power before the trustee has had a chance to reimburse himself out of the trust funds. Plainly the beneficiary now has a legal duty to reimburse the trustee." (ibid)

In Fuller's view, the difference between the cases seems to depend on what the most appropriate means of achieving the aim of the rule, even though the principle is just the same in both.

If Fuller is making a distinctive claim here, he must be suggesting that the trustee in the first instance does not have real duties to himself, owing to the fact that the unmonitored exchange of monies is superfluous and without imposing any kind of cost on anyone. That, anyway, is the only feature of the situation that I can see that would cause him to diagnose the case as an illustration of his proposal that the powers/duties distinction is about the force imposed by the context, not the force imposed by the rules themselves and the reasons they supply for acting in one way or another. The trustee *qua* trustee is indebted to the trustee *qua* person, and while the reason for taking the money from the account has a ‘duty-like’ character -- securing reparations in a just manner – it might seem for practical purposes that it is actually highly pedantic wordplay to describe it as an actual discharge of duties.

Perhaps the idea is that the concept of duty only applies non-trivially in the context where it affects the relationship between different countable persons (e.g., the trustee and beneficiary), and does not apply when considering rational actions for one’s own benefit (e.g., the trustee and himself). If that were the case, then Fuller would effectively be saying that genuine duties are societal and not intra-personal, while power-imposing rules are those which apply in contexts where the rational behavior of an individual is being examined.

While all that might be independently interesting, it is not entirely clear what point Fuller could be making in connection to Hart’s secondary rules. Taking lessons from the trustee case and then applying them by analogy to the situation of the sovereign, we might reasonably infer that Fuller is using a Hobbesian argument to “self-care” to explain the contextually-imbued normative force for at least some power-conferring rules. The trustee has reason to reimburse himself, much like the sovereign has reason to maintain their political clout, but in Fuller’s idiom neither of these amount to proper *duties*, because the context is such that the right kind of sanction is not in the offing. Were there such sanctions in the offing – the complaint of the beneficiary, the complaint of the populace – then there would be duties, too.

But of course Fuller and Hobbes are at loggerheads in all other respects. For Fuller would also like to claim that the law *does* involve genuinely reciprocal obligations between sovereign and subject; the sovereign has duties, not to themselves, but to the people. Here, Fuller would like to say that context determines what kinds of behaviors the sovereign owes their subjects. Both the sovereign and the subject possess duties to one another insofar as they occupy the sorts of roles they have: the subject has something like a general duty to obey, and to respect the sovereign’s rules even when they are not very good. (Fuller 1958, 630) And the sovereign has the duty to spell out what on earth it could mean to be obeyed, by crafting the rational point of each law.

In Fuller’s view, the legislator might try to make law and bungle the job; on its face, this sounds like fodder for an attack on the doctrine of judicial and parliamentary supremacy. And actually, in some respects, it is meant to be. According to Fuller, there is a sense in which legal pluralism is not obviously wrong. (Something like it must be the case, he thinks, just in case legal systems cannot be reconciled.) But it would be hasty to think that this fact, by itself, significantly undermines the doctrine of legislative or judicial sovereignty; it is not to deny that the powers of those who govern are genuine powers, nor is it to deny that those who occupy the governing roles benefit from some institutional autonomy. It is only to concede that sovereignty is a political power, and upkeep requires skill. Some of the limits on their attempts to craft law might even be constitutive of their office: i.e., imposed by rules of recognition that must be fulfilled on pain of removing countable persons from the office of legislator. (Fuller 1964, 137-8)

Much like Hart, Fuller recognized that, for practical purposes, we ought to carefully credit the judge with some amount of independence in their decision making. That is, it seems quite important to recognize that the judge possesses powers of discretion. It is just a fact of the matter

that some law is judge-made law, given the ubiquity of the constant need to turn unwritten operationalizations of law into plain legal facts. The judge is not a legislator, but they make the law in their own way, and according to the unique scope of their office. (Fuller 1971, 144-5) The reason that we must acknowledge the judge's relative autonomy is that doing the reverse leads to enormous moral, political, and administrative headaches: e.g., when it turns out that a judge has been on the take to the mafia for most of their career, and that the whole of their case history is therefore put into question, then it would be an administrative catastrophe to revisit the cases given that, in the interim, those corrupt verdicts may very well have served as precedents in other decisions. (Fuller 1971, 24-5) All the same, judicial discretion is not a thing to be admired and encouraged wholesale, since it is a fact of the matter that the legislature bears the most weight of responsibility in making their aims clear.

Legal power implies legislative skill

When Hart explained the difference between primary and secondary rules, he characterized the difference by making use of the metaphor of the game. Fuller does not see much use in the distinction between primary and secondary rules, thinking that instead there is a division between different contexts where a single set of rules can be sanction-making, and some contexts where they are not. Correspondingly, he can legitimately complain that the metaphor of the game provides little advice on how the system should run in practice, and hence fail to explain the features of law that need explaining.

Instead of talking about the law as a game, Fuller prefers to compare the law to a kind of reinvented invention. Like Hart, Fuller agrees that there is no single task of law in general, apart from providing general guidance for conduct through rules. (Fuller 1964, 96) All the same, *particular* laws are crafted in order to accomplish tasks – they are there to get stuff done. Now, admittedly, there are times where their aims are obscure. To help us understand the business of judicial interpretation, tasked to determine the needs of the law in particular cases, Fuller asks us to imagine an inventor who creates the blueprint for a machine, but who dies before being able to build the machine. Suppose the inventor dies and, in his will, he tells his children that they need to complete the machine for him; but suppose he never tells them what the machine is for. How do the children proceed? They begin, and focus on, a particular question: the question of what the point or aim of the invention was, from what they can tell. Then they improvise or improve the machine in various ways to suit the father's aims, to the best of their ability, and in such a way that the machine is actually useful. That, in short, is the expert's task in the worst cases: to reinvent a wheel, under the assumption that it was worthy of being reinvented and made to work. (Fuller 1964, 84-7)

Agreeing with Hart, Fuller argues that the social conservative's vision of society runs against and resists the inner spirit of law. This vision can be accused of three major failures: of *inefficiency*, *ad hocery*, and *instability*. So, *something kind of like* the rules of recognition, change, and adjudication must be present in an account of law, if we are supposed to explain the clear cases of law properly. Honoring Fuller's critique of the distinction between primary-secondary rules, we will refer to the difference between second-order rules that in context possess either power-conferring or duty-imposing constraints by talking about them as different *norms*, not rules (norms of recognition, change, and adjudication). These norms, put together, constitute a kind of inner morality to the law (to use Fuller's term), which we will call "the ethos of law."

Hart placed most of his emphasis on norms of recognition, and comparatively less on norms of adjudication; at some points, Hart even seems to be willing to tolerate skepticism about secondary rules of *adjudication* when it comes to hard cases at the periphery of settled meaning. (Hart 1961, 153-4) Hart emphasizes the idea of discretion in hard cases, which is a kind of "non-

theory” theory of how to cope at the margins of jurisprudence. In contrast, Fuller is *most* interested in the norms of adjudication, and thinks that, in principle, every system of law must have certain adjudicative norms. Fuller would like us to notice that there are fine-grained ways of failing to make law, various sicknesses that typify a conservative political system that are cured by the institutions we refer to as systems of law.

Those defects of law are as follows. Some political rules can be merely *private commands*, failing to apply generally to the subjects in a political community. Some political rules are kept *secret*, and some apply only *retroactively*, in both cases failing to guide the actions of subjects in prospect. Some rules are individually *unintelligible*; and sometimes the rules considered as a whole are so *contradictory with* other rules that the law is unintelligible as a corporate whole. Some political rules *demand that subjects act in a way that they cannot*. Some rules have a high turnover rate, *changing* a great deal over short periods of time, again failing to guide the actions of subjects through reliably consistent means. And some rules involve *practical double-standards*: written in one way, and enforced in a different way. (Fuller 1964, 33-91) These are eight ways of failing to make law, and any sophisticated picture of law has to abide by procedures that aim to solve these problems. For instance, the United States constitution (Art. I, § 9, cl. 3) explicitly forbids private commands when it bans “bills of attainder”: i.e., laws that single out particular groups for punishment without trial. (United States Legislature 2000) Similarly, the common-law writ *habeas corpus* functions to help ensure that detainment tracks the genuine requirements of law.

Fuller is here pointing out that there are certain necessary aims that must be reckoned with by any genuine practical attempt to spell out rules of adjudication – the conditions that would spell out what it would take to be a useful invention that is worthy of being reinvented, so to speak. Fuller refers to the totality of the procedures that are invented in order solve these legal hassles as the “inner morality of law”, capturing the idea that the ethos of the law-maker is a real, purposive task. It is necessary for us to honor the ethos of the law-maker in order to be vaccinated against these commonplace ailments.

Now, it should be noted that the attempt to carve out ways of solving these problems in the conservative political order are aspirations of law, not essential conditions that must be satisfied in practice in order for the political system to count as a legal one. There are cases where some of these imperfections can and may be found in a set of legal rules. It may be the case that in practice some aspects of the law must be kept secret, for instance; and in some contexts it is perfectly fine to enact retroactive legislation. (Fuller 1964, 3-32, 91-4) (Fuller 1971, 82-99) But this is only to repeat the point that Fuller made against Hart, which is that the difference between powers and duties in secondary norms has got to do with the features in the context that constrain the conditions in which they can be applied successfully.

The practical point of view, revisited

Although there are stark differences between Fuller and Hobbes, we find that they hold a very similar orientation towards the appearances of the law. Like Hobbes, Fuller emphasizes the practical point of law in the sense that he thinks that the law-making features of the law are embodied in its capacity to guide action through enforcement. With Hobbes and Hart, he agrees that law must be consistent with survival, though he emphasizes that the survival must be of a social or collective kind. (Fuller 1964, 184-6)

To illustrate his vision of how the law operates, Fuller famously asks us to imagine the law as a tree. (Fuller 1971, 18-20) Suppose the main trunk of the tree is the capacity for the law to excite particular kinds of action, and the twigs are particular laws which may or may not have any effect in practice; while the individual twigs might die, the law can live on without them; but no twigs

could live unless the body of law were alive. The life of the law is not mainly in the ways we think about how the concept of law applies, or does not apply, to other normative domains. Instead, the central features of law involve its connection to real people and real behaviors, the things that make it *work*. And these features that are necessary to explain the success of making law help to demarcate some system of norms as law, and function as constraints on the intentions of legislators and judges.

In a manner of speaking, Fuller's emphasis on procedures might strike some of us as oddly reminiscent of mechanical jurisprudence. The virtues of the mechanistic perspective lay in its claim to procedural objectivity, and this is the very thing that Fuller wishes us to include in our explanation of the law. But of course they are in fact vastly different in their implementation, to the point where no further comparison is possible. Fuller's practical point of view asks us to consider the conditions under which mechanical jurisprudence actually could successfully connect words with deeds. He suggests that it would require a strict judicial hierarchy and a hyper-specialized division of labor, where each rule of the system is assigned a single purpose, and each part of the institution has a single function. If judges are not left some discretion and flexibility in their judgments, the organization of the system is drained of its humanity, and we are poorer for it. (Fuller 1971, 58)

In some lights, the conventional point of view is at its strongest when it tries to explain the possibility of sovereign decrees made *ultra vires*. Against admirers of Nixon who might think the President is above the law, Hart retorts that the sovereign does have definite limits on their powers as set by convention. Still, it would be an overstatement to suppose that there are or must be any actual repercussions in fact for such excesses. In Hobbes's hands, the practical point of view solves the problem by denying it: the dictates of the sovereign are never *ultra vires*, within the scope of their political powers: generally speaking, the limits of law are the limits of political will. Another way of putting the difference is by observing that the conventional point of view notes an important difference between the conditions for success of legal norms and the conditions for success of political ones, while (with the exception of the right to self-defence) Hobbes's practical point of view does not see much of a difference. The only constraints on the legal powers of the sovereign are those imposed by revolution or insurrection. Like Hobbes, Fuller's practical orientation towards the law also insists that the law is what the sovereign can get away with, broadly construed; but Fuller notes that "getting-away-with-it" requires that you satisfy some practical criteria, which happen to include considerations of reciprocal duty between sovereign and subject. The sovereign can fail at their duties without provoking revolution, because some political downfalls are comparatively undramatic.

While conventions matter to the political order, Fuller asks that we avoid fetishizing them. Social and political norms are not self-justifying, and their importance in guiding action is not always transparent to a reasonable person. Conventions are institutions, the institutions exist for various purposes, and the failure to satisfy those purposes has a corrosive effect on their legality. If we return to the metaphor of the tree, failure to attend to the ethos of law effectively means sickening the roots of the tree. You might hurt the roots without immediately killing the tree, but you can expect that the tree won't be long for the world.

1. *Procedural justice*

Put together, Fuller would like us to be modestly optimistic about the prospects of the law. Fuller is not committed to the idea that all law has a halo; he offers no guarantee that substantially bad laws might nevertheless be consistent with his blueprint for adjudication. However, the law does need to satisfy the ethos of law or else face extinction in the long run, and in that sense, a kind of procedural justice is necessary for law to exist.

Hart replied to Fuller by saying that the latter's procedural conception of law is compatible with "great iniquity", suggesting that Fuller's ethos of law was more like prudence than like morality. And, sure enough, Fuller does not suggest that norms of recognition must draw upon substantive moral convictions in order to count as law; his central innovation, the "rule of reciprocity", is primarily a constraint on *adjudication*, since it is not ordinarily thought to extend to the point where it might justify the overthrow of government by the use of legal language. (Fuller 1964, 61-2) And yet there are two viable replies that Fuller might make to Hart. First, he strongly suggests (in incredulous fashion) that satisfaction of the ethos of law helps to support morality and justice in four non-trivial ways: the ethos of law is a precondition for any good law, promulgation is a precondition for just law, evil law is frequently inept in following the ethos of law, and the ethos of law connects abstract words to the lives of real people. (Fuller 1964, 162-7) While Fuller might be right about these facts, there is no reason to think that Hart cannot account for them.

But second (and more seriously) one might note that a great deal of justice related to due process is compatible with "great iniquity", too. So, e.g., when an officer breaks the chain of evidence to put a guilty man behind bars, and as a result the judge throws the case out of court and allows the guilty man to walk free, all hands acknowledge that we are worse for the result. There is great iniquity here, which is the iniquity of the system that was not able to effectively foresee and mitigate a tragic outcome. But the iniquity of the system is not in any obvious way a reason to deny that the judge has acted justly by throwing the case out of court, even if there were no prior laws about chains of evidence. It is a fact that acts can be just in some ways, not in others, but it seems to me that this does not seem to impugn the integrity of the judge or the wisdom of their verdict. Law and morality might be different worlds, but that is not to deny that procedural justice functions can function as an important bridge between them.

It is at this point that we need to revisit the case of the 'grudge informers', mentioned in the introduction as a cardinal instance of a justice norm. In those cases, German citizens had exposed dissidents to the Nazi regime by reporting them to the government. In doing so, the so-called grudge informers were acting in line with the letter of the rules set out by the Nazi regime, and certainly in line with the totalitarian spirit of those laws. Now, to be sure, we can also note that the regime held the ethos of law and the concept of procedural justice in contempt; for example, during the Roehm purge it engaged in *ex post facto* legislation that legitimized state killing by retroactive decree. (Fuller 1958, 652-657) But at least some of the laws against sedition looked enough like the normal course of legal dispute to prompt the famous debate between Hart and Fuller over how best to make sense of those cases in light of general theories of law.

After the Nazi regime was toppled, the reconstructed German government was faced with the task of deciding what to do with the grudge informers. Post-war justices had at least three ways of dealing with the grudge informers. First, owing to the critical mass of procedural irregularities, they could deny that there was any law during the period of the Hitler government; or, at any rate, that the relevant laws against sedition were misapplied, or could not be applied intelligently. Second, they could argue that, contrary to appearances, the defendants were acting illegally – say, against a prior moral law, or against tacit human rights. Or, third, they could concede that the prior rules laid down by the Hitler regime were laws, but then enact retroactive legislation that would subject the grudge informers to sanction after the fact. Few harbored soft feelings towards the grudge informers, here, but all were concerned to give them their due. (Fuller 1964, 187-195)

As it happens, the post-war courts determined that the statutes against seditious speech were not law, on the Thomistic grounds that a sufficiently evil rule is no law at all. Fuller believes this was the right conclusion arrived at by the wrong reasons; the relevant criterion that disqualified the rules against sedition was not that they were evil, but rather that they were incompetently

made. In contrast, Hart argued that the statutes against sedition *did* meet the minimal qualifications of being law, since the relevant conditions passed through the relevant political channels. If we disliked this outcome – effectively, recognizing the rule of the abhorrent Nazi government -- then we need to pass a retroactive statute. (Fuller 1958)

2. *Encroachment*

When it comes to issues introduced and discussed in this chapter, it is easy to lose track of some of the larger themes. One of the themes that we have explored is the difference between Hart's conventional orientation, and how it differs with Hobbes's. By introducing rules of recognition, Hart gives us room to claim that the sovereign can make decrees outside of their own legal jurisdiction; Hobbes denies that such a thing is possible, except to the extent that legal limits coincide with political ones. As I've stressed, I would like to think that, in some important respects, Fuller is a highly softened and more sophisticated inheritor of the general Hobbesian approach to unwritten law. So what might he say on behalf of the practical point of view?

It was helpful to make a comparison between the law and games when fashioning our contrast between Hobbes and Hart, so let's revisit that. Recall, Hart distinguishes between two kinds of games: baseball and "scorer's discretion". (Hart 1961, 142-5) In baseball, there are conventional rules that function like scoring rules, and which tell us about the nature of the umpire's job. These rules are analogous to a certain subset of rules of adjudication. If an umpire starts to score by non-baseball related rules, then we can complain that their decrees are beyond their jurisdiction. And if people tolerate those rules for long enough, then they stop playing baseball. For Hart, the important thing to notice is that we can observe certain "promise-like" binding rules from the umpire's point of view, the internal point of view--unlike the game of "scorer's discretion", which denies that there are any significant rules of that kind. In Hart's view something like "scorer's discretion" is analogous to the Hobbesian conception of law. Since we think *that* description of the game is wildly out of touch with the appearances of baseball, the Hobbesian story is missing an important element.

Fuller's practical orientation towards law might be able to concede that some such articulation of the internal point of view is important in the characterization of the law. There are, indeed, decrees made *ultra vires*. The problem is that they would like to shift emphasis in a different direction. Fuller would like to agree that sometimes the sovereign oversteps their bounds; after all, they can legislate "incompetently" by ignoring the ethos of law. That having been said, the detachment of the limits on jurisdiction cannot be unmoored from observations about empirical, practical reality of how people behave in a system. If someone claims that the umpire has broken the rules of baseball, then that someone has to have an effective voice that can have some kind of practical effect on the acts of the umpire and/or the process of the game. Following the simile to its logical conclusion, the interpreted limits of the sovereign's jurisdiction have to be backed by some kind of political force, a force capable of influencing the acts of the sovereign or the subjects. We can call this the *encroachment thesis*: the idea that political muscle can alter and distort the practice of law.

For Fuller, the encroachment thesis has two dimensions. First, the thesis holds that loss in political clout eventually translates into loss in legal powers. Second, the thesis asserts that an increase in political clout potentially increases legal powers, if left unchecked. (We see here, clearly, sophisticated shades of realism.)

To illustrate the first point, Fuller introduces a thought-experiment. Suppose there once was a kingdom named Erewhon. Suppose that Erewhon is a stable and prosperous kingdom, but that it is constantly under threat from outside forces. Suppose that, in this kingdom, the sovereign

legislators had the foresight to pass a set of constitutional laws that told the populace how to behave during invasion or insurrection. The government claimed, by law, that in the event of a revolution the inheritors of the original elected government will flee to the safety of a friendly neighboring state (let's call it Werehomes). In that event, the subjects should defer by law to the decrees of the Werehomesians, who will faithfully report the dictates of the ousted government. Now suppose that Erewhon really is beset by invasion, and the legitimate government is sent into exile in Werehomes. Who count as sovereign: the exiled government, or the invaders? (Fuller 1971, 18-9)

Hobbes has a very clear story to tell, here: the invaders are the new sovereign, end of the story. Fuller would like to say something slightly different. For Fuller, it is right to say (and in total agreement with Hart) that citizens might very well continue to recognize the former government as the authors of law and the usurpers as making decrees *ultra vires*. Both disagree with Hobbes, in that respect. But, Fuller notes, eventually the tables will flip if each year passes, and it seems increasingly unlikely that the exiles in Werehomes will regain effective powers over Erewhon. As the fortunes of the exiles grow dimmer, the more likely that we will say that the invaders are sovereign.

So far, so good; Hart and Fuller would agree, as a matter of substance. Indeed, Hart mentions a similar thought-experiment in passing. He reminds us that rules of recognition must be rooted in actual practice, and questions of whether an exiled legislature retain their rights are ultimately not questions of legal fact. (Hart 1961, 119)

However, I think there is a different diagnosis of what accounts for the change, legally speaking. Hart would stress that there is a change in who counts as legislator that arises because of a change in rule of recognition, and there is some plausibility to that description. But Fuller reinterprets the thought-experiment to suggest that what's really going on is that there is a change in powers that depends on what the invaders can get away with in that context. In other words, there is a very subtle disagreement at stake between Hart and Fuller about explanatory priority. For Fuller, the fact that the exiles at Werehomes lose their legal powers is explained by the fact that they stop being a political force capable of enforcing rules implied by the rules of recognition; for Hart, the fact that they lose their legal powers is explained by a change in the rule of recognition. In short, Fuller wants us to appeal to more than norms – he wants us to see that quite a lot depends on *the capacity* for some political power to get away with the things they want to do.

Fuller's picture of the law depends crucially on this view of the implicit constitution of the social order, and we note of course how this is robust with reference to some notion of unwritten law. (It is also, in some way, suggestive of Foucault's diagnoses of unwritten forces and distributions of power affecting or even constituting the ultimate grounding and reality of a "legal" regime.) Fuller claims that we have to recognize that each political context generates the possible expression of all norms of recognition. That, for Fuller, explicitly amounts to a conception of implicit constitution for a political society – this is what he is referring to when he talks about the 'rule of reciprocity'. Norms of recognition need to have force to be significant to law, and in order to have force, they must be supplemented by a story about what it takes for the rulers to get away with the business of ruling. (Fuller 1964, 61-62, 137-40)

Fuller believes that, if we take the practical point of law seriously, then it will tell us something about the moral arc of the law. One of the fringe benefits of having a moral- or justice order is the fact that people seem to enjoy it more; a moral order is easier to enforce, all other things equal. So, Fuller argues, laws that flout moral norms – e.g., criminal laws against acts without any victim -- are degenerate, in the sense that nobody wants to enforce them. When police resources are stretched thin, enforcement officials prefer to spend their energy on those crimes that inspire the most public outrage: i.e., ostensibly moral crimes. (Fuller 1971, 39)

Fuller's second point is that legal powers can be increased by an increase in political powers, as well. As it happens, in everyday political life, the administration of a government constructs practical policies that have a loose or negligible connection with statute. This is a legal monstrosity, and it occurs regularly. So, for example, many countries engage in selective enforcement of the laws in such a way as to produce systemic discrimination, which is a bottom-up form of fiat law. Fuller suggests that if they are able to get away with it for long enough, then the selective enforcement of the law becomes a law unto itself. (Fuller 1971, 31) Operationalization, and the practical point of law, encroaches on the law.

3.3. Law is a branch of political morality (Ronald Dworkin)

We have here seen four updated views on jurisprudence and the philosophy of law: legal realism, mechanical jurisprudence, conventionalism, and soft practicalism. The legal realists were hard-nosed behaviorists of a sort, treating the notion of rule-following as a black box; the mechanical jurists were logically obsessive, and neglected the messier realities of law. Conventionalists hold that the law is a system of conventional rules that tell us who gets to call the shots, while practicalists hold that the law is a tool we use to get things done. With the exception of the mechanical jurist, all of these views incorporate elements of the internal and external points of view into their own synthesis, and none of them say that subjects have any general obligations to obey the rules. This, it seems, is the price we moderns have to pay in order to properly describe the phenomenon of law.²⁰

But not everyone wants to compromise between the internal and external points of view. Some are not at all satisfied by the weak and highly contingent sense of duty attached to the above-mentioned views, which liken legal rights and duties to role-assignments in structured games. Some people yearn for a clearer normative story, where the demands of law map more squarely onto the things people really do think ought to be done. There is a nostalgia for theories of law—such as Aquinas'—that admit that a theory of law should have some kind of clear and intimate connection with our general moral duties to trust the rules of the governors.

Another tendency we have seen in the more modern theories of law is a progressive decrease in emphasis on unity and unification in our normative lives. Hart made the heterogeneity of the law a cornerstone of his philosophical project, and used the difference between primary and secondary rules as a means of making sense of sovereign decrees made *ultra vires*. Where Hobbes permitted and endorsed fiat law, Hart found a way we could cut fiat out of the picture. Fuller agreed with Hart that there is a distinction between primary and secondary norms, but argued the difference had to do with contexts of successful application of the laws. This serves as a potential corrective to Hart's overall vision, but Fuller is less interested in making the case for unification than he is in pointing out that the law requires craftsmanship.

Dworkin abhors the tendency towards a disunified theory of law, and seeks to provide an alternative. In Dworkin's view, the bottom line of a theory of law needs to be kept in mind. The bottom line is that the law is a thoroughly normative system, grounded in evaluations of what ought to be done, that is and ought to be responsive to what we care about. Law is not the kind of thing that will make any kind of sense to the ethnographer or the Martian who wants to know about the nature of some part of social reality. In order to know anything about the legal system, one must participate in it, and interpret what is going on; the right basic picture of law needs us to be its author. Many of us often take it for granted that "the legal system" and "the moral system" are two independent entities, but Dworkin claims that this is a massive theoretical mistake; there is

²⁰ "We moderns", obviously excepting Aquinas.

only one single system, *the system of what we care about*. (Dworkin 2011, 1-6) The ‘moral’ and ‘legal’ slices have different aims in the cognitive and social division of labor (the moral domain is concerned with dignity and well-being, the legal one with securing rights), but the nature and character of the roles they play depends on interpretation. (Dworkin 2011, 6-7)

And to participate in the law, one must acknowledge two important facts about the legal philosopher’s situation. First, one must acknowledge that the general character of the law is *both political and moral*, as the business of law is to provide legitimation of the coercive acts of the rulers by securing rights on demand for subjects. (Dworkin 2011, 406-413) Second, that a theory of law is part of a web of belief that is responsive to other normative beliefs, and hence requires *charitable interpretation*. (Dworkin 1986, 45-86) As we shall see, once one takes these two constraints on board, he thinks we must conclude that the best theory of adjudication is something he calls *integrity theory*. (Dworkin 1986, 164-275)

As a result, Dworkin has little or no interest in arguing for the separation between morality and the law, and is not interested in claiming that the legal “is” is distinct in kind from the moral “ought”. The concepts of “law”, “politics”, and “morality” are nothing like natural kinds, mapping onto stable mind-independent things, people, and events; instead, they are *interpretive* concepts, which only make sense from the point of view of someone who is participating in the process of trying to make sense of the normative kinds of social activity. There is a plenitude of opinion about how morality in general and law relate, and the questions about how they do relate depend to some substantial extent on how we think they ought to relate.

Rights enforceable on demand

Hart and Fuller were at loggerheads on many issues, as we’ve seen, but one thing they agreed upon is the idea that the law provides general guidance for subjects, full stop. Neither of them were interested in arguing, for example, that the law has a necessary connection with coercive policies of the government. For instance, Fuller goes out of his way to declare skepticism over whether the aims of the penal aspects of the law are retribution, rehabilitation, deterrence, or prevention: they could be any of these, or all of them. (Fuller 1971, 40-54) Hart flat-out states that his view places only secondary emphasis on the role of coercion in law; a monopoly on the legitimate power to punish is indeed a feature of law, but only one among others. (Hart 1961, 248-9) Both suggest that the political authority, whatever it is, must have some effective political powers, but neither are committed to the idea that coercion is an especially important part of the nature of those powers.

Dworkin is interested in describing one prominent feature of our legal architecture, which is precisely the idea that the institution’s whole point is to compel obedience. In particular, the courts and the police exist to uphold the rights of subjects, and organizational mechanisms exist to take up those rights when subjects complain about their violation. So, Dworkin argues that the law is a project in (note the blended term) “political morality” – *a project whose point is to legitimize the coercive actions of a system of government*, by providing a means for subjects to secure political rights on demand. (Dworkin 2011, 404-407) E.g., the reason why you are morally obligated to pay your taxes is that, if someone stole your car, the police would try to find it. And police can’t exist without the resources implied by a tax-base of revenue for the government. The taxes are legitimate because such institutions *exist to* enforce your rights when asked. Moreover, the obligation to enforce those rights is a serious one: the rights exist as “trumps” in our reasoning, meaning that they should prevail over any other prudential or utilitarian considerations. (Dworkin 1977, xi-xii)

In this fashion, Dworkin agrees with Fuller’s demand for a practical theory of law, and he takes Fuller’s demand for a rule of reciprocity seriously when he describes the constitutive aims of law. By describing the law as an attempt at the legitimation of coercive policy, Dworkin is suggesting

that the law flows from a sense of obligation that the sovereign ostensibly must have towards subjects. But Dworkin takes a step away from Fuller by adding an explicitly moral dimension to the analysis of what the law is; where Fuller wanted mainly to talk about “the ethos of law,”—and seemed thereby to equivocate somewhat between morality and prudence, between “legal competence” and moral goodness—Dworkin demands that we pay close attention to the central notions of justice and morality which are indispensable at all points. Subjects and sovereign alike have special obligations to their political society, owing to the fact that they are members of that society; but the general nature of the obligation lies in its connection to moral conviction. (Dworkin 1986, 176-224)

Hart and Dworkin can be contrasted. For Dworkin, the law is, and must be, viewed from the kind of internal point of view that will acknowledge how legal norms are continuous with honest ethical conviction. It is not enough to simply accept the community’s conventions (as Hart suggests); one must also *own and endorse* those conventions, as much as they can. If this cannot be done, then the participant’s sense of legal obligation to the social order shall disappear alongside their sense of moral obligation. (Hart 1961, 255-59, Dworkin 1986, 13-15)

One of the benefits of Hart’s positivism is that it avoids the dual implication we found in the naïve reading of Aquinas: that civil disobedience is immoral (which offends the conscience, upsetting the modern liberal sensibility), and that immoral political decrees are illegal (which invites political insurrection, upsetting Hobbes). We found that the naïve reading of Aquinas needs revision, but Hart’s theory still has some potential selling points over Aquinas, since Hart avoids the implication in Aquinas (and Hobbes) that civil disobedience and insurrection are of central concern to theories concerning the institutions of law, and instead brackets them away as political or moral questions. But one of the costs of Hart’s view is that it does not offer compelling reasons to obey the law, apart from acceptance of the secondary rules.

Dworkin would like to retain the benefits of Hart’s view without incurring its costs. He agrees that we cannot adopt a theory of law that is too simple in the story it would like to tell about insurrection, civil disobedience, and whitewashing any substantial cruelty by the state. Dworkin would like to say this: it may indeed be the case that a political regime’s rulings are so odious that we owe it no legal deference. For instance, in his earlier work he argues that in pre-Civil War America, when Northern judges were tasked with upholding the Fugitive Slave Act, they could legitimately claim (by reference to moral rules) that the formally promulgated Act cannot be enforced. (Dworkin 1986, 219) But this is the most extreme reading of the situation, to be put forward only in what Dworkin calls a *moral emergency*, where the rights of persons are not being taken seriously, and where they ought to be. (Dworkin 2011, 411) All hands need to interpret the law in its best light and govern themselves accordingly.

The honest participant’s point of view

Most recent accounts do not place any exaggerated emphasis on the idea that law must be viewed optimistically. Hart’s conventionalism is skeptical of the idea that law must be rooted in morality; Fuller is skeptical of Hart’s skepticism, but does not go so far as to plainly argue that the law is continuous with morality. The tendency in Dworkin’s thought forces him to argue in the opposite direction. Law is a branch of political morality. For him, a law that is utterly and thoroughly unjust, *might be* no law at all; its classification depends on the participant’s interpretation of the law in terms of the whole political system.

One of the commendable aspirations of logical formalism is the desire to arrive at a *single set of answers* to any question concerning the interpretation of the demands of law in hard cases, and that the solution to the question can be arrived at *objectively*. Dworkin demands the exact opposite style

of interpretation: instead of trying to interpret the operational meaning of the law in an inductive or deductively flawless way, we need instead to look at the habits and practices of the law as a kind of creative enterprise. But much like the formalists, Dworkin's end-point is the same: like the mechanical jurist, and unlike many others (including Fuller and Hart), Dworkin believes that there are decisively correct answers to the question of how to resolve hard cases.

According to Dworkin's conception of creative interpretation, we have to take on board two things. First, we need to interpret the demands of law *charitably*, and according to our best light. Second, we need to construct our vision *ethnocentrically*, from the participant's point of view. In this way, Dworkin is uniquely positioned to have a theory of operationalization as a form of unwritten law.

1. *Charity and coherence*

When faced with the business of interpretation, Dworkin demands that the notion of charitable interpretation take pride of place. In this, he follows a tendency in post-Quinean philosophy of language to regard charitable interpretation as an essential and indispensable feature of meaning attribution. (Dworkin 2011, 148) Although it may seem to be taking us off track into the realm of semantic theory, a brief summary of some of the surface features of that tradition is required, as it proves to be of ultimate importance in understanding the intellectual forces that had a significant influence on Dworkin's work. In contrast with Foucault's skeptical attitude towards attribute truth and goodness when interpreting the judgments of our rules, it is necessary to offer some kind of justification for the principle, giving due credit to its historical proponents.

The principle of charity is a methodological constraint on how we attribute meaning to natural language utterances, first proposed by Neil L. Wilson and later brought into prominence by WVO Quine and Donald Davidson. (Routledge 1998, 27) In a nutshell, the idea is that in radical communication environments -- i.e., contexts where you and another person are not speaking the same language -- interpreters are forced to try to interpret each other in such a way that most of the sentences they speak are truthful and rational. The principle of charity can be deployed in many ways. On some occasions, charity is taken to demand that the interpreter attribute the maximum number of *true beliefs* to the speaker as possible (within the normative constraints of evidential- and inferential warrant). On other occasions, the principle of charity is utilized in a more expansive sense, as a principle that foists upon us the task of optimizing *agreement* -- meaning, we must assume that the speaker is rational, and that their beliefs are generally true, right, and good. (Davidson 1973/4) (Thagard and Nisbett 1983)

Although the initial use of the principle of charity was motivated by technical concerns in formal semantic theories, the need for charitable interpretation can find some support in common-sense experience of language learners. When placed into a new social environment -- say, as an undergraduate taking a first-year course on a particularly difficult subject -- and faced with a flurry of daunting speech patterns, the new initiate is forced into the position of playing a *naïf*. That is, the initiate needs to assume that the speaker is talking sincerely, and making true statements about the things that they ostensibly know about. The suspicious interpreter who thinks they are being constantly fooled by the vain and diabolical professor will not have a robust cognitive basis for forming any theory about what the sounds they are hearing *mean* -- it is a fact that a measure of trust is needed to make sense of the contents of what is being said. And if this point is restricted to just a thesis about language acquisition in radical contexts, then it could be consistent with the desire to engage in a critical hermeneutics of suspicion once one has an adequate grasp of the language.

At its most boring, jurisprudence concerns the non-radical (normal) contexts possessed of laws that enjoy a hard core of settled meaning. In such cases, the problem of interpretation does not take on the appearance of being a problem. But in the more difficult cases faced by higher courts, judges face the problem of operationalizing the law in a context that is situated in-between the radical and normal poles. This is where we encounter the problem of the penumbra of interpretation: where we have *some* acquaintance with the aims of the statute, and *some* acquaintance with the facts of the relevant cases, but remain *uncertain* in their decisive application. Still, if penumbral contexts are at least somewhat like radical contexts, then we can legitimately infer that some kind of charity is required in interpreting the meaning of the law. Presumably, the modest form of charity can be taken on board by a critical theorist with sophisticated tastes, though it is unlikely that the expansive notion of charity will be of much use.

Dworkin employs something closer to the expansive principle of charity. According to Dworkin, we always have to interpret the law according to its best light. In interpreting, we are helpless but to assume that our system of law is a force of justice, truth, and integrity—this last in the sense at least of non-corruption on the part of the key players, and at most in the sense of the sincere, systematic attempt at realizing the ends of morality and justice embodied in precedent via law—until the weight of the evidence tells us otherwise. To be sure, in the limiting case it is possible that our best interpretation *just is* that there is no best interpretation of the system -- that our political system is so odious and illegitimate in its decrees that no deference is owed. On the grudge informer's case, Dworkin observes, “[t]he hideous Nazi edicts did not create even prima facie or arguable rights or duties. The purported Nazi government was fully illegitimate, and no other structuring principles of fairness argued for enforcement of those edicts.” (Dworkin 2011, 411) In such extreme cases it will be hard to attribute law to the proceedings if we understand law as the provision of rights on demand. To take another example, it is simply a matter of interpretation whether or not the Fugitive Slave Act is a law after the Northern judges refused to acknowledge it in practice. (Dworkin 2011, 410-12) The conception of law as integrity seems to force us to say that the Fugitive Slave Act is a valid law, though an evil one that is trumped in practice by more fundamental moral rights. But if someone were to assert that the Fugitive Slave Act is not valid law at all, then from the point of view of integrity, we need not accuse them of being deeply confused about the concept of law, so much as they would be speaking in an eccentric fashion about the blamelessness of ignoring a bad law.

Although the expansive sense of charity is a requirement of the honest participant's point of view, this should not cause us to infer that all interpretations are made equal. Dworkin does not believe that interpretation is a free-for-all; he intimates that there must be criteria that distinguish good interpretations from bad ones. Since law is a real-world political institution with a moral point, it follows that a citizen who needs to know the law will need to carefully attend to facts about how a community understands itself. This means the interpreter has to collect real information from other human beings about how they understand the community. By analogy, the film critic cannot review a film without having seen it; if they do so, they fail to meet even the minimal epistemic requirements of film criticism. (Plus, they'd be straight-forwardly guilty of integrity problems.) Still, the nature of the exercise is evaluative through-and-through, since ultimately the wise interpreter must try to interpret the demands of the political community in the best moral light.

Dworkin's principle of charity shares more than just a passing resemblance to Aquinas's conception of jurisprudential rules. As we recall, Aquinas held that the law was an authoritarian institution, and that authorities carried (in some lights) the grace of God, by virtue of their authority. Hence, unless they were tyrants, Aquinas felt that we owed it to ourselves to interpret

their dictates in the best possible light. We referred to this as “rose-colored originalism”. It is worth noting that while Dworkin maintains the “rose-colored” part of the law, he denies the “originalist” part. (Dworkin 1986, 313-17) We have to interpret the law as best we can, and it is true that in the context of our liberal political community that will mean we have to interpret the law with a heavy dose of respect for precedent and statute. All the same, the law is an instrument for the living, and “the best interpretation” is not always one that pretends that it has preserved the legislative intentions of the dead.

2. *Integrity and the community of principle*

All of the theories that have offered a positive articulation of the norms of jurisprudence have also tried to offer guidance that holds regardless of the makeup of the political society. The legal formalists hold that the expert only has one job, which is to follow the mechanical or scientific procedures that have been set for them. Aquinas advocated for rose-colored originalism, on the grounds that this mirrored the hierarchical structure of divine providence. Hobbes argued for sovereign self-care, and was indifferent to the exact nature of the sovereign office that was involved. Hart suggested that there is little more advice for us to follow besides obedience to convention; any further comments will have to be variations on the observation that the judge ought to be granted powers of discretion. All of these are supposed to be general theories of how the rules of adjudication work, which do not need to relativize our ideas about the proper operations of law by grounding them in a robust connection with the form of the political society. The difference might amount to one of emphasis, but it is a difference all the same.

By conceiving of the law as a branch of political morality, Dworkin forces us to add another dimension to the analysis by asking us explicitly to consider the kind of political community that we want to build. Hart sought to demarcate the law as a distinctive social practice by appealing to secondary rules; like Hart, Dworkin affirms that some such rules exist, and are significant. However, Dworkin does not believe that the story of law ends with secondary rules. Instead, Dworkin thinks that we need to motivate the character of those secondary rules in our conception of what the political community is like. (Dworkin 1986, 191-216)

To translate his views into Hart’s idiom, the primary and secondary rules that establish the structure of political governance must be supplemented by additional considerations. All rules, including the rules of recognition, must be motivated by a kind of preamble that lays out the conditions under which subjects are supposed to relate to each other. This preamble should make reference to the blueprint of the social order -- the sense of associative obligation that subjects owe each other by virtue of their common membership in the community. Genuine associative obligations have four features: they might be felt as *special* obligations to one’s neighbor, obligations that are *personal* in kind, *generally* directed towards the well-being of a group, based on an *equal* concern for all its members. (Dworkin 1986, 199-201)

The point might be illustrated by introducing a negative example. Suppose that we, inspired by Hobbes, thought of our political community as a gathering of people caught up in a project geared toward mutual survival. In this kind of community, the social order is like a group of strangers stranded together in a horror film, charged with the task of staying alive. If that is how we think about our community, then the structure and contents of the laws will be correspondingly crude. In this *de facto* community, Dworkin thinks the social order would not even try to produce the sorts of associative obligations that are needed for a genuine community; no special obligations to one’s fellow group-members, no sense of personal responsibility, or general concern for members equally. (Dworkin 1986, 208-9)

Now, it is possible that a theory of jurisprudence might not need to make reference to the moral convictions of the political community. So, it is possible for the judge to advocate a strictly backwards-looking view, forcing us to adhere to explicit conventions as far as they will go, and engage in creative discretion when faced with penumbral cases. It is not difficult to imagine the kind of political community that would embrace this ideal; communities based on bureaucracy, for instance. Or, the judge might take a forward-looking view, consulting the conventional aspects of the law only on the basis of their utility; but without reference to a common history, the forward-looking view sacrifices a static sense of shared communal character entirely.

While these are possible guidelines on how to approach the task of the judge, Dworkin argues that these idealized theories of jurisprudence are not acceptable – they are not going to do the things we want out of a theory that either fits our actual institutions of law or our vision of how our institutions ought to be. Dworkin argues that the vision of law that we see in our own lives demands that we try to reconcile the past with the demands of the future in a creative synthesis. Our theory of jurisprudence must not be purely consequentialist, based on maximizing the expected utility of subjects, because such a theory does not incorporate a robust sense of national identity in its calculations, and because judgments based on optimizing utility seem to better fall under the jurisdiction of the legislator than the judge. (Dworkin 1986, Dworkin, 1977) But deliberation also (contra Hart) shouldn't be purely conventionalist, because many of the most treasured features of our integrity involve reference to principles, principles that are often implicit, and yet which can override the more explicit norms. In short, Dworkin argues that we want to live in a political community of principle: we must think of the law as an expression of the integrity of a collection of people, a reflection of who they are and what they care about, whose point is to make for an honorable future. (Dworkin 1986, 228)

In a community of principle, there are two kinds of arguments that are of special concern to the substance of law: *principles* and *policies*. Considerations of policy are the broadly-conceived aims of the collective: the sorts of thing that Lon Fuller encouraged us to consider as being implicit in all laws. In contrast, considerations of *principle* are those individual rights that are ostensibly protected by the political order, and secured on demand by enforcement mechanisms in the system. (Dworkin, Law's Empire 1986) These rights can be balanced against other rights, possessing relative weight, but once their relative rank-ordered is settled, they hold regardless of any consideration of policy. We might compromise between competing principles, but whatever compromise we choose must have the force of an absolute when put into action. So, we might decide that people have a right to free speech, while noticing that free speech often results in a politically troubled state of affairs (e.g., when that speech is particularly odious); and all the same protect that right as a 'trump' over any policy considerations.

There are significant areas where Dworkin's vision of law as integrity draws from the work of Lon Fuller. As we recall, Fuller likened the task of the judge, in the interpretation of statute and the body of case law, to the task of someone who is given the blueprints of a mysterious half-completed machine and is asked to complete the invention. The contemporary judge must think about what good the legislator thought their law was doing, and try to accommodate those aims in such a way that the machine proves useful. And now that we have a little philosophy of language under our belt, we can understand Fuller as asking us to think of a context of radical interpretation, and adopt a robust kind of charity. Fuller does not intimate that the judge is always in a radical context; the purpose of the thought-experiment is to say something useful about the situation of the judge in the hardest of hard cases, and draw some lessons about the judge's situation in moderate ones.

As a way of thinking about the task of the integrity-endowed judge, Dworkin offers the following similar thought-experiment. Suppose that you were the literary executive of Charles Dickens, and suppose also that Dickens had stopped writing *A Christmas Carol* half-way before it was completed. Your task is to look at the existing materials and write the definitive edition of the book, by completing the final chapters. How do you proceed with your task? (Dworkin 1986, 232-8) A first step will be to consult the narrative that Dickens has written out, and try to extend that narrative in what you consider to be the best direction. But suppose you think that much of the material that Dickens has given you is quite spotty in places, full of hackneyed references and tropes – perhaps Scrooge seems too sentimental at the climax, or you think the moral of the story is too on-the-nose. If you think these things, then you might need to rewrite the narrative in order to make a better story – in current parlance, by *retconning* parts of it. Still, there is no avoiding the task of reading the first draft and trying to accommodate it as best you can. What you should not do is simply abide robotically by the existing written word (akin to conventionalism), nor should you fully *reboot* the narrative that only pays lip service to what came before (akin to consequentialism).

The task of the judge can be made even clearer by thinking about the ideal judge, and observing how they decide hard cases by following the demands of a community of principle. Suppose we had a sage-like judge who was endowed with enormous jurisprudential gifts, to such an extent as to put Solomon to shame. Let's call this judge "Hercules". As Dworkin concisely explains in one passage of *Law's Empire*, Hercules needs to "treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own, and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began. He will ask himself which reading of the act... shows the political history including and surrounding that statute in the better light. His view of how the statute should be read will in part depend on what certain congressmen said when debating it. But it will also depend on the best answer to political questions: how far Congress should defer to public opinion in matters of this sort, for example... He must rely on his own judgment in answers to these questions, of course, not because he thinks his opinions are automatically right, but because no one can properly answer any question except by relying at the deepest level on what he himself believes." (Dworkin 1986, 313-4)

With these constraints in mind, Hercules needs to offer judgements on the present case that offer the best constructive interpretation of the current community's conception of justice, fairness, and procedural due process. (Dworkin 1986, 238-240) Once we expand our criteria to include this wider domain of value considerations, Dworkin thinks that we will be able to resolve hard cases. In all such circumstances, Dworkin believes, there shall be in theory one and only one determinately correct verdict. This so-called "Right Answer Thesis" has been a defining feature of Dworkin's outlook on jurisprudence, and distinguishes him sharply from those who believe that there really is such a thing as an open texture to law. (Bix 1995)

3. *Objectivity and Hercules*

Does Dworkin think that legal scholarship is objective, in the sense of involving rational non-relative constraints? It's hard to say. For Dworkin, words like "truth", "objectivity", and the like are all redundancies in our vocabulary, and need to be analyzed as words we use to emphasize the fact that we find certain conclusions to be rationally cogent and worthy of attention. The main reason why we believe that our claims are objective is the sense that they *must be* believed. (Dworkin 1996)

This view of objectivity is implausible and the view of truth is controversial, but the rest of us can reasonably demur from Dworkin's proposals about meta-ethics and epistemology while doing

minimal damage to the rest of his views. For it seems that his account does involve treating the study of law as being partially objective, meaning that the less coherent interpretations are more apt to be described as faulty. Literary criticism may regard an extravagant cut-and-paste exercise like William S. Burroughs' *Naked Lunch* as a masterpiece in the *avant garde*, but it is far from obvious that Dworkin's conception of law can tolerate any analogue in the legal sphere. Moreover, it is just a fact that the interpreter of laws has got to make objective interpretations of the law, so long as you assume (as Dworkin does) that legal institutions are attempts at institutionalizing political morality in a way that is supposed to be capable of enforcing rights on demand. This vision of the point of legal theory involves a concept of task success: i.e., the idea that we can intervene in the world in specific ways in order to achieve our goals. The success or failure of our institutions can be troubleshot in an objective fashion -- and must be, on Dworkin's own lights.

Indeed, there are some clear marks of objectivity in the way that Hercules must perform his craft. Echoing all sane practitioners of the Common Law tradition, Dworkin's vision of "law as integrity" demands that judges engage in consilience of evidence in the evaluation of case-law. Moreover, his vision of law as integrity permits and endorses the ideal of compromise between alternative conceptions of the good. The modern liberal conception of good government demands and presupposes the success of political and legislative procedures that have a reasonable shot at satisfying the aims at representative government: namely, procedures must allow subjects to converge upon the best solutions to their collective problems by means of a legislative process that is sensitive to the ebb and flow of public deliberation, and which considers itself a genuine fraternity interested in solving those problems together.

To earn the title of a community of principle, one must have in place mechanisms that allow the principles to be put into practice by the proper negotiation between precedent and principle. Broadly speaking, this means that Hercules must keep his ear to the ground and pay careful attention to the political realities of the time before he interprets the demands of law in its best light. More specifically, Hercules must first attend to existing legal rulings about the concrete institutional principles that have a proven track record in being taken seriously by the system. Those rulings might very well be badly conceived, morally repugnant, and so on; in which case, the judge might decide that the rule is a law without any binding force, and assign it no weight in the conflicts that come to the bar. All the same, the first task of the judge is to consider these communal principles, and follow them as far as they go. (Dworkin 1986, 219)

This all adds up to a dynamic and quite complex process of legal interpretation, and mediation between past values, present situations, and hoped-for future outcomes. Individual conviction and "rights that trump" run up against the demands of precedent/social convention and the need for a community to have "honour." At the very least, it seems fair to say that at many points in such a Dworkinian process there is ample space for a number of rules that we might call "unwritten law," as norms and judgments spring forth from these various sources and compete for status as the best possible answer to a given legal question.

4. *Practices and participants*

In the preceding remarks we canvassed three plausible approaches to operationalization of law, and observed the larger pictures in which they are situated. The main points of distinction were these:

- By taste, Herbert Hart preferred to focus on the broadest-range issues in the philosophy of law. One of the questions that concerned him most was the problem of demarcating law from morality. The majority of his written work on the law emphasized the role of his *conventional point of view*, which preserved the sense that the law is primarily *about being subject*

to rules. He argued that his *rules of recognition* were primarily responsible for demarcating law from other normative disciplines. Ostensibly, in matters of jurisprudence, he said little more than that the judge possesses powers of *discretion* in hard cases: i.e., where conventions face the hard challenges of reality. But the reality is that he also asked us to see that the sovereign's judgments have legal limits, which is by itself a significant imposition upon the authority of judges as competent authors of law. Hart's rule of recognition made him sensitive to implicit constitutions, and placed restrictions on the possibility of fiat law. His emphasis on moral neutrality offered very little room for robust justice norms; indeed, the law, on Hart's picture, is drained of any requirement of fidelity to any substantive aims, apart from those enshrined in the secondary rules like the rule of recognition. For Hart, the secondary rules only needed to be known to the experts.

- Fuller takes the details of jurisprudence more seriously, though without the analytical attentiveness of Hart. Fuller wants to look at the law from the *practical point of view*, which amounts to saying that legal norms need to be faithful both to the *aims of law* and the *contexts of their application*. Fuller agrees that the judge possesses powers of discretion, but articulates the limits of that discretion by reference to the ethos of law, *the conditions for task success* of the judge and legislator. Fuller enthusiastically proposes that the sovereign and subordinate judge have obligations to observe legal limitations, to advertise the requirements of law, to keep faith with the aims of laws, and to maintain consistency in those laws that have been set. At all points, the judge and legislator need to assess context by consulting *the rule of reciprocity*: i.e., the rights and duties of both sovereign and subject. Fuller affirmed the existence of fiat law, implicit constitutions, and justice norms.
- Dworkin constructed his theory out of his experience with the details of cases. The law must be viewed from *the participant's point of view*, conforming to *honest conviction*, not mere convention. He asked us to consider both whether our best theory of law fits the actual practice of the law, and whether or not our best theory of law meets our ideal conception of how legal practice should work. But so long as we are talking about the law, we must be talking about the conditions of a *political community that secure the rights of subjects on demand*. Dworkin argues that our best form of political community is the *community of principle*, which demands norms of jurisprudence that are faithful to the conception of *law as integrity*. A central motivating point, for Dworkin's conception of law integrity, is the idea that jurists must preserve the ideal of "protected expectations". Dworkin's approach from integrity permits all forms of unwritten law, depending on whether or not the relevant implicit principles can be found when we interpret precedent to secure an "honorable future."

We can see a thread running through each successive theory, a relatively clear narrative line that grows bolder with time. Where Hobbes asked us to think of the sovereign office as a *formal* device brought into being by the joining of hands between all and all, Hart asked us to realize that the sovereign office was a *substantial* creature with definite contours rooted in secondary rules. But Hart neglected to provide a robust account of the relationship between sovereign and subject in terms of substantial rules of adjudication. Fuller agreed with Hart that the sovereign office was a substantial one, corresponding to norms of recognition, but he asked us to think about *the relationship* between sovereign and subject as substantial, too; as a result, he spent comparably more time talking about the norms of adjudication. Yet Fuller neglected to spell out, exactly, what it meant to be *a subject to some community*; at best, he provides some remarks about the implicit composition of voluntary associations. Dworkin agrees with Fuller that the sovereign and subject both have duties to each other, resulting in substantial norms of adjudication. But Dworkin also asked us to pay close attention to the subjects themselves and the nature of the political community they live in,

and effectively treats the idea of being a subject as a concept that dynamically alters the upkeep of the sovereign office.

As the story evolves, we come to expect the sovereign to carry relatively more burdens. Where we started in Hobbes with a concept of sovereign 'duty' as self-care, we gradually found that some of her verdicts can be of null effect when delivered *ultra vires* (Hart), that her decrees must involve procedural competence in making law (Fuller), and finally, that she owes us mechanisms for securing rights on demand in exchange for the right to coerce (Dworkin). Moreover, as the story progresses, we should also notice that there is relatively increased attention to the details of cases. This is fortunate, as our concentration at this stage is on operationalization as one mode of unwritten law: i.e., the part of law that involves a set of practical instructions that allow us to sanction what can ideally already be found in words. These practical instructions will in some ways mitigate the level of surprise that subjects and the judiciary will have at government action.

Our method of approaching the issue has been to assume that the operations of law shall depend on the 'big picture' that we are confronted with, forcing our account of unwritten law to coincide with an account of the law in general. So we have spent a lot of time on the big pictures, laying out a framework that we shall need in order to lay out the parameters that make the category distinctive. Along the way, we have made notice of some of the respects in which individual theories have thought about justice norms, implicit constitutions, and fiat laws. Now is the time, drawing on all these sources, to investigate the concept of operationalization proper, making due reference to the views surveyed above, and do the hard work of evaluating actual and potential cases of unwritten law.

CHAPTER VI. CASES AND COMPLICATIONS

1. Operationalization and norms of jurisprudence
 - a. The lexical question
 - i. Intellectual good faith
 - b. The hard jurisprudential question
 - c. The prudential question
 - i. Satisfaction and discretion
 - ii. Optimization and the right answers
2. Implicit constitutions
 - a. Four claims of implicit constitutionality
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 - ii. Rough drafts
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 - iv. Fan fiction
 - b. Stakes
 - i. Expertise and institutional respectability
3. Change and stability
 - a. Justice norms
 - i. *What justice norms are (not)*
 - ii. *Justice norms in case-law*
 1. *Elmer*
 2. *Brown v. Board of Education*
 - b. Fiat rules
4. Secret laws
 - a. Salience and meta-secrecy
 - b. Accessibility and communication
 - i. Contextual secret laws
 - ii. Categorical secret laws

At the outset I proposed to offer a recipe for unwritten laws with three major ingredients. First, that unwritten law is a matter of informal promulgation of laws, understood as access to informal venues. Second, that the access of the mass of ordinary people, or “folk”, to informal venues amounts to deference to experts concerning the rules set by the steward of the public trust. Third, that deference depends upon the folk’s education in the basic picture of law, and the experts’ education in the sophisticated picture of law. The kinds of unwritten laws in our taxonomy that can be manifested will depend on the picture involved; as in cooking, the quality and kind of thing you end up with depends on your choice of ingredients. If we follow the recipe correctly, I promised an account of unwritten law that would satisfy three appetites: systematicity, modesty, and critical utility.

Though we have made substantial headway, I have not yet delivered fully on that promise. For instance, we have had to postpone casuistic judgments until the conclusion, and it is here that we will be able to judge whether the account has been a success by its own lights. We have also had to postpone a discussion of some essential operational details mentioned at the outset: the notions of *intellectual good faith*, *risk of legal error*, *stakeholders*, *the need for formal promulgation*, *a communications environment*, and so on, each of which will prove essential for understanding in any detail how a system of laws can be enforced without formal promulgation. In short, we have not dealt with cases and complications.

This final chapter ties these strands together. In it, I will show what kinds of unwritten laws can be crafted from which kinds of pictures. I will also offer some suggestions on how we might apply them to topical cases. The ‘biggest’ and ‘smallest’ forms of unwritten law, being operationalization and implicit constitutions, are treated first; along with them, we will see the ideas of *stakeholders* and *intellectual good faith* drawn out. The tools introduced in the first sections are uniquely important to the discussions they are situated in, but they are also important in ways that will ramify throughout subsequent sections. The final section – on secret law – will specially depend on all the prior sections working together, as the idea of need for formal promulgation in context cannot be explained without the preceding materials in place.

1. Operationalization and norms of jurisprudence

The main business of the expert is to inform the folk about the tacit operations of law, or operationalizations of law. These are rules in a political system that explicate the actionable meaning of laws that are already disseminated (formally or informally), but which are not themselves formally disseminated. But the idea that some operations of law are explicit (or formally disseminated) is not entirely lucid; for it is not especially clear how to produce a fine-grained contrast between formal and informal venues.

In order to provide necessary structure to the discussion of operationalization in the context of cases, we must ask at least three kinds of questions, which for convenience I will call the ‘lexical’, ‘jurisprudential’, and ‘prudential’ questions. The lexical question is: “What is operationalization, if it is meant to be a form of unwritten law?” The normative question is: “Should we operationalize law, and under what conditions?” The prudential question is: “To the extent that we should operationalize the law, how do we in fact do it, and how do we do it well?”

1.1. The lexical question

As we have defined it in the Introduction, ‘operationalization’ is a precise, concrete unwritten rule that is not itself formally promulgated, but which potentially draws from written sources. Operationalization is a stubbornly persistent portion of the law that remains unwritten, the residue

left over when formal codes are themselves insufficient to direct the actions of rational subjects in very specific contexts where their application is sought and demanded.

But this characterization of operationalization is a bit too pat, if operationalizations are supposed necessarily to be a kind of unwritten law disseminated from informal sources. For, plausibly enough, the law has been thought to have an open texture, accompanied by a relative indeterminacy of aim and fact. (Bix 1995, 7-10) (Hart 1961, 123-36) If that were so, then unwritten law must be ubiquitous, since the final application of law will derive from natural language, the ultimate informal venue for promulgation of meaning. I will try to show that we do not need to arrive at this conclusion by arguing that unwritten rules are only occasioned by contexts where the application of a case to a rule is apt to produce confusion in some form, and where there is no confusion amongst people of good faith, there is also no need to suppose the settling of the case under the rule counts as the application of unwritten law.

Well, the first thing that needs to be noted is that *operationalization* is distinct from a *natural elaboration*. To elaborate a law is to specify, or make precise for practical purposes, what can already be plainly found in the written (formally promulgated) word. For example, if a law bans the interstate sale of weapons, then we do not need to consult either the legislature or judiciary to find out whether or not an AK-47 counts as one of the things banned, even if the word “AK-47” does not explicitly appear anywhere in the law-books. It is rationally unsurprising that the courts would regard the AK-47 as part of the extension of the concept of ‘weapon’. Despite the fact that “AK-47” does not appear explicitly in the law-books, we should not count *this* as reason to call it an operationalization, or unwritten law, as the case is too trivial to bear the weight of our subject.

Why do we draw a line, here? Well, it goes like this: elaborations are written laws, having to do with the *extension* of a concept (e.g., ‘weapon’) that derives from an *unsurprising definition* to a novel case (‘AK-47’) that *unsurprisingly fits* the definition by virtue of features rightly taken for granted about the case (e.g., that the AK-47 functions to do what weapons do) and the *unsurprising aims* of the statute that allows us to classify the case properly. But the mere novelty of the case is strictly irrelevant to the salient features of the case; the important thing is whether or not the classification of the AK-47 as a weapon is apt to generate confusion to experts, and hence to force remedy by the invention of a new meaning-rule, or revision of an old one. Without the threat of confusion from reasonable people, there is no need to assume that the rule has changed; it is just as well that we might say the world has changed, while the law’s extension has widened even while its intension remains as it was.

That is the default way of thinking about elaborations, anyway, all other things equal. But we should also take care to notice that there are two kinds of elaboration: *conservative* and *expansive*. Conservative elaborations are instructions on what is to be done by virtue of a statute, and which gain their authority by virtue of the fact that the instructions contain *central* instances of concepts embedded in the meaning of the written statute. If the sign in the park says, “No vehicles on the grass”, then do not drive your SUV on the grass. Meanwhile, expansive elaborations are instructions on what is to be done by virtue of a statute, and which gain authority by virtue of the fact that the instructions contain *peripheral* instances of the concepts embedded in the meaning of the statute. (Winter 2001, 69-103) Again, considering our favorite park sign: if you are driving a Segway, then (perhaps) we should not drive that on the grass, either. The difference between ‘central’ and ‘peripheral’ membership of a concept, here, means nothing more or less than the first and last cases that come to mind in connection with a concept in the context of that statute. To put the same point in a less cumbersome vocabulary: *conservative elaborations are rationally obvious to experts and rational folk alike; expansive elaborations are rationally obvious to experts, but which the folk regard as*

rationaly unobvious without being surprising. And then we can understand operationalizations as rational surprises to experts, the area of law where we find a gross indeterminacy of aim or fact.

Cases that we might want, pre-theoretically or intuitively, to identify as expansive elaborations of the law might turn out to be operationalizations in practice, depending on whether our interpretation of the concept embedded in the law would be *rationaly surprising to the rational subject, apt to produce confusion*. Hart's favored example of a penumbral case, the wheelchair on the grass, is a fine example of a case that seems to flout the letter of the law, and yet in a way that it would be appropriate to find surprising. (Hart 1961, 125-130) But it should be noted that these are practical, *aposteriori* verdicts, as you cannot predict in advance what rational subjects of good faith will or won't find surprising. So, for example, there are many who might find it surprising that "tomato" counts as a peripheral member of the concept of "fruit", and if there were any law that hinged on the concept of tomatoes -- say, an especially cumbersome piece of regulatory law related to agriculture -- then that fact would be crucial in determining whether the law was an explication or an operationalization. But, prior to the surveys of experimental philosophers, we might just as well suppose that rational subjects would think this classification is unobvious but appropriate.

Again, I say that expansive elaborations are not operationalizations, because expansive elaborations concern those non-obvious but unsurprising articulations of a concept that is being considered in light of the relevant statute. In the context of a statute that is concerned with domestic inter-state transportation, a nuclear warhead is not an *obvious* instance of a weapon; one does not imagine that the inter-state smuggling of nukes is so commonplace as to make it central to that context. Still, the rational subject would presumably not be *surprised* to find that the act of transporting nukes across state lines falls under the prohibition on sales. In any event, the relevant criteria that separate elaboration from operationalization are as follows: elaborations are not rationally surprising and they possess varying degrees of obviousness, while operationalizations are rationally surprising to (at least) the folk.

Operationalizations can be broken into two kinds, as shown in the following illustration. Suppose a labor dispute arises concerning the collective agreement of an academic union. The dispute concerns the provision that employees must be supplied with an operations budget "no later than the end of the year". Now suppose the employer maintained that the phrase "end of the year" meant the end of the *academic* year, while the union interpreted it to mean the *calendar* year. The contract here contains sufficient ambiguity as to demand clarification.

There are three routes to clarity, here. First, if an answer as to how to interpret the contract can be found without the interference of the courts -- that is, without resorting to binding arbitration -- then it can be left unwritten. So, this may occur if, as it turns out, the nature of the meaning of 'calendar' is actually irrelevant to the core matter of the dispute, and so the question of how to resolve it does not arise. These *untested* cases are the default category when we think about cases of operationalization. Second, if an answer cannot be found prior to arbitration, and binding arbitration rules in a certain way (say, in favor of the calendar year interpretation), but decides that the ruling only applies only *from then on*, then it would be an instance of "writing out" the law by expansively elaborating its meaning, since the expectations of experts (but not the rational subjects) have been respected and protected. At that point, *so long as the case has been presumed to be handled in good faith*, the actionable meaning of the code will be unsurprising to everyone involved, and so will have the force of an expansive elaboration, hence written law. Still, as regards the time prior to the judgment, enactments are a species of unwritten law, describing an obvious practice in untested legal form. On the other hand, if the arbiter applied their proposed meaning-rule retroactively (i.e., in order to resolve a whole docket of waiting disputes), then *it cannot help but* be rationally surprising to that subset of rational subjects who are affected, since a temporally dislocated verdict is *not*

accessible to the disputants. This example points to a difference in kind between two forms of operationalization: *enacted validations* and *retroactive rules*.

Enactments are informal ways of thinking about how the law is put into practice. They ostensibly draw upon features of the background context of the life of some communal or institutional norms, and which are obvious to those who are subject to the rule, but which can be surprising to a rational expert who is informed of the relevant laws. Enactments occur at every level of government. From the point of view of those working in the executive and legislative branches, enactments will include existing policies that provide a regular means of going about decision-making. From the point of view of those working in the criminal courts, enactments will include, e.g., any decisions made by a Crown prosecutor or district attorney to selectively enforce some laws in such a way as to systematically discriminate against an oppressed minority. Enactments do not have the same legal weight (or force) of statute or made law, and hence might have the character of being highly defeasible in the determination of case-law. The normative content of an enactment will vary according to one's sophisticated picture of law; for Dworkin, this highly contingent and weak level is where it seems most suitable to consider matters of policy. (Dworkin 1986, 221-224)

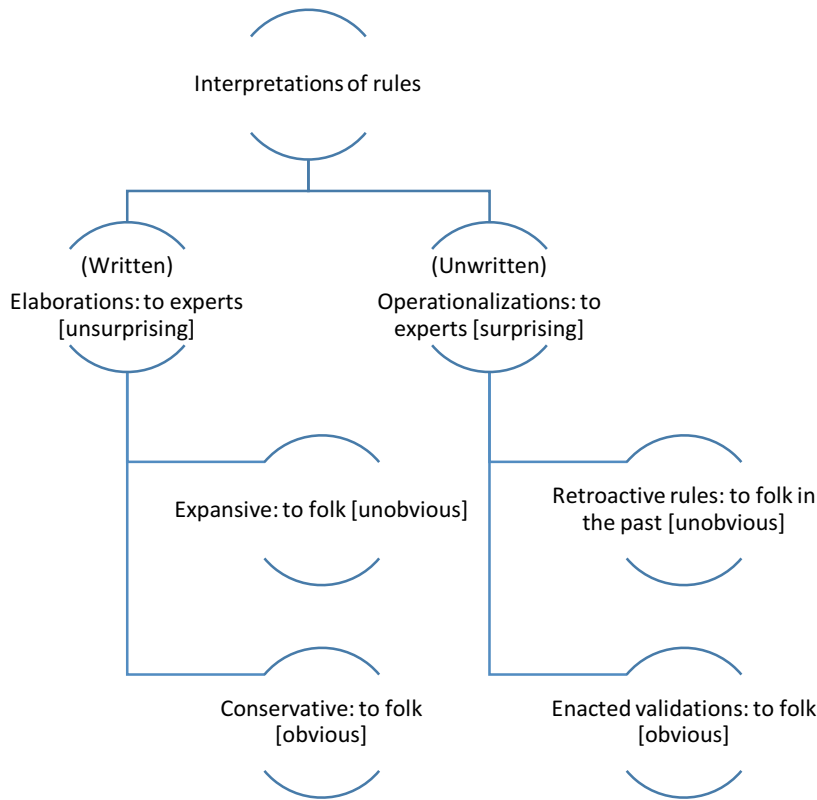
Retroactive operationalizations are interpretations of the law that explicitly empower or call a person to account for things they have done in the past, and for which at the time they had risked threat of formal sanction, though no precise injunction that targeted that class of action was available to guide the subject's conduct at the time. Retroactive operationalizations count as unwritten law because they violate our conviction that the person who is subject to a law should have a means of finding out the correct verdict on what is to be done. If a question of law is open to interpretation, and a subject decides to undertake an action of ambiguous legality, and that action causes complaint and is subsequently put to the bar, then it is hard to deny that the relevant aspects of law were tacit for the defendant.

But not all operationalizations are attempts to make *written* statutes precise; indeed, some of the most famous cases of retroactive legislation have involved political regimes putting their unwritten aspirations into concerted action, in such a way as would be surprising to experts.²¹ So, for example, if the analysis here is at all compelling, then the Roehm purge is a clear case of retroactive law in that grand, repugnant sense. (Fuller 1958, 650-1) (Recall that incident involved the imposition of capital punishment on political agents by fiat, and then the crafting a law later on to justify the legal grounds of the purge.) Whether we regard such violations of justice as promulgated law depends, at least in part, on whether we think the threat of formal sanctions existing at the time of the offense have been interpreted according to the appropriate picture and in good faith. (For secret Nazi statutes, probably not.) But because our concern in this section is with jurisprudence, not legislation, these activities will be better addressed under the heading of *secret law*.

²¹ Whatever we might want to say about retroactive legislation, there may be some hard limits on the ability of the law to be widened in scope to past events. That is, most of us would probably like to say that we cannot interpret operationalization, or even write explicit retroactive statute, in a novel way that pretends to hold in scope over the actions of whole classes of the long dead. For, one might argue, the fact of the matter is that dead men suffer no threat of sanction for their transgressions, formal or otherwise. And this is not a point about fairness or justice in what we can say (since it is likely that virtually all retroactive operationalizations are unjust), so much as a fact about what we can say in good faith. The matter will turn on the concept of personhood, and whether one takes this idea to be a legal fiction or metaphysical fact.

Whatever one's account, one must at least attend to the facts about existing practices. So, e.g., at the (admittedly ridiculous) Cadaver Synod, Pope Formosus's bones were dug up and held on trial for perjury. (Moore 2012) All the same, the Pope was presumably under threat of formal sanction for perjury at the time that he lived and ostensibly told his lies.

All of these classes of jurisprudential verdict might helpfully be captured in diagrammatic form (Fig 6):



Intellectual good faith

The common denominator in our classifications of legality is that they rest upon the presumed satisfaction of the ideal of *intellectual good faith*, a composite made up of criteria that lay out the conditions in which experts can be considered rationally trustworthy. Intellectual good faith involves setting the minimal conditions that need to be met by potentially adversarial players who participate in a common practice, the conditions under which it makes sense to say that they are all playing the same game or engaged in the same discourse. The ideal of intellectual good faith is meant to be a criterion in the politics of *respectability* or *honor*, and which is essential in helping to identify any *bone fide* representatives of the steward of the common trust.

And this is the criterion that allows the experts to distinguish between formal and informal venues in practical, complicated cases. Suppose, for instance, if the experts were to operationalize the meaning of “reasonable person” as “holders of estates who are possessed of a post-graduate education”, and that this was surprising to the folk, and not to experts, the latter being populated by an aristocracy. If we accept that the experts have not arrived at this construction in intellectual good faith, then it makes no sense to say that it has been disseminated in a formal venue, since *formality implies a stamp of official representation* which implies that the experts are *bone fide* participants in the game.

Notice, the ideal of intellectual good faith is not necessarily concerned with the *moral status* of expert deliberation: it concerns whether or not the experts are representing the steward of the public trust in line with the appropriate picture of law. Consider a Hartian analogy to a

characteristically non-moral practice -- playing a game of baseball. (Hart 1961, 142-5) We expect the umpires of a baseball game to offer their verdicts in intellectual good faith, and not to call *strike* on a grand slam. If an umpire calls *strike* when the ball is soaring over the crowd, then all rational observers will call this a call in bad faith. It is open to question whether we are still playing baseball together after such an unusual call, and depends on the appropriate picture of baseball – maybe it is a weird variant of baseball, or maybe it is a game of ‘scorer’s discretion’. But there is nothing in the *facts of the situation* that *forces* us to talk about the morality or immorality of the bad call, nor any need to talk about the moral claims of the quizzical attitudes of confused observers. If there is a necessity, it issues from considerations latent in the basic picture that tells us what it means to have good faith, not from the failure of good faith in the situation. Indeed, to say otherwise is to force us to adopt the view that blunders are a subspecies of evil conduct; and I would bet that most of us would prefer to regard such puritanical judgments as optional at best.

The ideal of intellectual good faith is composed of four criteria: *candor*, *integrity*, *fidelity*, and *humility*. To be candid is to represent the law in such a way that is transparent and not misleading, where “what you see is what you get”; the virtue of candor is *efficient uptake*. To have integrity is to maintain a coherent story, based on precedent and statute, which endures; the virtue of integrity is *to do things in a coherent way*. Fidelity amounts to accurate representation of the stakeholders and their interests in deliberation; the virtue of fidelity is *achievement of the correct ends*. And the value of humility involves placing limitations on judgments and verdicts; the virtue of humility is *to forebear from doing things one ought not do*. Some background of presumed agreement over the aims and purposes of conversation is required for some precise sense of cooperation, which is in turn needed for understand what is communicated. (Grice 1975) I think it is pretty sensible to say that whenever people who share a common language go about that project of reconstructing their conversational aims and purposes, they must ask the kinds of questions demanded by the criteria of good faith outlined here.

The virtues of intellectual good faith are not distinctive legal rules, in two senses. First, they need not (I suspect) be characteristic of good faith in uniquely legal discourse; probably, they apply to *all* discourses. But second, and more importantly for us, they are not themselves rules or principles at all, but rather kinds of *considerations* which we appeal to, ostensibly because they – when properly interpreted -- unify a set of rules as a distinctive type of practice. It is by drawing on these virtues that we *generate* appropriate principles to regulate the discourse. Now, each individual possessed of intellectual good will can spin a story about what they’re up to by fashioning principles out of these virtues, but the assumption of intellectual good faith requires at least a pretense of sharing the derived principles with other people in order to serve as a wellspring for cooperative engagement and not mutual befuddlement.

Consider, again, the oddball umpire who decides that a grand slam is a strike. If it is a strike, then the umpire’s verdict is confusing in every extreme – it invites a sense that, either actual rational deliberation is not being honestly expressed (failures at candor), or that highly unusual means are being deployed in counting the event as a ‘strike’ (failure of integrity), or that the umpire’s ends are decidedly not towards playing baseball (failure of fidelity), or that the umpire has simply violated the limits of their jurisdiction (failure of humility). These are four ways of being confused about how the practice is proceeding, ostensibly resolved in part by a finer grained picture of how the practice works. If we decide that the game of baseball can survive after such a bad call, we can at least agree that the call is, *at best*, a verdict that reflects an unwritten rule of the game.

1.2. *The hard jurisprudential question.*

Now that we have a rough idea of operationalization, and the thorough connection between operations of law and intellectual good faith, we need to ask whether or not we do ourselves any good in using it. What values does operationalization promote, and what values does it inhibit? We have seen the first draft of an answer in favor of publicity when we previously considered the formalists and realists, both of whom proposed different means of knowing the law. But answers that are more precisely geared towards the particular problems of jurisprudence can be and need to be surveyed, since they make motivated claims about the values of particular approaches to operationalization. And, importantly, they also emphasize the virtues of intellectual good faith in different ways, which have systematic effects upon which venues the experts prefer to consult.

There are two extreme answers open to consideration. On the one hand, there are those who advocate the *codification project*. (Reimann 1989) On this view, the ideal of law is to be perfectly *candid* in the expectations it has of subjects, making it all explicit; and any unwritten aspects of law are intrinsically unfair, potentially to the point of illegality. *The historical project*, by contrast, tackles the issue from a different vantage point, by emphasizing the historical *integrity* of the law and the traditions enlivened in precedent and statute. On that view, unwritten law is both potentially healthy and inextricable part of the legal order.

Utilitarian and legal positivist Jeremy Bentham was perhaps the single most obdurate proponent of codification, which calls to mind a relevant episode in the history of letters. Bentham, writing to then-U.S. President James Madison, offered to single-handedly rewrite the American criminal code free of charge. Bentham explained in full what this entailed: that the code would be streamlined for ease of consultation, with the general rationale for every particular statute laid out in such a way that it follows logically from the principle of utility. He also proposed to include “appendages”, or tests, which would lay out the conditions where a statute was enforced well or badly, though claimed this additional step was optional. Throughout his missive, Bentham stressed that his codification project would have a number of beneficial effects for the new republic: his code would remove the uncertainty of the law, would make the law more complete, would make it more intelligible to subjects in the contexts where it matters most (what he calls “cognoscibility”): particular disappointments and general anxiety, evil action by citizens, evil punishment by judges, and arbitrary exercise of power. (Bentham 2000, 8-9, 20-21) In so doing, he would perform no less a feat than doing away with the Common Law (which, to recall one choice phrase, Bentham called “a prodigious mass of rubbish”). (Bentham 2000, 21)

Now, Bentham’s codification project does not always strike people as either necessary or beneficial, or the Common Law as being entirely without merits. The German *historical school*, for example, suggests that the law organically grew out of the life and community of a people. (Beiser 2011) Historical jurists are committed to the idea that the operationalization of law is and ought to be regarded as ineluctably dependent upon the customs of a community, *not* from the will of the sovereign. For the historical school, codification only limits the flexibility of the law. (Reimann 1989, 97-98) On this view, it is at least sometimes better to leave codes unwritten, so that the law fits the parameters of the ways in which people want to live their lives.

Between these two extremes, we have a diversity of intermediate views. There is no point in exaggerating the difference between these two kinds of views. Indeed, the fact of the matter is that each picture of law entertains, endorses, and displaces the core criteria in different respects, and with respect to different audiences. Let’s consider briefly those we have focussed on throughout.

We see that the value of candor about the contents of law appears in Aquinas as a means of sharpening the testimonies of persons who offer accusations at trial, but is simply taken for granted for elements of the divine and natural law, which impinge upon the human law by offering

guidance on how to interpret charitably the political steward's rulings. This is a fairly lukewarm safeguard against opacity, falling well short of something like Bentham's codification project. The value of candor is better served by both formalists and realists, and their inheritors in 20th century jurists like Hart, Dworkin, and Fuller (and, to a lesser extent, with Austin); though the accounts offered about the nature of law are vastly different, they agree that there is very strong reason to present the law "as it is." So, here we might recall from last chapter some claims made by Fuller, who is keen to acknowledge that some statutes can foreseeably and justifiably make use of variable standards which can resist totally complete and satisfying written elaboration: e.g., standards like "reasonable person" or "not in bad faith". (Fuller 1964, 63-5) For Fuller, all of the virtues of intellectual good faith canvassed in the previous section are appropriate in directing the deliberation of experts, since they reflect aspects of the ethos of law. Meanwhile, Foucault and Marx would stress that the law either lacks, or needs to *keep hidden*, the things that it requires of us.

Similar remarks can be made with every other criterion and every other theorist or school. *Humility* has no place in Marx or Foucault, as power plays a central role in their conception of legality. Oddly enough, humility plays a similarly diminished role in Aquinas, though ostensibly for different reasons than Marx and Foucault – for Aquinas, the human law is continuous with the divine and natural laws, and so the jurisdiction of the just ruler is capable of legitimate expansion. Meanwhile, humility takes on very significant weight in Fuller and Hart, who each think there are definite limits to the powers of the judge.

Integrity matters equally to Aquinas, the formalists, and the 20th century jurists, though with differences in accent. For Aquinas, the value of past precedent is vitally important, encoded in the view we called 'rose-colored originalism'. And Dworkin, of course, regards integrity as the keystone to his approach to the philosophy of law, finely expressed in the image of the 'chain-novel'; still, his conception has an uneasy tension with his interpretive approach to normativity, which can permit wild, ahistorical deviations from existing law in times of moral crisis. Integrity is not quite so prominent with Hobbes, Austin, Marx, Foucault, or the realists. For instance, as we have seen, for Hobbes, the substantive body of the laws could be reinvented anew with a new sovereign.

Hobbes and Marx both emphasize *fidelity to set aims*, though the nature of those aims will be widely different (toward the commonwealth and the ruling classes, respectively); but for Austin, there are no special aims of law, no goods it is engineered to create and protect. (Austin, *The Province of Jurisprudence Determined* 1995) What matters is the genesis of law, not the common good. In an odd way, Foucault is an advocate of the importance of fidelity to the law; but he proposes that subjects are ultimately keeping faith with whatever force is most expedient in maintaining regimes of power over bodies. (Foucault 1977)

Which is all to say that no two sophisticated picture of laws will be quite alike, and often can offer surprising contrasts and strange bedfellows. But while there are different areas in which the pictures of law would prize the values of intellectual good faith, the point of discussing these ideals here is just to draw from them *the different articulations of why operationalization might be virtuous or vicious, in comparison to the elaboration of the written law*. All of these theories place value on the reasonable interpretation of statute by subjects; none of them deny that it would be better for subjects to have their expectations protected. They just put different accent on what kinds of breach of expectation are *justifiable*, in broad strokes. Codifiers are more likely to hold that surprising operationalizations are unjustifiable, and ignore those surprises that have gotten rubber stamped by a formal process; historical jurists can condemn unexpected enactments of the courts, just in case they depart wildly from the expectations of the historically informed subject. For Hart, if subjects (albeit, mainly, experts) encounter surprising changes in the jurisdiction of authorities and their powers, then it

must be through alterations in the rule of recognition; not so much for Aquinas, who requires that human rulers obey the demands of justice alongside everyone else.

If there is a dramatic difference which we might highlight in connection with unwritten law, it's the key battleground issue of whether or not *retroactive law* is to be tolerated. The codification project cannot tolerate retroactive statute – that is the very point of the project, if it is to have any serious meaning. Codifiers are also uncomfortable with enactments, at least in inclination. Hence, they can have no tolerance for secret laws, either, since secret law is defined entirely by reference to the unmet needs of a context, while the codification project must stipulate that law must be explicit in all contexts. Historical jurists are similarly hostile to retroactive legislation – the law moves in one direction only, which is forward. Such jurists are friendly towards enactments, given that they prefer the organic evolution of community norms to any perceived stipulations of the judiciary. It is only the casuists who have enough theoretical room to advocate on behalf of *both* retroactive operationalization *and* enactments, but only within the boundaries set by “the ethos of law,” however they might conceive of it.

1.3. *The prudential question.*

So we know something, now, about the nature of operationalization as a form of unwritten law. It is different from elaboration in that it potentially surprises the rational subject, and especially the expert; at the margins, the potential for rational surprise is what distinguishes written and unwritten law. Operationalization can concern laws that are already unwritten, and seek to offer a verdict that assigns legal responsibility and potential sanction to those who have acted in the past. Operationalization can also offer prospective guidance in the enforcement of formally promulgated statutes, just in case the measures taken up for enforcement of those laws does not receive a stamp of official approval.

Along the way we have seen just how pervasive the unwritten features of a legal system can be (and perhaps especially within legal systems derived from the Common Law). Now, supposing we are stuck with unwritten law or some element of unwritten law – that, *pace* Bentham, it cannot ever be fully extirpated. Suppose, as seems quite likely, that the codification project cannot be extended as far as we might like. Under what conditions, and why, do we in fact operationalize law? Furthermore, what are our best practices for doing it *right*?

There are at least two views that roughly fit the views we've seen offered by the main protagonists of the sophisticated picture we've described over previous chapters. First, we might look at a potentially rationally surprising deliberation and verdict over the meaning of a statute as an exercise in constraint satisfaction, or rational choice under non-ideal conditions. This view, or something close to this view, is found in Hart's lecture on discretion, and Fuller's remarks in *Anatomy of Law*. (Hart 2013) (Fuller 1971) The idea is that an expert in the law – whether on the street, in the newsroom, in the law office, or behind the bench – is going to know what the unwritten law is by asking a *narrowly circumscribed* list of questions regarding the conventions and aims of the law. The objective of those questions is to make sense of events that are happening “on the ground”, to construct a descriptively adequate model that helps us to explain the vicissitudes of the legal order.

Dworkin offered a radical alternative. For Dworkin, decision-making by the courts is better understood as deliberation which seeks to approximate *optimal* judgment, a self-consciously evaluative project whose goal is to interpret the law in its best form. As described in the previous chapter, Dworkin's ‘Hercules’ is an important and recurring thought-experiment in the body of his work, an ideal point of reference that tells us how deliberation works when it is done right. (Dworkin 1986, 254-58) What is characteristic of Dworkin's scheme is that it does not place as much explicit emphasis on the value of protecting the expectations of subjects, at least as norms of

jurisprudence are concerned. (To be sure, he thinks the view of law as integrity is in fact going to cohere more with common expectations than strict conventionalism (Dworkin 1986, 130); still, the main selling point of his view is that integrity functions as a distinctive ideal in political morality alongside justice and fairness.)

1.3.1. *Satisfaction and discretion*

Fuller proposed that there are eight constraints that any valid law must meet in principle if it is to count as law at all, a set of procedures that make law distinctive as a restriction upon the actions of subjects. (Fuller 1964, 38-9) I have captured his principled jurisprudence by calling it “the ethos of law”, a culture of expectations which every expert in the law must understand if they plan to apply their craft competently. These eight principles (generality, publicity, prospectivity, intelligibility, coherence, practical feasibility, stability, and conformity between rule and practice), together with Hart’s secondary norms and certain platitudes about background conditions of the law, form a kind of minimal legal ethics.

While we ought always to try put the eight constraints of his ethos of law into practice, as a matter of fact we are (with the exception of the generality requirement) only obligated to satisfy them in principle. (Fuller 1964, 60) Fuller recognizes that there is a trade-off between the hard demands of principle and the soft desire for results that are useful in coordinating the plans of subjects in practice, and as a result he allows for the possibility that some particular laws will not meet *all* of the practical requirements of the ethos of law at once – e.g., context may sometimes be required to keep some laws secret (violating publicity), and context may sometimes ask us to enact retroactive laws. (Fuller 1964, 91-94) The crucial requirement is that the body of law in general ought to have an appropriate set of procedural mechanisms that connect fine stately words with actual governmental deeds.

The general demand that we formally publicize and advertise our laws is not an absolute or categorical injunction for Fuller, but it comes close. For Fuller, the need for generality of laws is the closest that we come to ‘hard’ constitutive rules for law; failure of any of the rest, including catastrophic failure, will result in defective ‘Pickwickian’ law or worse. (Fuller 1964, 38-40) Still, the demands of utility create exceptions everywhere. Fuller’s general conception of the ethos of law is one that attempts to capture the bare *minimum* requirements for competent statecraft; so long as our general rules in the ethos of law are deployed, Fuller’s demands have been satisfied. (Fuller 1964) Fuller’s system asks us to deploy the principles artfully, but does not ask for perfection; the utopia where all eight principles are “realized to perfection... is not actually a useful target for guiding the impulse toward legality”. (Fuller 1964, 41-2) Reality offers too many complexities, and we ought to do our best with what we have.

As a result of his eagerness to admit that every constraint in his ethos of law lends itself to exceptions, Fuller also asks us to tolerate some tacit operationalizations. For example, in his view retroactive legislation is entirely acceptable (and commonplace) when retroactively making existing precedents and statutes more precise, as we observe in some cases of tort law; after all, if a plaintiff succeeds in an especially surprising way, then there is no alternative but to say that the defendant is being subjected to a retroactive penalty. (Fuller 1964, 56) According to Fuller, retroactive decisions are also well-grounded when they rest on prior enactments of justice norms that already hold sway in the legal profession. (Fuller 1971, 145-6) In this way, enactments and retroactive law can complement one another.

But some instances of operationalization are deeply troubling. Fuller does not equivocate when he insists that it is illegal to fashion laws out of whole cloth in order to impose strict liability for acts that are deemed criminal in retrospect. (Fuller 1964, 92) Now, granted, the whole-cloth invention

of retroactive statute tends to be associated with the most highly dramatized cases of tyranny available to recent historical memory. Still, it is easy enough to think of contemporary examples of pernicious enactment when we consider those cases of systematic discrimination and selective enforcement that we referred to as cases of practical encroachment. A recent instance of systemic discrimination can be found in the ongoing plight of citizens of color in Ferguson, Missouri, whose lives and livelihoods have been inequitably harmed by policies enacted at the community level by the police, sheriff, and municipal court systems. (New York Times 2015) (United States Department of Justice 2015)

What about the contrary question – whether or not it is sometimes best to forsake the operationalization of the law, either by giving the relevant rule an upgrade (writing out the practical demands of the code explicitly), or downgrade (leaving the legality of a rule open to question)? Fuller notes that there are cases where a rule needs to be left without particular guidance, in due deference to the fact that the law is an instrument of its users. So, for example, we tend to leave concepts like “reasonable doubt” unelaborated, without either written or unwritten precision, out of a sense that *it is up to each of us in practice* to figure out what counts as reasonable doubt. (Fuller 1964, 64-5) There are also areas of law that are unstable, in the sense that they concern context-sensitive aims, concerning areas of public policy that are highly sensitive to changing trends in society, politics, or the marketplace. These are places where the law needs to be left vague in order to allow sufficient flexibility to defer to the discretionary powers (or at least expertise) of extra-judicial experts. (Fuller 1964, 170-7) But on other occasions, we may consider the absence of operationalization and elaboration to be entirely wrongheaded: i.e., when law, and especially criminal law, is left unconstitutionally vague. (Fuller 1971, 147) The law needs to be kept on a leash.

1.3.2. *Optimization and the right answers*

Dworkin is not especially concerned with the value of written law. The relevant aspects of his discussion center around what he calls the “ideal of protected expectations”, which is the notion that the law has to provide subjects with fair warning about how they ought to act. (Dworkin 1986, 117) Dworkin thinks that this ideal is ultimately not intrinsically significant, since the need for fair warning is ultimately beholden to (and potentially moderated by) other questions of political morality. To be sure, Dworkin does recognize some value to protected expectations, and acknowledges that it is one of the attractive features of the conventionalist’s account. Indeed, one important reason for taking up his account of law as integrity is that doing so involves reference to implicit principles of law which are going to be partly known to experts in the history of law. However, the core value we need to care about is not whether or not a law is *publicized*. He does not defend unwritten law, or defend written law, or try to criticise either; he has other fish to fry.

The value or disvalue of protected expectations is ultimately an instrumental feature of our normative judgments of the system, not a decisive or self-evident value. For it is a fact that, in any given case, there will always be some rational subjects who will have their expectations disappointed; for instance, many subjects who go to the expense of launching lawsuits will do so only if they think they have a reasonable shot at winning, and may be surprised to find their expectations dashed. For Dworkin, the important question is not whether their prior expectations were *justified*. (Dworkin 1986, 140-4)

Dworkin’s conception of legal justification is not easy to meet. It is, in its way (and not surprisingly, given the above explanation), an *optimizing* conception of jurisprudential deliberation; it asks the judge to do the best they can on the whole, drawing from the legal and political resources they have available. It does not ask the judge simply to apply rules or norms in conformity with

certain procedural constraints; it asks the judge to apply the law at its best, *tout court*, by doing proper service to the community of principle in the manner described in prior sections. (Dworkin 1986, 254-258)

Aquinas furnishes an even more ambitious apparatus for expert deliberation. Ideal conduct is set in terms of the goodness principle and its sub-maxims, the principles of conservation, persistence, and rationality. The task of the human law is to guide people towards that ideal and away from sin as far as they reasonably can while in the office of steward. Judges must maintain good faith in the moral sense, of trying to do right by everyone, as unjust judges are unfit to offer judgments; that good faith requires aiming at the correct verdict over the right cases by consideration of evidence in a prudent way. For Aquinas, the idea of jurisdiction is a prudential requirement that potentially introduces surprising inversions of legal authority in those cases where judges behave in bad faith. (Aquinas 1944) For Aquinas, then, the bar is set to its very highest: your judgment must aim at being the very best, else there is a lingering prospect of legal usurpation by the righteous.

Despite its unmistakably optimistic features, the Dworkinian system cannot be labeled as a piece of naïve perfectionism. Dworkin asks the judge to aspire to deliberate like Hercules, but does not expect even Hercules to reform the whole of a legal and political system for the sake of justice. Hercules, like the judge of more modest powers, must acknowledge both what the law is and what it should be: for them, the law *is* however the proficient judge understands the offices of the political institution in their best light, while the law *ought* to be an institution that satisfies the ideals of the political subjects (themselves understood in a kind of idealized way in terms of rationality, of not wanting to use their rights to violate those of others, and so on). (Dworkin 1986, 400-407) In a manner of speaking, the law is the best and most useful sovereign available, while it ought to be the sovereign that a (decent) people require. All the same, Dworkin's conception of jurisprudence is far more onerous or demanding than Fuller's or Hart's, and its commitment to the moral aspect of law makes it an exemplar of a theory that endorses justice norms. What Dworkin seems to share in common with Aquinas is his disinclination to regard humility as a dominating virtue of law.

Summary of Operationalization Section

Whether we think that operationalization is a good thing or a bad thing, it is at least *a thing*, and we have got to deal with it. I have tried to cut our big pictures of law at their joints, at places where there will be distinctive disagreement over how we ought to handle cases of unwritten law in jurisprudential affairs.

In theory, unwritten operationalization needs to be contrasted sharply with written elaborations. The difference between them, in practice, is paper-thin. Both concern the ways that law works, and especially the rules of jurisprudence. It is true, but unilluminating, to say that operationalizations are informally promulgated and elaborations are formally promulgated. That difference, put in boilerplate, amounts to a difference between kinds of *venue* – the official word, versus the unofficial one.

The work in this section went into teasing out what that difference comes down to at the level of correct enforcement. I suggested that it comes down to a difference in expert interpretation of the body of regulative rules inherent in the law and, in particular, the level of *rational surprisingness* of their readings when they are assumed to be done in intellectual good faith: the less surprising and more obvious, the more we call it an enactment; the more surprising and unobvious, the more we call it an operationalization. (An added wrinkle, of course, is that the idea of intellectual good faith is itself open to interpretation within a pre-existing sophisticated picture of law: codifiers stress the importance of candor, and the historical school the importance of integrity, and so on.) At the

level of practice, differing interpretations of the value of humility are especially significant in cashing out the difference between optimizing and satisficing approaches to judicial interpretation.

Rational surprisingness of some interpretation of a law, be it common-law or statute, is the very criterion by which we can form a distinction between official respectable guides to conduct and less official advice. For this reason, we have maintained the thesis introduced at the outset: that the distinction between written and unwritten law comes down to a difference between official and unofficial venues.

2. Implicit constitutions

Whether or not there is such a thing as an implicit Constitution to a particular legal system depends, obviously, on how one thinks about the legal state of constitutions in general.

Almost every picture of law endorses some kind of context-invariant constitutive conditions reflecting the supposed conditions for legality, reflecting a conviction that legality is a definite kind of social organization (Foucault being the exception). But we should recall that some pictures of law, such as those of Hobbes and Austin, deny that there is any special legal force to particular Constitutions of particular states; that is, they deny that there are any binding rules that are capable of establishing *legal* limits on sovereign powers. On such pictures of law, the sovereign treats the Constitution of their state as a kind of interesting, perhaps weighty, political or prudential constraint on their conduct as a ruler, but deny that it has special *legal* status. This view is very much at odds with the presumptions (or, sometimes, pretensions) of many modern states.

So the status of a Constitution as a distinctive kind of foundational legal document – a “big-C” Constitution, which places definite limits on the powers of the legislature -- depends entirely on whether or not we are dealing with a picture of law that has *substantive* constitutive criteria. Since we are mostly interested in the legal viability of implicit analogues of the big-C Constitutions, much of the interest in the question, “is there any such thing as an implicit constitution?”, has to be reframed as, “is there any such thing as an implicit substantive constitution?” Though the substantive constitutions are the locus of our attention, we should keep in mind that there is not much harm (nor much profit) in discussing formal constitutions, as our subject remains unwritten law.

No matter what approach one might take towards the hard jurisprudential question – codifier, casuist, or historical school -- the most reasonable default stance that you might take towards implicit substantive constitutions is skepticism as to whether they exist. And, sure enough, absent further analysis, this skeptical pose seems to be quite defensible, since arriving at false positives in a discussion of the question of the essential rules of government involves high risk of legal error – errors which are potentially unsettling in their practical implications for government and subjects alike. But actually, it depends on which kind of implicit constitution under consideration, and the very idea of an implicit constitution begs for clarification. In what follows, I will briefly delineate four ways that people might speak of implicit constitution, and which invite different degrees of skepticism.

2.1. Four claims of implicit constitutionality

Talk about constitutions can be off-the-cuff, and done with varying degrees of plausibility. I think we can infer the existence of four potentially different kinds of ways of talking about implicit substantive constitutions. Taking inspiration from Dworkin’s literary metaphors, we might refer to the four varieties of implicit constitution as *appendices*, *rough drafts*, *revised drafts*, and *fan fictions*. Each example reflects a different quality of fit between a basic picture of law and a particular institutional context. Appendices are *almost certainly* cases of constitutional law (though barely implicit), and fan

fictions are almost certainly not cases of constitutional law (though surely unwritten); though much depends, as always, on the picture of law used in context.

As we have treated it, the implicit constitution of law is a set of rules for a particular legal system that presumptively endorses some set of constitutive rules for legality (setting the conditions under which powers are legal or non-legal), and which is *not* officially disseminated. But while we have left the idea of an ‘official venue’ relatively ambiguous, allowing it to be defined by the appropriate picture of law, we find that there is an additional criterion involved in formal promulgation of Constitutions: namely, that they be *recognizable as constitutions*. That is, they must appear in special formal venues (e.g., a particular book or set of documents) which are recognizable as having foundational status. Here, the “foundational status” of a venue means, at the very least, that it ostensibly contains (a) a body of doctrine that is *central* in fixing the content and manner in which inferences are properly made and business conducted in the system of government, and (b) which serves argumentatively as a *regress-stopper*, the terminus for the legislature’s legitimation of statute and policy. (Turner 2010, 75-6)

Appendices

On this way of conceiving the difference between implicit and explicit constitutions, some of us might arrive at a potentially surprising conclusion: namely, that the founding documents (say, Canada’s Charter of Rights and Freedoms, or the United States Constitution) are *explicit constitutions of their respective governments, while the interpretation of the provisions contained within those documents (e.g., in Supreme Court decisions) are part of their respective implicit constitutions*.

It seems to me that this could be a perfectly reasonable thing to say, so long as one has the right picture of law to vouch for it. For it seems to me that few would dispute that the interpretations of the Supreme Court are *asymmetrically dependent* upon the contents of the foundational documents, and, in that way, are less central. To the extent that this reasoning seems persuasive, then it will follow that the precepts used in Supreme Court decisions are, or at least may be, part of the implicit constitution; and since these decisions are utterly central to the living body of the law, that the very idea of an implicit constitution is an indispensable part of the jurist’s toolkit. Now, to be sure, nothing in this argument would mean that the interpretations of the Court are any less of a regress-stopper than the contents of the black letter in the founding documents. And hence we properly say “The Constitution obligates us to Y”, or “Policy Z is unconstitutional”, and in so doing make reference to Supreme Court judgments.

To the extent that this bit of ontological housekeeping seems plausible, we might think that the idea of an implicit constitution invites the least skepticism when it functions as *a set of serialized appendices to explicit constitutions*. While the interpretations of the Court are written law – that is, formally promulgated – they are not *written amendments to the Constitution*, but *written interpretations of it*. In this respect, they would occupy an interesting mid-point between written and unwritten laws, being both implicit as constitutions and explicit as laws. In this way, we would be permitted to say that *some* enactments will be formally promulgated, but not formally promulgated in the venue of the written Constitution. For instance, the 4th amendment of the US Constitution protects citizens from unreasonable search and seizure, and it, conjoined with the 9th amendment, has been interpreted by the Supreme Court to mean that citizens have a right to privacy. The protection of privacy *is* written law; moreover, the right to privacy is also protected by the Constitution, *having been interpreted that way by experts* (presumably apprised on the right picture of law); but the right to privacy is *implicit to the Constitution*, since the word ‘privacy’ (and its cognates) does not actually appear in the written document that serves as constitutional venue. Conceived in this way, the implicit constitution is a kind of appendix which provides much of the operational meaning to the

Constitution.

So it seems that the United States and Canada enjoy unwritten constitutions in the form of such appendices which are formally promulgated as laws, but not formally promulgated as constitutions.²² However, appendices need not necessarily be themselves instances of written law in any sense. Consider, as an alternative example, the state of the Constitution of the Yapese people, a population in Micronesia who live on a set of islands located approximately 450 miles south-west of Guam. Numbering slightly more than 10,000, the modern Yap peoples have experienced centuries of imperial rule, in turns by Western (German, Spanish) and Eastern (Japanese) powers. The Yap gained legal autonomy only recently in 1982 when the Constitution was passed. (Tamanaha 1988, 82)

The Yap Constitution provides a formal set of powers, declaring legislative supremacy, fundamental rights, and so on, which are more or less typical of Western states. (Tamanaha 1988, 87) But the Constitution also offloads a great deal of content to the power of tradition, a force that is both an entrenched and seemingly intractable part of the life of the Yap. (Tamanaha 1988, 88) Those traditions focus on securing generalized norms of deference in the form of a strict caste system, which distinguishes between upper and lower tiers of social classes. (Tamanaha 1988, 84-85)

Now, to the extent that we believe that the Constitution functions as a regress-stopper, we would have to claim that the ‘appendices’, in this case, make up the bulk of the contents of the law. But actually, this is a borderline case. For, as Tamanaha argues, these traditions of deference are forceful enough in practice that other written provisions in the Constitution (e.g., sections on fundamental rights) fall by the wayside – the word of law says that people have rights, but the caste system does not tend to offer the kinds of protections that would reflect any kind of respect for those rights. (Tamanaha 1988, 89) If we think that the caste system functions as law, and not as a merely political system of tolerated illegalities, then that system is not an appendix in the relevant sense.

Rough drafts

The idea of an implicit substantive constitution is somewhat less viable when it purports to be the only game in town – where there is, properly speaking, *no* written Constitution – meaning, the constitution is fully derived from an analysis of the legal order in such a way that is not dependent upon reference to a formal venue with constitutional qualities. If you will accept the metaphor, these are like ‘rough drafts’ of the political order, presented as essential limitations on the legal status of decrees. Supposedly, the case of Britain is supposed to be the exemplar of a state which possesses a constitution that stands alone. The idea that there is an unwritten Constitution of the United Kingdom is well-received and has a non-trivial place in the way that political discourse happens in that state. (Blackburn 2016)

Yet a glance at the commentaries on the unwritten Constitution of the UK will show that, in these cases, the idea of an implicit constitution is something like a rough attempt at capturing *the whole political institution* (including the proper classification of the ruling system as a form of government). So, for example, the Blair government attempted unilaterally to dissolve the office of the Lord Chancellor in 2003. (Stratton 2009) In an opinion offered by Sir John H. Baker, the Blair

²² A book-length defense of the proposal that America has an unwritten constitution can be found in Amar (2012). In it, Amar argues that the unwritten constitution can be read by appealing to four kinds of contexts through which experts might supplement their understanding of the written meaning of a statute: the linguistic context, historical context, contemporary popular context, and the context of modern case-law. (Amar 2012: 12-13) But at all points, Amar asks us to see the unwritten constitution as co-dependent with the written one. (Amar 2012: 10-11) In doing so, he offers us a set of appendices.

government was thereby guilty of adopting a “Presidential” style of rule, eschewing any rule by committee or consultation with the House of Lords in its decisions.²³ (Baker 2013) Baker argues that Blair’s move towards unilateral governance counts as an alteration of the implicit constitution of the government. (Baker 2013, 5) There are two important aspects to this case: the elimination of the Lord Chancellor, and the move towards unilateralization.

There is room to say that Blair’s move was unconstitutional across multiple pictures of law. Both Hobbes and Hart could make a case, here. First, though Hobbes was not himself an advocate of the division of powers (being forever a monarchist), his theory recognizes that the sovereign office could be composed of *presumptively* divided powers -- i.e., that there is nothing essentially crazy about talking about a sovereign oligarchy operating through committee structure. In cases where historically significant government posts like that of the Lord Chancellor are dissolved, even for just a brief period, we might say that the sovereign has undergone an internal change, not necessarily that one part of the office is acting *ultra vires*. We could also say, if we wanted, that the post was not dissolved, though the occupancy was vacant. Hart, in his usual way, could make the point more easily: that the powers are real enough, that nothing about the law changed. At any rate, these pictures may converge on the point. Blair acted beyond his jurisdiction, and hence it is no surprise that his decision was ignored in due course and the post reinstated.

But one might go further and suppose that the very project of consolidating power away from the committee structure of government is a change to the implicit constitution of that government. Would that proposal sound plausible? Does change in the advisory structure of a government amount to a change *in its constitution*? For Hobbes, the answer is no: this is a change in the advisory habits of the sovereign, different regimes of ‘sovereign self-care’. In other words: unilateralization is (in this way) *not a big deal* when we go about describing legal verities. For Hart, the answer is yes: this is a change in the essential rule of recognition and changes what makes the UK political order distinctive for what it is. Unilateralization is, on this view, *quite significant indeed*.

This is just to say that one might not on first glance know whether we are talking about formal or substantial constitutions when we inquire into the latter question: i.e., whether there is a secondary rule of recognition that is being changed at the highest levels of power (as Hart must say), or whether the change is a merely political one (as Hobbes must say). *Some* reference to the facts will help to answer the question of whether there is indeed an implicit constitution, but there is no purely empirical resolution to the question, as it depends upon interpretation of the grounds of law -- making reference to features of the basic picture that one would prefer to take for granted. (Dworkin 1986) In these murky cases, housekeeping exercises in political and legal philosophy turn into statecraft (and *vice-versa*). Our prejudgments about the correct or appropriate picture of law, complete with its constitutive criteria, will be decisive in determining how we characterize a central feature that supposedly holds for UK law. Much depends on the stakes that one perceives as attached to the adoption of one picture over another.

Revised drafts

A third type of implicit constitution is what we will call *revised drafts*. The idea underlying this concept is that it is just sometimes possible for the appropriate picture of law to be fully at odds with the explicit claims made by a constitutive document. That is to say, it is theoretically possible for a formally promulgated constitution to be mistaken about the grounds of law that it provides. In such cases, the true grounds of law would be implicit, driven underground by the explicit words.

²³ The erosion of governance by committee in Commonwealth nations is a phenomenon explored at book length in (Savoie 2008).

An example might help. The Constitution of the United States explicitly grounds the legal status of the republic in moral law, or rights of man grounded in natural reason, justice, and the aim of securing tranquility. The Constitution, of course, should be taken as a constitutive legal claim about the core features of the republic. These claims may or may not be strictly speaking claims of natural law, but they are certainly non-positivist in their implications.

Yet it is a fact that the concept of natural law has become, by degrees, less and less “natural” in American law over time. The historical school, based on combined fidelity to ideals of justice and integrity of a common code, did much to keep the spirit of natural law alive, though mixed with social sources. As the American Revolution receded far into the rear-view mirror, references to natural law became more focussed on preserving due process. (Fowler 1927) One might say that the American version of natural law began looking like Locke’s, but soon turned into a kind of Hobbesian picture, and then to Fullerian one. It would seem that drafts of the constitution were revised with the needs of the epoch.

And, to be sure, there are very important differences between these three ways of talking about grounding a legal system in natural rights. Put quickly and roughly, the Lockean view treats the natural right to property as an extension of one’s right to the useful fruits of one’s labors, and that such rights apply in full force regardless of whether any state respects them. (Locke 1823, 115-7) A lawful government is grounded in these natural ends: life, liberty, and property. Hobbes’s conception of natural right downgrades the natural rights, by and large, to the status of natural principles or virtues (except perhaps in those special cases where the sovereign specifically puts designs on the life of a subject). That is a very different grounding relation, since the constitutive rule of law is embodied in the will of the sovereign, which is presumed to be of equal extent with the demands of natural law. By the time we reach Fuller, the only ‘natural’ principles are those that belong to the ethos of law, a set of instrumental rules that help to promulgate made law effectively.

To the extent that this evolution in the laws involved transition from one picture of law to another, and to the extent that these pictures are thought to be very different, we are forced into a puzzling state. Either we might say there are multiple appropriate pictures of law (that our picture of law is as based on interpretation, and open to radical variance across time), or there is one grand picture available that is powerful enough to capture all these others (that law is a particular social kind with definite boundaries).

Fine enough: the difficulty is that both approaches provide a picture of law that is, at least in the first instance, inconsistent with the apparent claims of natural law found in the Preamble to the Constitution, *if they are taken seriously*. Hart’s conventionalism takes the natural law seriously, but renders reference to it otiose by the invention of the rule of recognition. Dworkin, by contrast, displaces the claims of objective natural law by interpreting them as redundancies, since claims of truth and objectivity of law and morality do nothing but add a bit of emphasis to our first-order claims about the law. (Dworkin 1996) In either case, the picture of law is an attempted revision of the explicit code – an attempt at a revised draft. A lurking implication, hard to escape, is that *the founders of the republic haven’t understood the grounds of their own legal system*. And this is a bold, surprising implication.

It is worth noting that virtually every political philosopher who specializes in legal philosophy might be on the hook for trying to revise the written word of actually existing documents. For instance, we may recall that Hart denies that the society conceived as a whole could be considered sovereign, since it would make it very hard to distinguish between revolution and legislation; and would result in some unlikely explanations of ordinary legislation, effectively amounting to the idea that the electorate’s acquiescence to constitutional law was a reflection of the tacit wishes and

intentions of that electorate, as opposed to mere indifference. (Hart 1961, 76-8) If we thought that the sovereign office was constituted by habits of acquiescence, then the very idea of a government would be left obscure, failing to distinguish between the organizational and intentional forces of governance with the habits of subjects in it. Moreover, it would fail to capture the facts about how the United States regards its constitutive documents as setting legal limits on the powers on the sovereign office. The sting, here, is that the Austinian (and, to a lesser extent, Hobbesian) might be accused of disagreeing with the United States about the delicate matter of what grounds the laws of the United States. That is fine and well. And yet, by invoking rules of recognition instead of natural law, Hart is subject to the same criticism.

Sometimes, when writers make use of the idea of an implicit or unwritten constitution to a state, they mean to diagnose something about the bearing of some political culture towards the very idea of authority, which may or may not stand at odds with written constitutional documents. For example, (Price 1983) argues that the American republic is fundamentally skeptical towards institutions in general, and authority figures in general. The distrust towards authority results in a kind of political incoherence: on the one hand, an antinomy towards experts in both the domain of jurisprudence and even extends toward doubt in the authority of science; and on the other hand, a reverence for the rule of law. (Price 1983, 9-11)

Here is the upshot: if, by contrivance, we were forced to accept what the founders intended for the republic to be grounded on rights based on natural law, and if we were compelled to agree with current opinion that invocation of such rights is otiose, then we might very well say that the founders are mistaken. The appropriate picture of law might *overwrite* the written word, so to speak, and in that sense be a draft revision. This need not be fatal to the fortunes of philosophers of law who disagree about grounding questions, of course; we might say that disagreements over the grounds of law are effectively *meta-legal* disputes. But if worse comes to worst, then perhaps the sensible conclusion ought to be that philosophers of law, in offering different constitutive criteria of law, are indeed offering subtle revisions to the scope and ambit of Constitutions.

Fan fiction

The fourth type of implicit constitution shares some features in common with draft revisions, with one important difference: it involves draft revisions that are not *canonical*. We may refer to these attempts at constitutional drafting as “fan fiction”, reflecting a phrase used to describe novels, stories, and other intellectual properties by authors who have no legitimate authorship rights with respect to those properties. The analogy is complicated in the legal context by unclarities over some of the essential concepts: the idea of authorship, rights, and the like, which are all set by the appropriate basic picture of law. So, in the context of a discussion of implicit constitutions, a doctrine counts as fan fiction just in case it does not track any of the demands of intellectual good faith: that it flouts the virtues of integrity, fidelity, humility, and candor. It is, head-long and robustly, plumping for only one particular, and perhaps peculiar, point of view.

In the present day the American extreme-right “sovereign citizen movement” provides a suitable example. The sovereign citizen movement is a constellation of overlapping forms of civil disobedience, organized around an anti-federalist legal agenda. Sovereign citizen legal theory (SCLT) operates against a contextually odd but sophisticated picture of law, described at length by Sullivan (1999). On Sullivan’s recounting, Sovereign Citizens assert these propositions to be true:

1. The government of the United States has created two forms of citizenship: the *federal citizen* and the *sovereign citizen*. By default, Americans (by-and-large) are sovereign citizens, in a sense ostensibly derived directly from the Constitution. Federal citizenship is a product of the 14th Amendment, and includes those who are directly connected with

the federal government: its employees, and citizens who live in districts and not states. (Sullivan 1999, 797)

2. There are also two different kinds of state. There are the fictional states which are thought to be little more than proxies of the federal government (that is, the states that most of us are familiar with, like Oregon, New York, or Alabama); and there are the *actual* states, which have borders that are identical to the so-called federal states, but which are governed in fact by the people residing *in* them. (Sullivan 1999, 797)
3. Sovereign citizens have rights that federal citizens do not enjoy. They do not owe income taxes; they have an inalienable right to travel, without any need to follow driving regulations; an unlimited right to arms; and an inalienable right to hold any public office, including judicial offices usually held by lawyers. (Sullivan 1999, 798-801) Describing itself as a form of the common-law system of justice, the sovereign citizenry believes that they are free to arrange their own court system to resolve local disputes. On occasion they have used this as a means of harassment of other citizens and public officials. (Sullivan 1999, 794)
4. The holding of foreign honors or titles is in violation of a version of the 13th Amendment that was passed but not formally promulgated. Any who hold such titles will have renounced their citizenship. (Sullivan 1999, 807-808)
5. Ever since the 14th Amendment was passed, the federal government has attempted to convert sovereign citizens into federal citizens, by encouraging the sovereign citizens into accepting contracts with the government by way of the social security system, among other federal programs. (Sullivan 1999) In this way, on the SC's picture of law, the federal government is ostensibly taking away the rights of citizens.

Members of the sovereign citizen movement hold odd beliefs, but a scholarly review of psychiatric reports shows that they are often competent to stand trial. (Parker 2014) The peculiar feature of SCLT is that it stands entirely at odds with the convictions of those who most of us recognize as experts about American law: i.e., the entire working judiciary. This owes to the fact that, according to SCLT, all lawyers have renounced their citizenship, since when they pass the bar exam they are granted the title of "Esquire". (Sullivan 1999, 808).²⁴

And it is essential that we understand that the legitimacy of SCLT's ambitions to function as a purveyor of unwritten law involves sidelining the experts in one fashion or another. Indeed, that is exactly what you would expect, if my thesis is right. For in order to control the unwritten law, you have to be in control of the whole professional class that functions as steward over the sophisticated picture of law that holds in force.

2.2. Stakes

So there are at least four ways in which we can talk about implicit constitutions, and they invite different levels of disbelief. There are what we called *appendices*, which are implicit constitutions that are asymmetrically dependent on explicit ones. Some appendices are formally promulgated as law,

²⁴ What makes it especially clear that SCLT is constitutional fan fiction is the fact that, even if you grant all the other peculiar beliefs (1-5 above), it should still be surprising to find out that the American Bar Association is an agent of Britain. This claim is at least unobvious, and more than a little surprising, no matter what picture of law you operate in. The history of official American denaturalization of citizens is problematic enough, without needing an injection of fresh adrenaline from the public. (Weil 2012)

and are properly regarded as part the constitution, without being formally promulgated in a constitutional venue. This is the implicit constitution, but counts as written law. Other appendices involve explicit deference to the traditional features of civic life. Such are implicit constitutions, and unwritten laws. Unlike appendices, *rough drafts* are implicit constitutions that “stand alone”, in the sense that they ostensibly have force that is independent of the existence of any formal constitution. *Revised drafts* are proposed pictures of law that contradict or substantially revise features of the basic picture that is explicitly embedded in a Constitution, but which allow most of the sophisticated picture of law known to experts to remain intact. *Fan fiction*, in contrast, proposes a basic picture that departs significantly from the basic picture explicitly and formally promulgated in the constitution, and which leaves very little of the formally promulgated parts of the sophisticated picture of law intact.

These are ideas of consequence, and the stakes are plain to see. But one of the less obvious, yet still important, functions of a constitution is that it tells you what kind of people you should defer to, broadly identifiable by either character or competencies. Each of these cases offers up a vision of who counts as an expert about law, i.e., a member of an honored class that is capable of giving guidance on how to act legally. To put a finer point on it, each attempt to define what counts as an implicit constitution indulges in what we might call the politics of *institutional respectability*. Examples are already at hand. The Yap people defer to some extent to the written constitution, but regularly default back to the caste system; if you want to know what to do as a matter of law, you do not go to the courts (as they have so far remained quite silent on most issues of significance in this regard). (Tamanaha 1988, 86) The American Bar Association, according to SCLT, does not count as being an honored or expert class; worse, its members do not even possess any legal standing whatsoever. (Sullivan 1999, 808) According to some potential commentators, the unwritten constitution of the UK demands committee consultation, not Presidential Rule; the Presidential style of rule reflects a kind of governance that is not strictly appropriate for the United Kingdom. (Baker 2013, 7n12) Each picture of law strongly suggests that some sorts of people are more worthy than others, and with varying degrees of success, depending on the kind of implicit constitution we are talking about. So the cogency of the kind of unwritten law here *proceeds downwards from* appendices, rough drafts, and draft revisions, using their recommendations about expertise in order to weigh against the selective fan fictions of various groups.

Expertise and institutional respectability

As far as law is concerned, experts must be institutionally respectable. This idea of institutional respectability, as I understand it, has two properties: respectable persons are at greater risk of legal error, and they are in positions of relative advantage.

First, institutional respectability implies *disproportionate risk of legal error*, meaning, referring to a class of people who are generally positioned in the social order in such a way that they must as a matter of social status be capable of attending to the true details about the contents of law in general. For a convenient name, to be in a position of disproportionate legal error is to be a ‘*central stakeholder*’ in the institution, meaning that they are vulnerable as subjects of law. This vulnerability owes to a greater proportion of regulation and increased reputational stakes associated with failure to conform to those regulations.

The risk of legal error is not necessarily an issue of being actually subject to blame or sanction, or practical risk, or risk of harm if one gets the law wrong; it is not necessarily the case that they are a class of people who are more prone to be caught. Rather, it is a reflection of the fact that central stakeholders are expected to possess true knowledge about the law in their actions, and that they face higher existential stakes if they should falsely represent the law owing to their social status.

In contrast, citizens whose lives are beyond the regulative scope of most of the laws, and who are not made to be socially invested in them, are *peripheral stakeholders*. To see the difference, suppose every citizen had an individualized, invisible auditor who monitored every one of their actions, and who kept an objective, infallible record of when the laws have been breached – everything from tax evasion, to murder, to jaywalking. Also, let's suppose that the invisible auditor also kept track of the things that persons of notoriety said about what the law demands. What you will find is that legal regimes could not find fault in all classes of person equally, owing to the situations addressed by the laws, and the different situations people find themselves in.

Now, being a central stakeholder does not mean necessarily mean possession of a position of *honor*. To be sure, the honored classes (judges, community leaders) are central stakeholders in their societal contexts; but so (can be) criminals and delinquents. Both the legal experts and the masters of illegalities are scrutinized by virtue of occupying their social classes, and in that sense both of them are at greater risk of legal error than the survivalists who live in the mountains of British Columbia, where there are presumably fewer occasions to get laws wrong in general. (To be sure, everyone in a state runs the risk of flouting particular laws, including our survivalist; the point is that there are fewer of them to flout, and/or the stakes they face are not based on social status.) We can also include children, and those divested of reason.

But experts are not among the dishonored classes, since it is part of the nature of expertise that the expert be hypothetically worthy of deference, which cannot be the case if one is part of a class which is by definition unworthy of deference. So, that leads to a second criterion that the respectable classes must meet: they must be in a *position of relative advantage*, in that its members are disposed to be respected as satisfying a function that is perceived to be necessary in their social context. And, here, “respect” is a fairly muted term that acknowledges benefits owed to the class based on the state of the norm, not necessarily admiration for its beneficiaries.

That is, roughly, what it means to be institutionally respectable: members must be central stakeholders, and they must be in a position of relative advantage. Institutional respectability implies both dependency upon a system and doing well by a system. You can't be respectable without having some stake in the system, though you might find yourself on the wrong end of the system (e.g., delinquents); and you might very well be respectable owing to your talents and capacities, but not be *institutionally* respectable (e.g., Tarzan, perhaps). The conjunction of these two features together will make members of some population appear to possess special powers and privileges with respect to the institution they are a part of. (In fact, it only guarantees the appearance of having such powers, but often the glamour may function to create a position of actual advantage.)

Obviously, institutional respectability is a necessary but not sufficient condition for expertise in law. It is possible to be knighted by the Queen and not know the first thing about the government of the UK. That said, experts in law are drawn from the pool of the respectable classes, under some rule that is guided by considerations inherent in the basic picture. For among other things, the basic picture of law provides some idea about who counts as respectable, based on different interpretations of what kinds of person are fit to achieve expert status, either by perceived competence or character.

Summary of Section on Implicit Constitutions

The difference between written and unwritten law depends on where the law is presented, which depends on subjects being able to see and know *who the experts are*. The minimal thing we can always say about experts in a legal system is that they are both vulnerable and advantaged: vulnerable because their social status is tied to good epistemic performance, advantaged because that social

status is apt for validation. Real or imagined expertise is determined by the basic picture of law, which provides us with an even better set of instructions on how to figure out who to defer to by way of telling us who counts as the steward of the common trust. When the experts refer to the appropriate political authority outright, the thing they are pointing to is the written constitution of the polity; but when they redraft the existing words, or offer a draft of implicit system of governance, they are offering potentially true claims about implicit constitutions, properly speaking.

The importance of a basic picture and its actual or ostensible constitutive criteria can be made clearer through a story. Suppose that a seasoned world traveler, Jude, is lost in a foreign country, Abcedistan. Jude is on a mission that obliges her to consult the local authorities about legal practices of interstate commerce. Although Jude is intimately familiar with the economics, social circumstances, and politics of neighboring countries, her studies never extended to the point where she had even a surface-level conception of what might count as the appropriate political authority of *Abcedistan*. Happily, she speaks the native language, and is prepared to seek out the offices of law at first dawn, so that she might complete her task.

Fate intervenes, and she never gets the chance. Unfortunately, on her first night, she suffers a stroke which produces in her a state of prospective amnesia, where she is unable to form new memories. As a result, she hasn't got a conclusive idea about whether there even is a sovereign in Abcedistan, nor (if there is one) who the sovereign might be, or what they might want. The laws may be there, and may be formally promulgated, but insofar as she is concerned they might as well *all* be unwritten. She could, of course, just *ask* – but within the space of minutes she will forget, and the memories will never have enough time to be consolidated into the form of justified belief.

Whenever we try to communicate with people who speak an unfamiliar language, we are in a position of 'radical interpretation'. (D. Davidson 1973) In this odd circumstance, although Jude can speak pretty well with *the people* of the country, she is in a position of radical interpretation *in relation to the political order* – she will always be a stranger to the politics of the land. She hasn't got sufficient resources to engage with the rulers of the society in intellectual good faith, where the virtues of candor, fidelity, integrity, and humility might take on some kind of shared meaning. All she can do is to charitably interpret who counts as an expert, according to prior prejudice and theory about the verities of law that she has encountered that are salient to the region, and suppose with equal charity that which respectable sort that she consults for legal advice is more or less speaking truth.

But in this context, charity tells Jude very little unless it is accompanied by the right basic picture. A reader of Aquinas's might ask us to seek out and find the righteous man, whose fair-mindedness and Catholic piety allow him to represent the spiritual needs of the population. The practical standpoint of Fuller and Hobbes asks us to find experts who know how things work, and who has a robust sense of managerial competence – how to set up the initial parameters of a system in such a way as to produce the greatest advantage. The critical dissident like Marx or Foucault would advise you to find the people who invent and control other people, who exert the lion's share of power over the minds and self-identities of others -- the masters of the spiritual economy, so to speak. And a proponent of consulting regularities of deference, like Hart or Austin, would ask you to find those who are apprised on the normal or traditional state of affairs, the regular political habits or agreements that comprise a political society. All of their readings of the situation deploy the principle of charity equally, but with potentially different advice on who counts as an expert. On one day, Jude might be told to go to the bishop who says that interstate commerce of the relevant kind is fine, since God permits all missions of mercy; and the next day, to the wise and worldly taxi driver who says that it is not, as no such exchanges will be tolerated by the police. By

virtue of her condition, Jude is at the very highest risk of legal error – sitting at the epicenter among central stakeholders.

To be sure, these strategies for deference which issue from different pictures of law do not necessarily need to lead different radical interpreters into very different directions; indeed, there may be enormous overlap, even as they consult different groups of would-be experts. But it is just as possible that the different communities of would-be experts might diverge in significant ways when implicit constitutions are concerned, and not when it comes to sophisticated pictures of law, as in the case of constitutional draft revisions. Disputes over grounding need not be catastrophic, and consensus across pictures is still possible. And the more consensus can be found across diverse perspectives, we can be relatively more confident that we have identified an unwritten constitution. But on occasion they might diverge sharply when it comes to the hardest questions of unwritten law, and in ways that might not be amenable to empirical resolution, as in cases of constitutional fan fiction.

Here's the upshot. Jude is not totally lost in Abcedistan. She can choose one scheme or another, based on some patchwork assemblage of beliefs about what the law seems to be and ought to be. But it is a fact that whatever picture she decides upon will be hostage to her prior ideas about the economics, society, and traditions of the region, and her own ideas about the relative weight that considerations of justice ought to have over social power. And when it comes to implicit constitutions, the folk are *all* in Jude's position. Better and worse arguments can be crafted at the level of expertise, but for her there is no substitute for the articulation, defence, and popularization of the basic picture of law.

3. Change and stability

Our rules have an intimate connection with our expectations. We discover tacit rules when we try to explain what we take for granted when things go otherwise; we make rules when we want to take things for granted so that they don't go otherwise. Laws are rules presented by the appropriate political authority, the steward of the public trust. In this way laws provide sanctuary to our expectations, the simple project of getting on with things as they go. But things change. Kings change their minds, they die, or they go mad. And people change, their values change, they starve, they go mad. Law watches things change, and says: fine, but all the same, here is how things should go.

We try to follow these rules, armed with a basic picture of law, and with access to experts. And sometimes, in spite of our diligent efforts, we get it wrong regardless. That owes to the fact that some pictures of law impose greater risks on subjects, and as a result, produce greater potential for unlucky error on even the attentive subject. In general, those views which bottom out in verdicts of definite individuals (occupants of the sovereign office) under some definite description (well-known constitutive rules that establish the powers of the office) are most precise, and introduce the least risk of legal error -- for instance, Hart's positivism. Those views which only rely upon the correct application of rules under some description or pattern without making clear reference to criteria for identifying occupants of the office will threaten subjects with greater risk of legal error -- for instance, Aquinas's natural law theory. The reason here is that the success of our kind of rule depends upon tracking the correct verdicts under proper conditions. And answers to the question, '*Whose* verdict?', are more instructive than answers to the question, '*Why this* verdict?', though the two together are better than one in isolation.

In the absence of any organized institution which might maintain the stability of the law, there are two great forces which assure the production of stories which purport to answer that question: the moral convictions of subjects themselves, and the demands of the political scene.

3.1. *Justice norms*

A justice norm is just this: a rule that is promulgated by experts, by virtue of their authority as apparent practitioners of justice, whose demands might nevertheless be held under threat of formal sanction. Such rules are meant to moderate potential areas where the law may change, either by encouraging alteration of the rules, or by providing a means of satisfying the rules in times where there is some kind of interesting change in the state of affairs.

Such rules can operate both *inter-regnum* and *intra-regnum*. In the former, the affairs of justice will operate at the biggest level, concerning (say) rules for succession of kings, and *potentially* the rules of just war; and, in the latter, may concern decrees of the sovereign considered to be *ultra vires* owing to their manifest injustice. Both varieties are important, but the ‘big-level’ justice norms overlap too significantly with issues in moral and political philosophy, and with constitutive criteria in general, so we will confine our attention to the cases of unwritten law that most preoccupy the attention of legal philosophers: operationalization, and their norms of jurisprudence.

When left to their own devices, people will arrive at two major kinds of answer to the question of what rule operates as law. Our discussion, brief as it is, will content itself with a Manichean division which is more or less commonplace. Either you hold an optimistic picture of law, and believe that a ruler *qua* ruler is an advocate for justice, and so the appropriate political authority must, or should, fall under that description; or you don’t believe that rulers have those qualities, so you don’t share those expectations. You need an optimistic picture of law in order to sign off on the existence of justice norms as a form of unwritten law: either by saying that moral convictions have a reliable causal influence on the political order, or by saying that they share a constitutive relation.

What justice norms are (not)

The nature of this category of unwritten law presupposes facility with a theory of justice, and the idea of justice is, if anything, more contentious than philosophies of law. Certainly, the pictures of law we have canvassed have held contrary opinions on the matter. In Aquinas, we found that justice amounted to natural moral law, which is a *paternalistic* doctrine based on a mixture of deontological and consequentialist logics. In Hobbes, justice was *crypto-contractualistic*: in its origins justice is supposed to be based on natural principles of equity, and in its realization justice is actually based on the will of the sovereign. For Austin, justice was ultimately *divine command*, and we do our best to discover the requirements of his commands through the consequentialist science of utilitarianism. For Marx, justice was a welfarist doctrine which demanded the allocation of economic resources according to their *real value* (understood as socially necessary labor time). For Fuller, the drive for justice amounted to the *rule of reciprocity*, which mediates between distinctively moral claims of autonomous duty and contractual exchange (Fuller 1964, 19-27); for Hart justice required (roughly) the *equitable* treatment of persons under the presumption of equal moral standing (Hart 1961, 159-160); and for Dworkin, justice required a form of *liberal egalitarianism*, i.e., which insured people from harms suffered from factors that are beyond their control. (Dworkin 2011, 360-1) Each, in other words, has their own distinctive moral picture.

The interface between law and morality may be correspondingly complex, if we spend even just a moment of time trying to unravel the meta-ethical underpinnings of our first-order moral convictions. And, sure enough, those complexities are well worth attention, being intrinsically valuable in every sense that matters. But combing the depths of meta-ethics is not necessary for our project here, at least not at the present stage of examination. For if we can find some interesting common ground that we can take for granted that they share, then too many details about moral

theory will distract us from the core project of articulating the idea of what a moral venue would look like, and hooking that up with the notion of unwritten law. And, happily enough, it seems to me that there are two common denominators:

- (a) Each is interested in comparing the idea of law to the idea of *justice*, where justice very roughly means something like this:
 - a. a set of rules and/or basis for comparison of cases, whose point is to tell us what ought to be done;
 - b. proficiently applied (i.e., where ‘like is compared with like’);
 - c. whose aim is to grant whole classes of people what they are due as persons;
 - d. as moderated by factual and historical inequalities;
 - e. and which give rise to judgments about our rights, duties, powers, and liberties.
- (b) *The truth of moral ought-claims* can be apprehended as mapping onto verdicts concerning what is to be done as offered by the *informed virtuous person*.

Suppose you follow me in thinking of this as a kind of a *reductive basis* with which we might understand the cognitive contents of the global concept of justice. We can then think of the community of virtuous persons as an informal venue for promulgation of demands of law to those who are curious about what they ought to do. The subsequent and natural question is whether, and to what extent, the verdicts of the virtuous person are strictly different from the demands of law -- whether, and under what conditions, the demands of the virtuous person are causally efficient in forcing the hand of the appropriate political authority (what we called ‘weak optimism’ in the introduction), and most interestingly, when the appropriateness of a political authority *owes to* the steward’s real or imagined virtue (‘strong optimism’).

So much for what justice *is*; here is what it *is not*. Although there are a number of cases where a law is invalidated simply because it fails to meet certain norms of justice, not all of those cases concern us. There are two areas where justice might impinge upon political will here: prospective moral convictions, and cases of *bone fide* natural law. Two examples are easy to come by. Suppose, for instance, we think back to the cases of the grudge informers, and posit that the informers faced no threat of formal sanction from the Nazi government. So we might ask: “Was their conduct illegal, even in the context of the Nazi regime?” Fuller gives us the tools to suppose that there was no law at all for anyone to consult; but another view is possible, owing to Justice Radbruch, who argues instead that the grudge informers violated the “higher law”. (Fuller 1958, 559-660) This latter view seems to be out of the question if we adopt any modern picture of law. For our interest is in informal promulgation under those conditions where there *is* a threat of formal sanction, and presumably most of us would like to say that, in these cases, either Hitler’s government was the stamp-bearer of formal sanctioning, or there was no law one way or the other. Now, that might allow us to consider the grudge informer’s case as a *retrospective form* of unwritten law, i.e., in the context of post-war Germany, as Hart suggests. (Hart 1958, 619-620) But it also forces us to remain silent about the harder question of how the grudge informers ought to have considered their conduct when they were doing it, as far as legality is concerned. A second class belongs to hard cases where the appropriateness of action is considered in the context where there is no obvious appropriate political authority; for instance, the legality of resorting to cannibalism when lost on the high seas without hope of rescue, as in *R. v. Dudley & Stephens* (1884).

Some will like to say that the participants in these two sorry cases engaged in actions that were illegal even at the time and in their contexts. We might call cases considered under that description *moral vetoes*; and we might argue that they invoke blame from the conscience in a way that ostensibly makes some kind of ‘law.’ But actually, in neither of these cases are we discussing either unwritten laws, or written laws, since neither seem to involve the threat of formal sanction from the

appropriate political authority. Instead, they are (at best) a grander species of rule for which we can offer no account at the moment. If they are indeed law, then it would seem that their legal status is beyond the powers of the present work to account for.

Still, it is worth raising to prominence the fact that many of the most riveting cases of justice norms are *not necessarily* moral vetoes in that sense. A *Thomist* is free to argue that, when Daniel accused the rulers of Egypt of licentiousness, the threat of formal sanction was offered *from God*, and failing that, from the practitioners of divine law. They might then tell the story about the Word, it being promulgated formally to the angels, who then formally promulgate it to the recipients of revelation and by way of reason and science. When conceived in this way, Daniel's accusation was not merely a moral veto, but instead turns into natural by-product of the ordinary course of business, legally speaking. And we can account for it as an unwritten law in the usual way, with all the usual attendant risks.

Though some of the force of natural law theory emanates out of attempts to raise these exceptional cases to the level of legislation, much of it is more interested in accounting for the seemingly intractable role that justice has in the actual deliberation of judges, experts, and even subjects in determining what forms of action are legally permitted, in those cases where a threat of formal sanction is a going concern. We concentrate exclusively on these latter sorts of cases, not knowing how to think through moral vetoes themselves.

Justice norms in case-law

Cresting on our survey of the practitioners of unwritten law, we find that there are two degrees of strength behind endorsements of justice norms. Weak optimists like Hobbes and Fuller hold that moral convictions do causally impinge on legal validity. For Hobbes, moral authority derives from legal authority, and that our reasons for supporting law are also moral ones. For Fuller, the processes that bind legal regulation inherent in the ethos of law push the law away from practicing great evil. A common current in both views is the emphasis placed on the justice implied by successfully securing *order*, adhering close to the reductive basis of justice described previously. For Fuller this involves, or strongly suggests, a satisficing approach to jurisprudence. Strong optimists – Dworkin and Aquinas – argue that there is an even more robust connection between law and morality, that in some significant sense these two great systems of thought are conceptually codependent. For Aquinas, strict legal truth depends on the system of regulations appearing like justice to the folk. For Dworkin, law is a concept of political morality, whose point is to secure a system of rights. Both of them ask us to deliberate in correspondingly more complex ways about our moral convictions, and for that reason oblige us towards making use of the optimizing strategy.

A distinction is sometimes made between critical and conventional forms of morality, roughly mapping onto the difference between *philosophically reflective morality* and the *morality of 'common-sense'*, respectively. For us, exemplars of the two categories can be identified by thinking about cases of morally unsurprising verdicts and reasoning for experts of law, and what is morally unsurprising to the folk. Sometimes the intersection between critical and conventional forms of morality promotes harmony, and sometimes it breeds conflict. In either case convention and critical morality have the capacity to usher in a change to the operations of case-law. When they work together in helping justices to arrive at a verdict, we find it most easy and comfortable to slip into the stance of optimism, and grants us fine insights onto one of the best-behaved varieties of unwritten law. But when they conflict -- as in cases where "activist judges" challenge the operational meaning of precedents established in case-law in a fashion that is controversial to the folk – the stance of moral optimism obligates the judge to opt in favor of the best and fairest surprise, even if the cost is to overturn precedent.

It is easiest to see the ramifications of optimism in one's picture of law when we supplement these abstract stories about legal grounding and concentrate, instead, on the small changes to law that happen at the point of operationalization. To explore the differences between these grades of legal morality, we will test them against two cases of characteristic justice norms given treatment by Dworkin: *Elmer's case* and *Brown v. Board of Education*. (Dworkin 1986, 15-20; 29-30) *I choose these cases to discuss, mainly, as Elmer's case* provides an instance where folk and critical morality converge in their opinions, and *Brown* is a case where folk morality was in a state of tumult.

Elmer's case

The scene is set in New York, late nineteenth century. Consider Elmer, a man who stands to be the main beneficiary of his grandfather's estate, according to his grandfather's will. Elmer killed his grandfather in 1882, fearing that his grandfather would change the will. Elmer was caught and sent to jail. While in jail, Elmer demanded to receive the sum left to him in his grandfather's will. His counsel argued that there was nothing in the statute of wills that bars a beneficiary from receiving the amount allotted, just because the beneficiary happened to murder the deceased. Not everyone agreed. Elmer's sisters – next in line for inheritance -- took the issue to court, and demanded that Elmer be blocked from receiving the amount bequeathed to him. The judges sided with the sisters against Elmer. (Dworkin 1986, 15-20)

Now, in retrospect, it is almost unimaginable to think that *Elmer's case* could have turned out in any way other than it did. A verdict in favor of Elmer would have led to pernicious systemic consequences, including both toleration of incentives for patricide and corrosion of the integrity of laws concerning the transfer of holdings. But the statute of wills, taken on face value, had absolutely nothing to say about the matter. When this narrow department of the law is considered in isolation, it is rationally surprising to suppose that it will make exceptions in this case. (Dworkin 1986, 18-20)

Everything depends on how rationally obvious we believe the verdict turned out to be. On the one hand, it could be either a case of *retroactive operationalization*, or it could be a case of an *enactment*, depending on our sophisticated picture of law. If it is a retroactive operationalization, then it is consistent with many pictures of law, including the positivist view, and would not necessarily be a justice norm (though it might very well be *just*). And it would be retroactive just in case we think that it called Elmer to account for a thing he had done in the past, for which he had risked threat of formal sanction, even though no precise injunction had targeted the estates of murderers at the time the crime was committed. But if we consider it in another light, we might think it is a product of something more like informed discretion, drawing upon features of the background conventional morality which were reasonably clear to those who are subject to the rule, but which could be admittedly surprising to experts who are apprised of the black letter of the law. In this interpretation, it would be a very good instance of a *justice norm*. And it is a justice norm, because the verdict could only strike us as being a legitimate formulation of the law if viewed from an optimistic point of view, since murder is (I think we all agree) immoral.

There is nothing absurd to either interpretation. But on the face of it, the most natural explanation of the judge's decision is intuitive: we think Elmer was unjustly profiting from a capital crime, and so *of course* we think his claim to inheritance was null. In other words, intuitively speaking, morality matters to law. We can rationalize and expand on this intuition in various ways: we can say that Elmer's prior expectations were not the sort of thing worth protecting; and that his highly specific compartmentalization of law into discrete modules was, from a legal point of view, perverse. What matters, though, is that this is a case where justice norms were an enactment.

Aquinas sought harmony between the systems of law, with the moral law impinging directly on human law; and so he would agree entirely with the decision against Elmer. For this reason, we might think that Aquinas had the right story to tell.

Dworkin agrees with the Thomistic verdict, but offers a different explanation. For Dworkin, the reason why we find the verdict against Elmer so persuasive is that it draws from truisms already existing in facially unrelated criminal statutes. Every other bit and piece of the law strains to punish the murderer; it is a principle found everywhere in the criminal law that the criminal should not be permitted to benefit from their own wrongdoing. (Dworkin 1986, 20) *This* law did not (or, at least, was silent about it), but *The Law* as a whole certainly does. So the question is not whether the consultation of the body of law as a whole is a prudent move when going about jurisprudence; the question is how we are supposed to justify this mode of decision-making through norms of jurisprudence. Granted, we *could* have adopted a modular reading of these statutes, with strict limits of application. But legal interpretation is holistic, not modular, and forbearance from consultation of the policies embedded in relevant neighboring statute would be to commit to the tyranny of artifice.

The difficulty with these optimizing approaches to the rules of jurisprudence is that they offer up greater risks of legal error, the more they depend upon the complexities of interpretation over matters of fact and principle. Dworkin assures us that there are unique right answers to questions of how to interpret the law, depending on facts about the whole political institution; Aquinas suggests that the right answer depends on the demands of natural, divine, and eternal laws. Much depends on interpretation of the rules, and the wisdom of the interpreter in being able to identify all the constraints that would jointly result in the right verdict. Because of the enormous complications involved in crafting these verdicts, and owing to the lurking possibility that the social sources of authority might be the wrong kind of experts about the demands of law, both Dworkin and Aquinas leave the folk in a state of heightened risk where they might unknowingly break the chain of deference.

Others will say that this goes to show that there is always opportunity to invent new law when one encounters gaps; the task of the court is to both apply existing law and solve conflicts put before them and, if the law is silent, then to let discretion come into play. Unwritten rules, including moral rules, come to *inform* the written law without themselves *being* law. (Dworkin 1986, 114-117) Perhaps we can just say, full stop, that the judges who refused to allow Elmer to inherit the estate were engaged in discretionary reasoning in a hard case (as Hart might want to say); or we might offer an additional piece of insight by stating that the justices were repurposing or reimagining the victim's aims, and supposing that the victim would not be willing to reward their own murderer (as Fuller might say).

But whatever we say, surely we must admit that the decision goes beyond their jurisprudential call of duty by consulting criteria that fall quite outside the scope of explicit instructions in the statute of wills. By looking at the wider body of law, the judge is engaged in a kind of jurisprudential *supererogation*. Fuller, for instance, agrees that we ought to apply the desiderata inherent in the ethos of law, and that they must be applied in accordance with the demands of expedience; but these parameters of application range over principles that do not themselves necessarily have much in the way of moral content. And for Hobbes, the only duties that are alive, here, are the ones of the sovereign to herself; the sovereign judge's application of principles of natural justice is, evidently, supererogatory as far as they relate to their subjects, as the sovereign has no contract with them.

Dworkin does not agree that the judge who goes beyond the statute of wills is going beyond the call of duty. Quite the opposite: the judge who confronts the body of law as a whole is just doing the thing that they ought to have been doing all along. The standard operating procedure of the

judge is to engage in optimizing reasoning to arrive at the right result, not just to satisfy a range of criteria in such a way as to produce a potential plurality of sensible verdicts. In easy cases, instructions on how to optimize our judgments are more or less laid out already in the statute along with the methods by which the statute has been enacted by government; but in hard cases, the judge must rummage through different departments of the law in order to find the resources to arrive at a verdict. (Dworkin 1986, 250-4) For Dworkin, this optimizing approach to jurisprudence provides us with instructions for figuring out what the statute of wills actually means, at least in relation to the whole body of law, and insofar as it bears upon Elmer's case.

Brown vs. Board of Education

After the American Civil War, the Constitution was amended to include a provision that no state shall deny any person the equal protection of the laws (the Fourteenth Amendment). Nevertheless, the post-Reconstructed South engaged in policies of segregation, including racial segregation in the use of public facilities. In a prior case, *Plessy v. Ferguson*, the Supreme Court argued that such segregation did not violate the equal protection clause, just in case all subjects were provided "separate but equal" access to public facilities. (By mid-twentieth century, the public mood was shifting against racializing policies of this kind). In 1954, the question of racial segregation was raised again to the Supreme Court, this time concerning the right to public education. The 1954 Court ruled, ostensibly on the basis of new sociological research, that school segregation led to unequal outcomes. Notably, it did not rule in principle against the "separate but equal" clause introduced in *Plessy*; it ruled only that the clause did not satisfy the Constitution in practice, when it came to that particular instance. Schools were advised that they needed to desegregate with "all deliberate speed", which was not sufficiently precise in its command as to prompt swift compliance from school officials. (Dworkin 1986, 29-30)

Owing to its thoroughgoing equivocation both in principle and practice, *Brown* served as an *enactment* of both a formal statute (the 14th amendment) and some kind of operationalization of *Plessy*. Whether *Brown* was a retroactive justice norm (overturning *Plessy*) or an enacted justice norm (putting *Plessy* into practice in a new world) depends on which kind of optimism you countenance in your sophisticated picture of law. What is difficult to dispute is that critical morality played a vital part in the decision; the open question is what significance moral authority must have in those cases where conventional morality is divided.

Consistent with Dworkin's method, the nature of the operationalization had to be mediated through an additional layer of reasoning -- our justice norms, which he treats as a body of *policies* and *principles*. Dworkin's handling of *Brown* involved the invocation of new, precise standards, which were themselves left equivocal in existing law. In *Brown*, the core issue was how to situate the "separate but equal" clause with respect to the guarantee of equal protections before the law. It required us to take a step back and ask deeper, philosophical questions about how to conceive of equitable consideration before the law. It asked us to tease out the justice norms, or principles of equity, that are needed to operationalize the law. For Dworkin, then, there is always a full body of elaborations to draw from; there is no *dire* need for any introduction of retroactive rules. But there is no pressing need to make sure that one's judgments are obvious to the folk, either. Integrity comes first, not candor.

What principled basis might we have to reject such unequal treatment? Dworkin considers three possibilities. First, we might say that the racialization involved in *Plessy* was based on classifications that in practice fail to respect the ideal of equal protection before the law, owing to the fact that *Plessy* failed to recognize as a matter of empirical historical fact that racialized groups are subject to greater systemic abuses than non-racialized ones. Second, we might say that laws

based on categories like ‘race’ are *necessarily* or conceptually racist; this view would force us to retroactively regard *Plessy* as unconstitutional. (This, or something like this, is most reminiscent of Aquinas’s familiar denunciations of ‘respect for persons’.) Third, we might say that *Plessy* failed to recognize that, as a matter of pre-existing institutional fact, some specific racial categories enact arbitrary, unequal protection before the law *because these social categories are rooted in prejudicial community preferences*. (Dworkin 1986, 381-7)

There are, accordingly, differences both in the standard involved in justification, and the scope of the verdict. The salient differences in justification were these. Where the first proposal asks us to reconsider *Plessy* on the basis of historical *observations of the iniquity that follows from racialization*, the second asks us to revise it on *the basis of the iniquity of racial categories alone*, and the third asks us to revise the law in light of the *toxic sources of racialized categorization*. The differences in scope are as follows. The first (prospective) proposal asks us to stop engaging in racialized categorization insofar as, on reflection, it leads to institutions that produce unequal consideration before the law. The second (conceptual) proposal asks the government to stop engaging in *any* racialization at all: that statutes must be color-blind, so to speak. And the third (historical) proposal asks us to stop enacting racialized categories in government insofar as those categories are rooted in prejudiced sources. (Dworkin 1986, *ibid*)

These three proposed justice norms are, on the face of it, minimally rational attempts to tease out some kind of principle that would help to reconcile existing law and the case put forward in *Brown*. But they are not all equal in their ability to provide practical directives to various stakeholders on how they ought to act. Indeed, of the three, only the second lends itself to immediate practical effect; if we accepted it as the justice norm behind the statute, then sufficient guidance would have been provided on what actions and policies the government would have to pursue in the course of fulfilling it: i.e., simply bleach all law of any discrimination on the basis of racial categories. (Dworkin 1986, 385-6) None can suffer discrimination before the law: “black”, “white”, and all other racialized terms are equally pernicious. This view, for what it’s worth, would seem to collapse the distinction between racial recognition and racism.

The first and third proposals require an additional layer of operational detail in order to be of use to the judge confronted with the task of resolving hard cases. If we decide in favor of the first proposal, that the source of perverse discrimination owes to the fact that racial categories used in legislation lead to racialization that generates unequal consideration before the law, then we leave ourselves vulnerable to the charge that racialization actually satisfies “the preferences of the community” in the best way that is currently available: e.g., the conservative apologist might argue that, even though racism is bad for the community, racial segregation in the schools is nevertheless the best realistic option for everyone, on the assumption that racial integration in a racist society would actually do even more of a disservice of the rights of the schoolchildren. (Dworkin, 382-3) That *détente* might have satisfied the American political majority at one point in its history, but it was unacceptable in the period of *Brown* and is unacceptable today. (Dworkin 1986, 387)

Finally, if we decide to go with the third interpretation, then the judge has before them a formidable task. They would need to spell out what, exactly, counts as a prejudicial set of preferences, and which social categories count as being especially susceptible to disadvantage through discrimination. In the context of 1950’s America, “white person” might not be featured on the list -- it not registering as the target of malign systemic discrimination -- while “Jewish”, “woman”, “homosexual”, or “black person” might very well be featured on the list. The judge would then have to craft a political and sociological theory that would allow us to determine which classifications were subject to malign discrimination and which were not. (Dworkin 1986, 386-7)

On first glance, Dworkin believes the decision for *Brown* ought to have been rooted in either the second or third justice norms. The satisficer, armed with their policy of respecting judicial powers of discretion, shall have an option to choose the one or the other. If we have no rules of jurisprudence, then there is no reason whatsoever to think that the outcome will lean toward justice; if on the other hand, we adopt Fullerian or Hobbesian sympathies, then there is some modest reason to suppose that either of these justice norms would serve the demands of justice.

However, for his part, Dworkin believes the third justice norm is the single best decision, as it makes the most sense of the full body of law, and provides guidance in prospect. And the reason it is preferable is that it allows us to make a distinction between positive and negative forms of racialization. This is important in prospect because Dworkin knows that the arguments being made in *Brown* shall set precedent in a fashion that becomes salient in other hard cases, which involve consideration of the differential impacts of affirmative action policies (as in the case of Alan Bakke). (Dworkin 1986, 393-7) If we followed the second principle, affirmative action policies would seem to be on the chopping block along with segregated schooling; if we follow the latter, then it allows the law to recognize a principle that is in line with a more sophisticated conception of equity. Whatever narrow range of justice norms we might consider plausible in the case of *Brown*, the fate of the law is to settle on one.

Summary of Section on Justice Norms

It needs to be noted that each picture of law will have different ideas about whether our expectation that law be a functionary of justice increases or decreases the risk of legal error. Aquinas and Dworkin both offered strong, criteria-level endorsements of the idea that morality impinges upon law, in the sense that both held that instructions for deference were constrained by moral convictions both in appearances (over the folk) and reality (the experts). And yet, they differed in the strength of the risks that their accounts offered to subjects who wished to know the demands of law.

First, as we have seen, Aquinas placed the subject at high risk of legal error, since he offloaded a significant amount of hermeneutical burdens on the ordinary subject during extraordinary circumstances. The sovereign, too, was placed at high risk of legal error, to the extent that they failed to keep up the moral appearances: as it turns out, the sovereign rulers could turn out to be inappropriate political authorities. (These facts are true even if we are considering Aquinas's theory in isolation from its moral aspirations: he has an internal picture of law, which itself imposes risks just by virtue of not pointing to an external criterion that would allow us to point at specific people and say, "Follow them".)

The level of risk that Dworkin's method put to the subject is, in contrast, frustratingly difficult to determine. Dworkin argues that the task of the judge is nothing less than to interpret the whole political institution in its best light, the task of a judicial Hercules. His approach from integrity suggests definite criteria that amount to low risk of legal error, while his interpretive methodology, and relatively obscure path to the right answers, seems to allow for high risk.

Retroactive operations impose a high risk of error upon everybody in every context, no matter what picture of law you adopt. In cases where enactments are concerned, the Dworkin/Aquinas style of optimism mitigates the risk of error among those central stakeholders who have access to the rules of moral propriety: the obviousness of a rule's status as a function of justice counts in its favor as law. Among those central stakeholders who do not have access to moral authorities, however, moral optimism can only increase their risk of legal error. If we consider morality to be a distinctive kind of discourse that is composed of prior principles derived from intellectual good

faith, then the risks are only compounded and solidified for sovereign and subject – the moral law, for Aquinas, would add (so to speak) just one more damn set of rules to worry about.

The second grade of justice norm can be found in Hobbes, whose natural principles offered weak normative guidance to the sovereign on how to direct their behavior, which we dubbed ‘sovereign self-care’. These same principles offered subjects strong normative guidance on how to act, but did not protect them from unjust judgments from the sovereign (that being, for Hobbes, close to an oxymoron). Experts are assured that the sovereign office must be maintained for the greater good; the truth of law is a moral truth, even if it may be hard to see by the folk. The folk’s dependency on the sovereign will place the subject at medium risk of legal error, as they know who to defer to, though the reasons for deferring may be little more than a muddle. The sovereign, in turn, is at low risk of legal error, as their powers are not strictly limited by prior law. Putting aside the odd paradox about the potential injustice of the sovereign authority, which we observed in Hobbes’s remarks on civil law, these principles of law are, more or less, both moral principles and species of unwritten law.

It is also worth asking how the folk might reasonably infer the existence of justice norms, if they happened to be unclear about the basic picture of law. As it happens, we are now in a position to provide some guidance to the lost.

During the introduction, I pointed out that there were four different ways of thinking about the scope and durability of the powers that make the sovereign office. There are those who endorse sovereign supremacy but add legal limits (Hart); those who deny sovereign supremacy, but lay out rules that guide and govern deviation (Aquinas); those who argue for sovereign supremacy, limited only by political power (Hobbes); and those who believe that legal limits are imposed by context (Foucault). I suggested that the Hartian model generally imposes low risks of legal error on the folk, the Thomistic model imposes high risks on everyone, the Hobbesian model imposes medium risk on the folk, and that Foucault’s model was indeterminate. (Fig 4, p.12) The reader might disagree with the assessments of risk given to each of the theories, but it is worth noticing what would follow if they were true.

In the section on implicit constitutions in this chapter, I argued that the very mechanism that the folk use to figure out who counts as an expert depends on identification of respectability. We say someone is respectable only if we can also say they are relatively vulnerable and relatively advantaged: vulnerable in the sense of being at greater risk of legal error than the folk, and advantaged in the sense of seeming to be doing what needs to be done for the social order. If placed in Jude’s position, the folk can follow a procedure: identify those persons who are advantaged, and then identify those among the group who are at greatest risk of legal error. And then, finally, ask whether such people know what they are talking about, as best one can.

What they shall find, in running through this exercise, is that some pictures may seem more apt than others. If those who are in positions of advantage are generally at higher risk of error than the folk, then respectability might be reasonably inferred by asking who is able to eke out the highest level of advantage among central stakeholders – effectively treating respectability on the model of a profession, one might say. If everybody in the population shares the same high risk of error, then the folk should defer to those who are able to both eke out the highest level of advantage (and, perhaps, promise to lower the risks of the folk) -- a legal ‘Superman’ or a Daniel, so to speak. And if the advantaged face lower risks of legal error than the folk, then the folk should defer to those among the advantaged who set out to increase their own levels of vulnerability – the altruistic model of respectability. What should be clear is that the latter two inferences strongly suggest the folk ought to adopt a distinctively optimistic picture of law – that, when faced with a system

undergoing dramatic changes, it may be most appropriate to attribute justice norms to a system, so long as the diachronic features of law and the theory of respectability are known.

Yet if levels of risk are comprehensively indeterminate, no generalizations can be made. If we cannot make systematic connections between pictures of law and social reality, then externalism seems to be the right picture for us to employ. If we would like to say that it all depends on context, and that all that succeeds is success, then it follows that under conditions of change, fiat may rule.

3.2. *Fiat rules*

Fiat rules are those novel commands which ascend to the status of law by securing habits of deference. The French king demands wine from the monks owing to an “emergency” shortage; in so doing, the king sets a precedent; and where the king has strictly only uttered a command, his command transforms into law just by their acquiescence. (Graeber 2011, 111-2) What is characteristic of fiat rules – and fiat laws, if there are such things – is that they involve changes to law, with threat of formal sanction, and usually on the cusp of a real or imagined emergency.

Hobbes did not want to believe in fiat law. Through a peculiar logic, he remarked that the authority of the sovereign judge could be unjust even while their decree, qua sovereign, was assuredly just; while it is hard for us to reconcile such a view with the demands of equity, we must respect the fact that, in his picture, no fiat was in play. Austin held that the law was a general command of they who had the habit of obedience over an independent political society, backed by threats; it is *prime facie* easy to associate the image of statehood with tyranny of the worst kind. But Austin was restrained by the facts about language: law, at least, still needed to be a *general* command. Left unresolved is the question of whether or not implied generality of a specific command qualifies as a law; hence, left equally unresolved, is the entire question of whether or not Austin’s picture of law admits of fiat law. Hobbes claims not to be a believer in fiat law – the sovereign can do no moral wrong, though their authority might be unjust (T. Hobbes 1997, 166) – but ironically his theory does very little to admonish the legislator who engages in it. Neither man wished to cross that one, final line, for fear that it would collapse the distinction between law and politics entirely.

This restraint is not shared by all. The anti-democratic political theorist Carl Schmitt begins his *Political Theology* with this sentence: “Sovereign is he who decides on the exception.” (Schmitt 1985, 5) By this, he suggests, the sovereign’s power is not just the ability to tell subjects what to do in normal contexts; it is also, quite notably, to define what counts as an emergency, and what to do in such cases. Unlike Aquinas, who seemed to hold that subjects of good conscience could determine the nature of an emergency deserving of dispensation, the sovereign is the ultimate authority, enjoying both legislative and worldly supremacy. Moreover, Schmitt suggests, the very idea of law is casuistic in this sense: norms of law are verdicts of the ultimate judge, the sovereign, and nothing else. Schmitt’s view is appropriately (perhaps grandiosely) cast as ‘political theology’, and makes it clear that fiat law is, in relevant respects, the ordinary course of business. As he puts it: “All law is “situational law.” The sovereign produces and guarantees the situation in its totality.” (Schmitt 1985, 13) Schmitt’s political orientation was aimed at externalism: ostensibly uninterested in ‘normative’ questions, concerned with ‘concretes’, and with reducing questions of politics and law to the dynamics of friend and enemy. (Frye 1966, 819-824)

It is hard to defend fiat law without sliding into a reduction of law to politics and, in the process, threatening to lose the very phenomenon we are trying to save and philosophize about. But there are at least two ways you can try to reconcile the existence of fiat law with the existence of law, and both were considered in their ways in Chapter 4. First, you can argue that law is a special form of politics that involves strategic attempts to establish control over peoples. This is a rough way of speaking about the Foucauldian view. Second, you can argue that law is causally determined by

politics, but importantly different, depending on whether or not the politics we are talking about has effects on how people think about their effective demands over property. This is a view we identify with the weaker form of Marxian socialism.

If fiat law is understood in either way, then it must follow that those who aspire to law are guaranteed to lack any protection by way of appealing to common expectations, norms, or the like. Attempting to figure out what rule is law demands, not a consideration of what rules are stable across time, and not a question of which office determines law, but instead requires a certain political instinct -- an ability to figure out the most popular strategies adopted by actors insofar as they function to improve their powers in the contexts in which they live, and on the basis of limited information available. There is no alternative but to participate in the game as a strategic player, one might say; even the meek and obedient are in a game of policing bodies, in their own way. If that is the case then any attempt to figure out what counts as law is always *essentially risky*, even at the best of times. That is to say, that the chain of deference is, in principle, always a matter of complex contingent facts, punctuated every so often by equilibria which give an illusion of stable legal facts, but which are in reality open to constant (attempts at) renegotiation and restructuring.

It is no wonder why the externalist, and notably someone inspired by either Marx or Foucault, has no choice but to accept fiat law, under those circumstances where politics intrudes into the domain of ordinary business. Law is “exceptions” all the way down; even the rule of the sovereign ultimately decomposes into people trying to secure control over bodies. In the kaleidoscopic vision of the externalist, the conceit of the nation-state ultimately dissolves under scrutiny, replaced by a more realistic vision of the political order -- a population-state. When conceived in such evocative terms, the distinction between law and every other variety of social control becomes a matter of degree rather than kind. And then the cardinal dilemma, at least for our purposes, would be whether or not ordinary legal theory, much less philosophy of law, could be salvaged at all.

Summary of Section on Change and Instability

Different pictures of law impose different kinds of risks of legal error on all parties concerned, owing to differences in their levels of toleration when it comes to changes in a legal system. The central stakeholders of legal regimes, both folk and expert, face the threat of legal error across four different gradations. Hart's positivism and Fuller's practicicism impose the lowest risk of legal error on subjects, as they both believe there are rule-oriented functions that regulate a political office both within a single regime and across multiple regimes. A somewhat greater risk of legal error is posed by Austinian positivism, at it only provides definite instructions on who counts as sovereign, and few or no instructions about how the sovereign thinks, so verdicts might change on a dime. An even greater risk of error is posed by Aquinas, who provides only the rules, and complicated and perhaps conflicting instructions on *who* rules. And Foucault and Marx give us pictures whose estimations are either essentially risk-laden or irresolvable.

Moreover, the different pictures also impose different risks of legal error on the sovereign: wherever there is a substantive implicit constitution (as with Hart, Aquinas, and Fuller), the sovereign faces relatively greater risk of legal error than where there is not (Hobbes, Austin). And even greater burdens are placed on the sovereign if they are forced to keep up appearances, and in particular, moral appearances, as partially constitutive conditions on their rule (Aquinas, Dworkin).

Finally, the different pictures of law differ in the extent of their moral optimism. Barring trivial exceptions, retroactive operationalizations are risk-laden for everyone involved. In its strongest form, optimism downgrades the risks of error for justice norms that are grounded in conventional morality, increasing the potential attractiveness of enactments based on justice. But optimism has

thoroughly unclear effects on enactments that are based on more controversial, optimizing approaches to interpretation in jurisprudence. In its weaker form, optimism seems only to have a benign or helpful effect on the risk of legal error, though the practical cash-value of such interventions is open to question.

There are two principal consequences of having a picture of law that confers heightened risks of error. In the first place, and in general, a higher risk of legal error translates into *greater need for formal promulgation of the law*. Arguably, natural law is the historical source of our drive towards codification of explicit constitutions for this reason: its conception of law leaves subjects so far at a loss in a sea of interpretation that formal promulgation of the statutes, when possible, could only be both welcomed and invited by rational people. Second, the higher the risk of error imposed by a picture, the more difficult it is to be a peripheral stakeholder to the system of law. The greater the size and diversity of the pool of central stakeholders, the potentially more diversity of opinion about experts about the demands of law.

4. **Secret laws**

Laws are formally promulgated when the folk know who the legal experts are and how to find them, and the experts know official venues where to look, in order to find out what is to be done. They are informally promulgated when the experts know politically apt rules that guide action, and can inform the folk on demand, but not by drawing from official venues. In either case, it is this chain of deference that ties people together as bearers of information about the contents of law. *A system of laws depends, for its long-term success, on binding the links of this chain together.*

Predictably, the strength of the chain is tested by *risk of legal error*, the possibility of breaking the law given one's status, and the situations they are in. The risk of legal error puts a strain upon the law by threatening to make the proprieties of deference uncertain. I have suggested that some pictures of law raise the risk of legal error for all stakeholders in the population alike: Hart and Fuller's pictures paint a picture with low risks, Foucault and Marx present a picture that is intrinsically risky (perhaps to the point of dispensing with law a clear phenomenon). Threats to the legal system can be mitigated by the charity and intellectual good faith on behalf of both subjects and their rulers, but they only go so far. Ultimately, if the risk is severe enough, the chain shall break; citizens will be left in an essentially confused condition.

Held against this metaphor, a secret law proves to be a baffling legal curiosity. It is a law that needs to be formally promulgated in some sense, but is not. It is a curious chain made of material that seems brittle, but may or may not break. Secret law frustrates the expectation that law should be accessible; and yet it is everywhere, and sometimes and in some respects, a banality in civic life.

So far, our remarks on the other varieties of unwritten law have been mainly about the law (or a legal system) considered as a whole, and have not focussed on particular laws and the publics they serve. However, the final category of unwritten law – secret law -- is a special one. In order to appropriately characterize the idea of secret law *as a form of unwritten law* (i.e., only informally promulgated, in some sense or other), we need to be especially sensitive to the particularities of laws in context, and the effects of those laws on the publics that they serve. Our project of developing a system of thought for the elements of general jurisprudence for its own sake has to be replaced by a general jurisprudence that is directed toward particular cases and their contexts. In doing so, we converge with the expectations set out by Great Britain's House Committee for Promulgation of the Statutes, who noted that "in general... such Acts as are of urgent Necessity are circulated in Print very quickly after they have received the Royal Assent; the other Acts of the Session being deferred to more distant Periods of Publication", and complained that "the Whole of the Annual Mass of Public Laws of each Session of Parliament cannot be obtained, even by

Purchase, until long after the Session has closed, though many of these Laws may require instant Observance”. (Great Britain. Committee for Promulgation of the Statutes 1796, 7-8)

In this way it will be necessary to say more about what it takes to be a venue, a site for the mobilization of information. After all, dissemination occurs through them, and trades on a difference between the distinction between *formal and informal* ones. In this task, I think two criteria have to be foregrounded. First, the salience of laws to particular parts of a population. Second, the communications environment in which a public lives and operates.

4.1. Salience and meta-secrecy

It is a fact that each particular law confronts each particular person with differing degrees of salience. So, even a peripheral stakeholder like the “off-the-grid” BC survivalist, who does not generally face risk of legal error in confrontation with the whole body of regulations inherent in law, may be at risk of error with respect to one particular law that central stakeholders may not face (e.g., lighting a campfire in a dry season, or hunting a certain animal during a prohibited time, such as its mating season). Salience is an irreplaceable part of secret laws in context, as it allows us to introduce the idea of *relative* central stakeholders, meaning those who are most in risk of legal error with respect to some *particular* laws.

In his (2013) discussion of secret law, Christopher Kutz offers two useful distinctions. First he argues that there is a difference between *mere secrets* and *secret secrets* (or meta-secrets). (Kutz 2013, 203-4) The idea is that, in the case of mere secrets, people know that they are missing out on some information that concerns the demands of law: these are, to echo one politician’s memorable phrase, *known unknowns*. (Morris 2015) Among the former are guides of conduct to governmental officials and agents: examples include covert operations (e.g., undercover police officers), prosecutorial guidelines, and even secret budgets. (Kutz 2013, 204-6) Meta-secrets, in contrast, involve operations of government that others do not know are happening – Rumsfeld’s unknown unknowns, as it were. (Morris 2015) Kutz offers the examples of secret treaties, secret executive legal actions, secret trials, and secret legislation. (Kutz 2013, 206-9) He argues that both forms of secrecy are possible under all theories of law, though meta-secrets are more morally and politically problematic than mere secrets, all other things equal, as they are generally of more sweeping consequence. (Kutz 2013, 204)

Kutz believes that, while all of these forms of legal secrecy might be problematic, there are greater problems with meta-secrets. For one thing, it is a fact that these severe forms of legal secrecy deprive a population of an understanding of themselves in relation to the political regime they live. For another, secret laws deprive the rulers of their legitimacy as rulers. (Kutz 2013, 212) So both of his considerations draw on existential, reputational stakes -- i.e., to the *ruler as such* and to the *subject as such*.

He also argues that there is a distinction between *secrets as such* and *low-salience secrets*. Strict secrets seem to involve the threat of formal sanction in cases where information is divulged. So, for example, the clandestine operations of an intelligence agent would be a secret as such -- the ‘if I told you where I worked, I’d have to kill you’ variety. On the other hand, low salience secrets are those which are formally promulgated, but kept obscure -- e.g., as Kutz mentions, Caligula’s pillars. (Recall, the notorious Emperor took personal pleasure in “publishing” new laws in public, but high up on pillars and with very small font, essentially rendering them illegible. He reportedly then took great delight in punishing those who broke such laws.) Kutz seems to think the difference is mostly an academic one, as strictly secret and low-salience secrecy are morally objectionable in a similar enough way. (Kutz 2013, 204)

If my suggestions are taken seriously then this does not seem like a set of conclusions that, on first glance, we should share. A peculiar defect is that his distinction evidently makes no systematic reference to the idea that formal promulgation is absent. On first glance at least, Kutz's concept of 'low-salience' secrecy maps well onto the idea of legal obscurity, though this is too wide a category to properly earn the designation of 'secret law'. An especially dull part of the tax code is both a low-salience secret and mere secret, but it seems to me very strange that we would even consider this to be an instance of secret law. The tax-code might be perverse, but it is not perverse in the same way that Caligula's pillars were perverse. Indeed, even the penalties are similar: Caligula's laws mainly functioned to impose fines. And yet Caligula's pillars were low-salience secrets, mere secrets, and – everybody thinks – legally perverse. The perversity seems to map onto the fact that there is a manifest difference between levels of accessibility, which means an essential critical criterion is missing in the characterization of secret law in its unwritten form.

That said, Kutz's treatment of the issue is actually commensurable with the system proposed in this thesis. The fact that we come to *prime facie* different conclusions owes to the fact that we have very different projects: so, in his distinction between secrets as such and low-salience secrecy Kutz is interested to point out that the strict secrets and low-salience secrets share an air of *moral* perversity in common, all other things equal, and I am concerned mainly with unwritten law, and hence, whether they are separate *legal* categories. But that should not be a reason to suppose there is some intractable disagreement. For as it turns out, Kutz's complaints about Caligula might very well describe secret laws considered as unwritten laws: i.e., as cases where there is a failure of formal promulgation, and where nothing less than advertisement will meet the needs of subjects.

4.2. Accessibility and communication

The accessibility of a venue implies the possibility of communication -- the possible exchange of signals, signs, directives, commands, precepts, and information in general. No matter what picture of law you adopt, at least the pretense of effective signalling is a constant, partly constitutive element of promulgation.

Now, to be sure, according to the method I have adopted, the picture of law is the arbiter of what counts as promulgation, and it is up to the picture to decide the extent to which context figures into the project of dissemination. So, some pictures of law -- such as those provided by Austin and Blackstone -- adopt the formal fiction that anything passed by the legislature just is promulgated, full stop. In their pictures of law, we may just assume that all formal venues are open for business across all contexts, so long as the legislature has done its job. *For them*, in effect, there is no secret law. But one person's *modus ponens* is another's *modus tollens*: if *we* decide that there *are* secret laws, we seem to need to make a distinction between open and closed venues, and will have reason to suppose that Austin and Blackstone have an inappropriate picture. (Kutz 2013) So suppose we adopt a picture that takes this demand seriously, eschewing the Austin-Blackstone thesis. How much signaling is enough for a law to be promulgated?

We know that formal signals do not have a monopoly on the public order. Sometimes, the informal regulation by fellow members of a public is sufficient to secure order. In the Dutch city of Drachten, when all traffic signs were removed, commuters responded by using an informal system of signalling, along with an increase in attention and due care. (Brownsword 2015, 16-17) Sometimes, legal signals are replaced by technological signaling. So, in a science fiction future where all cars are driverless, current 'rules of the road' would be replaced by the rules of automation that govern traffic lights and a car's onboard computers -- the legal regulation, 'you should not turn left on red', would be replaced with the fact that the car *cannot by design* turn left on red. (Brownsword 2015, 2-4) And sometimes formal dissemination of messages is of dubious

communicative value. On my commute between two cities in Southern Ontario, Waterloo and Hamilton, I pass a marvelous traffic sign: “Blowing snow conditions may exist”. If blowing snow conditions existed, then I would probably not be able to read the sign because of the *blowing snow*; and if those conditions did not exist, then I would not need a sign to tell me about them. In these cases, there is no need for formal promulgation of the law, at least not in any obvious sense.

What is characteristic of contexts where informal promulgation of rules is sufficient to secure the public order is that they are *normal communications environments*. Such environments seem to have the following properties: there is a taken-for-granted communications *network* held in *common* (e.g., telecommunications, hand signals, word of mouth), which is accessible on *demand*, in contexts where coordination problems are *salient*, in order to exchange *signals*, for the purpose of *solving* those coordination problems. There are at least six points of possible failure here, corresponding to the italicized words. (So, perhaps if a heavy supernatural fog were to descend on the Netherlands, the good people of Drachten might be unable to ‘access the taken-for-granted network’, i.e., to signal one another in good faith; or perhaps a visitor will not understand the right hand-signals; or if the traffic transponders stopped responding to pings from cars on demand; and so on.) Whether or not such informal regulations even count as law, as opposed to productive anarchic self-governance, depends on how we interpret the formality of sanctions in play.

The exact opposite of a normal communications environment is an *essentially defective communications environment*: where there is no network held in common which can be accessed in contexts where a coordination problem is salient, with which one might exchange signals for solving the problem. Such contexts are rare, barring full catastrophe or the fall of Babel. In these contexts, not even formal promulgation is possible (except, of course, if you adopt the Austin-Blackstone thesis). For it makes no sense to speak of experts being a venue for uptake of the law if the folk cannot consult them, and it makes no sense to speak of formal venue for uptake of the law if the experts cannot consult the sovereign. So, in essentially defective communications environments, there simply is no law, as there is no promulgation whatsoever.

Aside from being of obvious public interest to maintain and secure a normal communications environment, it is arguably a hard constraint on the very idea of there being any law whatsoever. Lon Fuller considers the normative strength of our aspiration to protect such public works to be something close to a demand of natural law, a substantive demand that holds irrespective of any government decree: that we must “Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire.” (Fuller 1964, 186)

We generally live our lives in between those two poles, where one or more points of tension are especially at risk of failure. These intermediate zones are *noisy* communications environments. All other things equal, formal promulgation of rules is most useful as a bare minimum where one or more points of tension are especially at risk of failure. In noisy communications environments, there are often obstacles that prevent the folk from getting information from the experts, and the experts getting information from the appropriate political authority. The noisier the environment, the greater the need for advertisement of the rules, formally or otherwise. It is reasonable to think that increased noise creates increased risk of legal error -- at least so long as the people involved are central stakeholders with respect to the laws concerned.

Let us suppose the steward of the public trust concludes that some formal statute needs to be promulgated: e.g., that a street-light needs to be put up in the Dutch town, owing to the onset of a supernatural fog. Fine enough. If so, then it follows that the higher the risk in general, the greater the need for advertisement in general; and if risk is especially high in context, the more that formal promulgation requires advertisement. In short: any agent interested in promulgation has got to

have a tacit interest in maintaining a functioning common system of communications. All other things equal, when there is a massive communications breakdown, agents of law cannot play it coy. In a noisy environment, you have got to advertise to central stakeholders.

What do we say about the legal status of subjects in those contexts, where formal *advertisement* is needed? In theory, it seems that we have only two credible options: either we say that the subject population has risked legal error *blamelessly* (perhaps because it is secret law), or we say they are not at risk of legal error because there is no law at all. Of course, the latter is always an option: under the right picture (say, if there is a constitutional need for fair notice), we may regard certain obscure rules as non-legally-binding. In those cases, the relevant class of rules will not even be secret law; they will be political secrets, deserving of rejection.

But if our picture of law asks us to come down in favor of the former interpretation, then we need to figure out *why* the subjects are ostensibly blameless. Either: (a) it is because the law truly is a secret law, hence intrinsically defective law owing to some failures of accessibility; or (b) it is because the written laws are merely obscure, and the courts might be inclined but not obligated to commute sentences of offenders (depending on the demands of one's favorite jurisprudential norms). If they are merely obscure laws, then they are not unwritten laws -- nor secret laws, strictly speaking.

On first glance, there should be precious little room for the middle category of secret laws. If all we have at our disposal were the 'hard' constitutive rules of our favorite basic picture of law, then we may find ourselves tempted to bifurcate between obscure written laws and non-laws; perhaps we might want to say that anything that looks like secret law (be it Caligula or tax-code) is either secret or is law, but not both.

But I think that desire for bifurcation needs to be resisted, because it potentially simplifies and distorts how some of us would like to understand how the notion of a venue works in the context of a sophisticated picture. In particular, it misses an important distinction which we have underdeveloped up until now: which is that a law can be formally promulgated without being advertised to its central stakeholders. In those cases, something can be law, and even formally disseminated in general, but unwritten in context: because it is obscure to the people who are most at risk of getting it wrong, and because the communications environment is so defective that nothing short of advertisement can give reasonable hope that they could get it right.

Contextual secret laws

We have mostly been interested in unwritten laws that are only informally promulgated, full stop. Now we have to consider a different class: those unwritten laws that are formally promulgated in principle, but not formally promulgated in context, owing to two major deficiencies: first, that those most at risk of legal error with respect to some law have not had some work advertised to them; and second, that a sufficiently noisy communications environment exists, such that nothing short of advertisement will be able to help guide the charitable, reasonable actor possessed of intellectual good faith. What is noteworthy about these contexts is that all the formal instruments that make for promulgation were in place, but where promulgation was not, strictly speaking, performed.

On April the 24th of 2013, the 40th parliament of the legislative assembly of Ontario met to read Bill 51, which sought to repeal the *Public Works Protection Act (PWPA)*. The Act was passed in the 1940's when there were worries that Axis saboteurs would damage the infrastructure of major cities -- courthouses, power plants, dams, bridges, and the like. It empowered the Province to decide which portions of infrastructure counted as a public work, and then to provide enhanced security measures to protect those works. (Marin 2010, 9)

During debate in the chamber there was a unanimous sense that the *PWPA* was a relic of the

past, and that the salutary features of the Act (e.g., provisions that protected courthouses and power plants) could be accommodated by shifting its powers to other sections of the law. It was clear to all parties that the time had come to let the Act die, so to speak. (Legislative Assembly of Ontario 2013, 1501) And yet, the Act was by then a piece of legislation that had survived largely unnoticed for more than seventy years in the law-books without complaint. What happened?

Legislation never comes out of nowhere. In this case, the repeal was driven by a foul political temper, subsequent to the government's handling of the G20 Summit in June of 2010. During that event, eight square city blocks of the City of Toronto were declared "public works" by Regulation 233/10, in order to function as a host for the meeting of international leaders. The government did not publicize the passing of this regulation, as it fell within the scope of the discretionary powers granted to the Province by law. The Regulation was directed towards citizens and visitors to the city of Toronto: those were its central stakeholders. The Regulation caught many citizens off-guard, as they were surprised to find that much of the metropolitan core was considered a "public work". It is *at least unobvious* to say that a street-corner is like a courthouse for the purposes of the Act. The Regulation was disseminated in public only after the arrests, creating even greater dissonance between expectations and legality. (McNeilly 2012, iv)

Moreover, the exact scope of the Act was not obvious to the most senior members of Toronto police services. An internal systemic review of Toronto police services observed: "[Toronto Chief of Police] Blair told the media that the security designation extended five metres out from the fence. That information was not correct – the boundary for PWPA authority was at the fence itself – but although the mistake was corrected internally in the [Toronto Police Services], it took some time to filter down to individual officers, and it wasn't until the G20 was over that Chief Blair said anything about the change to the public. When asked by reporters at a news conference if there actually was a five-metre rule, he replied, "No, but I wanted to keep the criminals out." (McNeilly 2012, iv)

The Regulation allowed the government to restrict freedom of movement within the core of one of Canada's biggest cities, resulting in historic levels of mass arrest (~1100), severe police tactics (e.g., kettling, which is the practice of forming police barriers around protestors to control movements), and restriction of freedom of expression. (Marin 2010, 5-13) Arguably, according to one veteran journalist who was present, a crowd of peaceful citizens were subject to police brutality. (Toronto Star 2010) Some of that suppression of speech continued well after the event, as one of the more serious offenders was placed under gag order, prohibited "from planning, taking part in or even attending any public event that expresses views on a political issue", and even to the point of restricting speech to the media. (Toronto Star 2012)

It is likely that some degree of civil disorder would have occurred even if the Regulation had not been advertised, since the G20 usually invites protests and amplified police presence. (Marin 2010, 7-8) However, it is not obvious what positive legal function was served by failing to advertise the Regulation. Many judicial experts, when asked, were unable to account for the legal source of the enhanced police powers. One enforcement official, when asked about the consistency of their actions with the Canadian constitution, replied: "This isn't Canada right now." (Marin 2010, 108) So if appearances are to be believed, the chain of deference was at a breaking point; at the level of enforcement and the level of the judiciary, communications were in the state of heightened noise.

Subsequent reaction to the Regulation was mixed. Some critics argued that the discretionary powers given to the Province had the potential to create secret law, which is an unacceptable extravagance in the Canadian system. (Legislative Assembly of Ontario 2013, 1495-1513) These criticisms were echoed by independent counsel, including former Chief Justice Roy McMurtry, who concluded that the Act was itself problematic to the highest degree: that it potentially could

be used to empower “private armies to restrict access to many (in fact any) public places, where the statement under oath by the private guard of the boundaries of the areas under restricted access is conclusive proof thereof”. (McMurtry 2011, 20) However, on some media accounts, the response of some parts of the Canadian public was more beatific. The Fifth Estate, a televised investigative programme for the CBC, paraphrased one prevailing sentiment of peripheral stakeholders: the civilians detained or arrested by the Act “should have stayed at home.” (The Fifth Estate 2010)

Criticism of the Regulation use the description ‘secret law’ with different degrees of severity. The Ontario ombudsperson, André Marin, put the point this way: “Regulation 233/10, passed to enhance security during the G20 summit, should never have been enacted. It was likely unconstitutional.” (Marin 2010, 5) For Marin, however, it was not an especially obvious case of secret law: “In fact, it may have been the best-kept secret in Ontario’s legislative history, *although it wasn’t a secret at all.*” (Marin 2010, 6) He clarifies: “Like the *Public Works Protection Act*, Regulation 233/10 was hidden in plain sight. It was announced not in newspapers, public service messages, or on ministry or police websites, but in the government’s seldom-read and little-known electronic legislative database and then in the *Ontario Gazette*, a publication of interest only to civil servants, pundits and the occasional lawyer.” (Marin 2010, 6) Meanwhile, the accusation of legal secrecy was made more widely, and more confidently, by members of the official opposition. (Legislative Assembly of Ontario 2013, 1501)

At any rate, the government evidently held the protestors blameless. Most of those who were detained or arrested were released once the conference had ended. Moreover, a subsequent (April 2016) court decided that the detainees could file a class-action lawsuit against Toronto police services. (Canadian Broadcasting Corporation 2016) Some of the weight of that blamelessness owes, no doubt, to the power of Canadian statute: we expect government institutions to operate through the justice norm of fair notice, and for enforcement to be in line with norms of justice. (Marin 2010, 98) But even if there were no such expectations, it seems reasonable to hold the central stakeholders blameless. It was a contextually secret law: something Caligula-like, not tax-code-like.

Categorical secret laws

Contextual secret laws are those laws which fail at the level of enforcement, where a bit of advertising legwork could make all the difference between legality and illegality. But there is another category of secret law, closer to the nub of Kutz’s concern, which also deserves our attention. Kutz, we recall, offered two conditions of interest: mere secrecy and secrecy as such. The intersection of these two conditions offers us a sterling example of legal secrecy that we’ll call categorical secret laws. What is characteristic of categorical secret laws is that they prohibit any transfer of information to the accused about the nature of their accusation: the chain of deference is, in this way, intentionally cut off at the level of operationalization.

Though the idea of a secret trial evokes imagery from Kafka, there are plenty of real-life examples where the court operates both *in camera* (where deliberations are kept private) and *ex parte* (without all parties present during the deliberations). As we saw in the discussion of Fuller, court martial in the army can be notoriously secretive, for reasons that are perhaps special to their context. (Fuller 1971) Yet in the modern liberal democratic context, secrecy is perhaps most tolerated in contexts involving potential terrorists, and especially those contexts that involve the perceived threat of terrorism from the most vulnerable and least advantaged classes of subjects. The case of Canadian Security Certificates furnishes a disquieting example.

On February 23 of 2007, in the landmark case of *Charkaoui v. Canada*, the Supreme Court of Canada ruled that the *Immigration and Refugee Protection Act (IRPA)* stood in violation of the *Charter*

of Rights and Freedoms, and hence was unconstitutional. (Supreme Court of Canada 2007) *IRPA* instructs and empowers the state to issue a certificate for detention of any foreign national or permanent resident of Canada, on the grounds that they pose a threat to national security, human rights, or any other serious form of criminality. The certificate is issued by the Solicitor General of Canada and Minister of Immigration. Any information related to the case is then reviewed by Federal Court. If the evidence is considered reasonable grounds for suspicion of the accused, then they may be deported. (Supreme Court of Canada 2007, 353)

The politics and morals of the situation are difficult to disentangle from the aspects that concern unwritten law, because both the moral and political matters loom large. On the one hand, some of those who are given removal orders are refugees who face extradition to countries that seek their brutal treatment or even death. Delivery into the hands of one's executioners is legally problematic because it amounts to a death sentence, which is in violation of section 7 of the *Charter of Rights and Freedoms*, which guarantees life, liberty, and security of the person. (Canada 2016) On the other hand, the risk of terrorist acts is considered very weighty, and prompts heavy-handed action on behalf of the government. The result is a state of legal purgatory, where refugees who are not arrested in connection with any crime, but are fit to be detained under *IRPA*, also cannot be deported. In effect, some commentators called this a state of potentially indefinite detainment. (Davies 2006, 3) The state of limbo is one that central stakeholders like Mssrs. Adil Charkaoui, Hassan Almrei, and Mohamed Harkat sought to be freed from, three members of a group that would be later dubbed the 'Secret Trial 5'. (Wala 2014)

The aspect of the case that demands our attention is the respect with which deliberations over the reasonableness of suspicion may occur without letting the accused know what charges they are supposed to be guilty of. The pertinent section of the Court ruling is worth reproducing at length: "Here, the *IRPA* scheme includes a hearing and meets the requirement of independence and impartiality, but *the secrecy required by the scheme denies the person named in a certificate the opportunity to know the case put against him or her, and hence to challenge the government's case*. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law." (Supreme Court of Canada 2007, 354) (italics added) The judges of the Federal Court "who are required under the *IRPA* to conduct a searching examination of the reasonableness of the certificate, in an independent and judicial fashion and on the material placed before them, do not possess the full and independent powers to gather evidence that exist in an inquisitorial process. At the same time, *the person named in a certificate is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process*. The result is a concern that the judge, despite his or her best efforts to get all the relevant evidence, may be obliged, perhaps unknowingly, to make the required decision based on only part of the relevant evidence. Similar concerns arise with respect to the requirement that the decision be based on the law. Without knowledge of the information put against him or her, the person named in a certificate may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence. If [section 7 of the *Charter*] is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. The *IRPA* provides neither." (Supreme Court of Canada 2007, 354-355)(italics added)

These judgments come down, in effect, to the *reasonableness* of suspicion, upon reviewed evidence. When a security certificate was struck down in May 2016 against Mr. Mahmoud Es-Sayyid Jaballah, the Federal Court seemed reasonably candid about the kinds of rationale that brought their decision to quash the Ministers' order. They explain that, for the purposes of the Court, a reasonable inference differs from unreasonable inference in that the former is a "process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts

established by the evidence”, based on facts which are themselves *known* or *established*. (Hansen 2016, 7-9) The judgment, in order to be reasonable, must then be established by the *preponderance of such evidence*. But it is important to stress the 2008 Court’s point, here, about just how easy it is to mask and distort the kinds of reasoning involved in decision-making when the relevant norms of deliberation are left tacit, in an environment where potential errors of reasoning cannot be laid bare, owing to the long shadow that obscures those deliberations.

And so, I think we can examine the case of security certificates independently from cases like Regulation 233/10 or the pillars of Caligula, in the following two senses. First, it involved a degree of remarkable secrecy, where the accused was not allowed to find out what law they stood accused of breaking. Indeed, they were also not permitted to know what evidence was used in coming to their conclusion. In this way, it was a case of secrecy *as such*. Second, and for that reason, we can think of *IRPA* as being a categorical secret law. It is not the context that is stopping appropriate information from flowing downstream; rather, it is the fact that the information is not supposed to flow if the law is working as its framers intended.

Summary of Secret Law Section

Secret law is a rule of conduct held on threat of formal sanction that needs to be promulgated in an official venue, and whose need goes unsatisfied.

There is a difference between formal promulgation of law being *desirable* and it being *needed*. Though one might think that promulgation of law is generally desirable, not all desires count as needs. The difference is that subjects face a need to know the law just in case they face an *existential* risk of doing wrong that cannot be mitigated by the attempt to do right, while the law is merely desirable when it merely frustrates their preferences. Subjects specifically need *formal* promulgation so long as the threat of sanction that subjects face is of ambiguous provenance, even when examined by experts.

The need for promulgation is a function of a subject’s risk of legal error. If the risk is so high that intellectual good faith and charity are not enough to mitigate the risk, we say there is a need for promulgation. When those risks are shared even by experts, there is a need for formal promulgation. At the abstract level, heightened risk of legal error is the relatively ‘risk-laden’ nature of the picture of law insofar as it affects central stakeholders. The level of noise in the communications environment raises the minimal bar required for dissemination of a legal rule: with great noise comes a correspondingly greater need for advertisement. Otherwise, there is no access to venues, which is what is required for deference to occur.

The idea of secret law is the hardest to pin down (*qua* law). Also, it requires a patient, step-by-step reminder of the difficulties we face in all the other varieties of unwritten law. Secret law inherits all the problems of these other sorts, serving as the exemplar, the pinnacle of legal norms left tacit, requiring all the tools of analysis at our disposal. Still, we have done our best, following Kutz’s scholarship, to make plausible sense of it, and even consider two graphic illustrations of the phenomenon, from the very recent history of a contemporary democracy committed in principle to the transparent rule of public law.

CONCLUSION:

ARCHIPELAGO OF THE SILENCES

I call upon the Latin American poet Maria Negroni to help bring the book to a close. She writes (2002):

The woman in love with the river strolls the deck of a flowing city. Premeditated and abstract, like a ballad of streets, so like dancing or burning castles, sorrow. I always wanted to see and be seen foundering. I like to lose myself in electric gardens. The heart does what it will, expands, climbs Plato's stairs, is sometimes blinded by the greed to create.

"Why are you sad?" asks a clear-eyed woman, pointing to something. It is a globe that unfurls. I pick it up and examine it. Set it spinning. I open the world that begins to take place, to flow over the large screen of the inexplicable. To come apart in my hands like an inspired song, an archipelago of silences.

To make sense of the diverse manifestations of unwritten law, I have made use throughout of the idea of a "picture of law". The metaphor of the 'picture' is meant to suggest that we need to represent the law in some way or other if we are interested in developing an account of its effects and affordances in the real world. Premeditated and abstract, the pictures of law can give spirit to our civic life, just as they can take it away: they can help safeguard our streets or they can move us to burn castles.

At all points I have tried to suggest that our choice in adopting some picture of law has effects on patterns of guidance for individual and collective action, and the right picture of law makes a bid of what kinds of effects ought to follow. In short, pictures of law matter, in the following sense: they tell us who to defer to and under what conditions. Armed with this information, we are able to talk intelligently about promulgation through informal venues, and thereby discover how unwritten law is possible. That is the general theory, and particular forms of unwritten law follow this pattern. Insofar as conditional relationships can be drawn between pictures of law and their

powers to authorize particular kinds of unwritten law, we can say that the account is *systematic*. In this way, I have tried to climb Plato's stairs.

Pictures of law come in two forms, the appropriate and the inappropriate. For our purposes, we have tried, as far as good faith permits, to be neutral about what counts as the appropriate picture, only wanting to make conditional observations about what we might say if a particular picture counts as the appropriate one. Very little guidance has been offered about what counts as the right picture of law, a task I must leave to other philosophers. This lack of commitment is conceived of as a virtue of the account, which I called *modesty*. There is no sense in being blinded by the greed to create.

The basic picture of law is drawn across three dimensions. We observe differences between legal *appearances and reality*; we observe differences between *constitutive conditions of law* and *ordinary, regulative rules of law*; and we notice the difference between *how a system works at one moment*, and *how it works across time*. Each of these features has corresponding effects on our strategies for finding to whom to defer. Knowing what the law looks like, and what the law really is, shall mainly tell us something about the *nature of legal expertise*: the appearances tell us where to look first, and the legal reality informs us about who has the last word. The constitutive criteria describe the *conditions for identification* of the (real or apparent) appropriate political authority who is vested with the job of maintaining the laws. And different views on how *systems of law operate* informs us of the potential for *risk of error* when determining who counts as expert.

The folk might or might not themselves be capable of seeing how to distinguish between formal and informal venues. Indeed, *for the most-part*, they do not need to observe this distinction. They need to know to whom to defer; the experts, informed of fine-grained knowledge of the regulative rules that make up the law, and acquainted with the rules of jurisprudence, will have a better idea. This 'better idea' amounts to (what we have called) a *sophisticated* picture of law. With an expanded world in view, the experts can tell us what the law demands, and will be the ones who can say what counts as a formal venue in cases where this is not common knowledge.

At the outset I made a bold claim. I proposed that the many varieties of unwritten law draw unevenly from different parts of our picture of law in order to compensate for the fact that they are not formally disseminated. The *implicit constitution of law* is a set of rules for a particular legal system that *presumptively endorses some set of constitutive criteria*. Justice norms and fiat norms are putative rules that govern *irregular changes* in a system; justice norms are unwritten laws when the *nature of their alteration appropriately conforms to an optimistic point of view*, and fiat rules *appropriately defy* the internal point of view. The tacit operations of law are rules in a political system that give actionable meaning to laws that have been disseminated, and draw from the rules of jurisprudence belonging to the expert. And *secret rules* are rules of a political system *where subjects require formal dissemination of the rule, and where they find their needs unmet*.

These doctrinal statements were followed by four chapters which drew attention to a handful of some of the most important classic pictures of law. Consider these examples, which should be evocative of the material we have studied. If the appropriate basic picture of law denies the significance of the internal point of view (legal realism), fiat rules are assuredly bearers of legal force, and hence are properly styled unwritten laws; if it is thoroughly optimistic (Aquinas), then justice norms are (at least partially) unwritten laws. If the appropriate basic picture holds that law is constituted by the alignment of strategic bids in securing power in a field of similar efforts (Foucault), then legality can only be assessed along a spectrum; with proper political will, the very office of sovereign can be dissolved; and the Constitution could be legally ignored, so long as the ignoring of it had a chance of succeeding as a bid for power. If rules of jurisprudence are mainly discretionary (Hart), then the guidance of experts can depart significantly from prior expectations

of the folk and from other experts, and judgments of the judiciary shall always take on the guise of operationalizations; all practical law will be, to an extent, informal law. If those rules are strict (legal formalism), then the operationalization of law can and should be exorcized fully by rigorous codification. And if strictly speaking the body of subjects do not *need* to know the law from formal venues in some conditions (as for Aquinas, with respect to the New Law), then *no* laws are secret under those conditions. *The scope and force of unwritten laws correlate to differences in the pictures taken for granted.*

There is, however, a *critical* aim behind these systematic observations. If at any point we see a picture of law that offends our core convictions, alerting us to our intuitive contempt for a body of beliefs we would prefer to take for granted, then these may be reasons to question whether the picture on offer truly is the appropriate one to have. If we think it just obvious that, as a matter of fact, there are some conditions under which laws need to be formally promulgated to be followed, then any picture which denies the need for formal promulgation under those conditions might be a picture not worth having. Or, perhaps, they may be reasons to bite the bullet, and to both tolerate and embrace the laws as we find them, both written or unwritten. There are a thousand ways to tame Holmes's dragon, to make him a useful animal.

Each form of unwritten law seems to stand alone, an island in a chain. Each works in spite, or because, of conditions where law is left tacit -- places where we are most comfortable taking norms for granted -- an archipelago of silences.²⁵ On the surface they are distinct, but surfaces conceal too much to be left alone, a thin veneer that longs to be pulled back, a globe that unfurls when spun. And the major aim of this dissertation has been to do just that, exploring in greater detail the terrain of the unwritten law, the archipelago of silences.

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