

## LAW'S ABSTRACT JUDGEMENT (LAJ) AND INTELLIGENT FIDELITY: ON WILLIAM LUCY'S LAW'S JUDGEMENT\*

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*EL JUICIO ABSTRACTO DEL DERECHO Y LA FIDELIDAD  
INTELIGENTE: SOBRE LAW'S JUDGEMENT DE WILLIAM LUCY*

Imer B. FLORES\*\*

We have to choose between an abstract, principled, moral reading... and a concrete, dated, reading.

Ronald Dworkin, *The Arduous Virtue of Fidelity* (1997)

Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose.

Lon L. Fuller, *The Case of the Speluncean Explorers* (1949)

SUMMARY: I. *Introduction: Law's Abstract Judgement (LAJ)*. II. *LAJ Reviewed*. III. *LAJ Revised*. IV. *Conclusion: LAJ Recognised*.

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\*\* Professor-Researcher, Institute for Legal Research (IJJ) and Law School (FD) of the National Autonomous University of Mexico (UNAM). I am grateful not only to William Lucy for his willingness to put his book under scrutiny of Juan Vega Gómez (as Chair), Amalia Amaya, Rodrigo Camarena González, and myself (as Commentators), but also to Edgardo Ocampo y Rubén Rivera for helpful research assistance and discussion of a previous draft, along as Adrián Chávez and Sócrates Osorio.

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## I. INTRODUCTION: LAW'S ABSTRACT JUDGEMENT (*LAJ*)

Elucidating and defending the abstract nature of law's judgement is the double aim of William Lucy's *Law's Judgement*.<sup>1</sup> It is worth mentioning that this feature of law, *i.e.* law's abstract judgement (hereinafter *LAJ*), has been either dismissed or overlooked by legal theory. What's more for most critical authors it is morally troublesome or historically anachronistic.<sup>2</sup> Hence, the book rectifies and redresses this wrong not only by exploring the various connections between *LAJ* and some of our most important legal and political values, such as dignity, equality and community, but also by showing its close relations to juristic conceptions embedded in the law, such as personhood, *i.e.* legal persons, and fairness, including responsibility, impartiality and equity (or even mercy). In that sense, it serves a double purpose: first, it makes a case against those who counsel liberation from *LAJ*; and, second, it redirects attention to the task of morally evaluating *LAJ* in its own terms.

In my opinion, Lucy's contributions, in addition to providing the first book-length and pretty exhaustive analysis and defence of *LAJ*, are both descriptive/explicative and prescriptive/normative, since it has both explanatory/expository and justificatory aims.<sup>3</sup> In what follows, I will commence by reviewing Lucy's *LAJ*; continue by revising critically his version of *LAJ*; and conclude by reinforcing why I applaud and embrace Lucy's *LAJ*.

<sup>1</sup> See William Lucy, *Law's Judgement* (Hart Publishing 2017) (hereinafter references will be made directly in the text and between parentheses). See also 'Abstraction and the Rule of Law' (2009) 29 *Oxford Journal of Legal Studies* 481-509.

<sup>2</sup> See Roberto Mangabeira Unger, *Knowledge and Politics* (Free Press 1975) 74: "The language of formal equality is a language of rights as abstract opportunities to enjoy certain advantages rather than a language of the concrete and actual experience of social life."

<sup>3</sup> See Imer B Flores, 'The Legacy of Ronald Dworkin (1931-2013): A Legal Theory and Methodology for Hedgehogs, Hercules, and One Right Answers' (2015) 9 *Problema. Anuario de Filosofía y Teoría del Derecho* 157-192, 165-173; and, 'Taking (Human) Dignity and Rights Seriously: The Integrated Legal, Moral and Political Philosophy of Ronald Dworkin', in Salman Khurshid, Lokendra Malik & Verónica Rodríguez-Blanco (eds), *Dignity in the Legal and Political Philosophy of Ronald Dworkin* (Oxford University Press 2018) 101-129, 103-107.

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## II. LAJ REVIEWED

The main claim that William Lucy defends right from the start and develops throughout the book is: “[L]aw’s judgement is abstract” (p. 3). For that purpose, in the introductory chapter 1, he begins by explaining his claim re how law judges us, which he identifies mainly with bourgeois (or liberal and modern) law, and by emphasizing that LAJ includes as three of its most distinctive features:

- 1) The presumptive identity component;
- 2) The uniformity component; and
- 3) The limited avoidability component.

According to (1) law —usually— sees its addressees as *identical abstract beings*, regarding both their capacities and entitlements, at least in a formal way; (2) law —generally speaking— judges its addressees by reference to *general and objective standards equally applicable to all*; and (3) law —often— includes a *limited number and range of exculpatory claims* that are subject to reasonableness standards (pp. 4-5). The first component refers to the nature of law’s addressees, *i.e.* legal persons or subjects, whereas the second and third components relate to the content of laws themselves (the former to legal standards and the later to its mitigations, *i.e.* rules and exceptions) (pp. 15-16). As Lucy clarifies, in stating the three components —(1), (2), and (3)— the qualifications used —‘usually’, ‘general speaking’, and ‘often’— are deliberate: “My claim is not that these three components are realised to the maximum degree across the whole of all or most current legal systems. Rather, it is that their significance in many legal systems and much legal thought is such that departures from them —which are in fact numerous— are regarded as suspicious or problematic.” (p. 5)

Lucy continues by making explicit two caveats regarding LAJ (p. 16):

- (i) It is not ubiquitous, but pretty common throughout legal doctrine; and
- (ii) It oscillates from more to less abstract (and back).

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And from the last caveat, *i.e.* “*LAJ* must be contrasted with less abstract (but not pure particularistic) judgment”, prefigures “another and related warning”: “It is that *LAJ* should not be flippantly contrasted with moral or ethical judgement. This is a mistake because there is no *a priori* reason why the models in play in one domain should not be similar or even exactly the same as those in another” (p. 18).

Later on Lucy responds to the question: “Why is *LAJ* worthy of further study?” (p. 19) Although his response is not fully unpacked until the end of the book, he advances: “My general argumentative strategy is an attempt to find value in *LAJ* regardless of the charges against it” (p. 25). In short, there are at least four considerations that make the study of *LAJ* worthwhile, each one responding to a charge against it:

(A) It appears to be an historical anachronism, but it is “historically significant”: “Its emphasis in generality and abstraction could be seen... as generating a distinction between feudal (or medieval law), on the one hand, and bourgeois (or liberal) law, on the other” (pp. 19-20);

(B) It “seems deeply morally counter-intuitive” by suppressing particularities and differences: “[L]aw deliberately ignores much about character, context, and knowledge of those before it, so that makers of good faith mistakes and those not wilfully ignorant can often be trapped in the law’s maw” (p. 21);

(C) It looks like “there is a great deal wrong with it” and as such is “deeply problematic” (p. 22); and,

(D) It follows —from A, B and C— that *LAJ* is, therefore, unfair, morally objectionable, or suspect.

In sum, he identifies at least four different, but sometimes related, strands in the critique of *LAJ*:<sup>4</sup>

<sup>4</sup> See Karl Marx, “Critique of the Gotha Programme”, in Karl Marx and Friedrich Engels, *Collected Works: 1874-1883*, vol. 24 (Lawrence and Wishart 1989); and, Evgeny Pashukanis, *Law and Marxism: A General Theory* (first published in Russian 1924, Pluto Press 1983). See also Unger (n 2); *Law in Modern Society. Toward a Criticism of Social Theory* (Free Press 1976); and *The Critical Legal Studies Movement* (Harvard University Press 1986). For an overview of the critical legal studies, in general, and the (critical) feminist theory, critical race theory, and other critical

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(a) The grip of a significant historical transition: “it is a shift from modern law to postmodern law, from autonomous law to responsive law, or from [liberal] legal order to post-liberal legal order” (p. 22);

(b) The suppression of “particularity and difference”, by ignoring “many of the significant features of those before it” and by articulating and informing behind an arguably gender-neutrality an “objectionably valorised notions of masculinity, on the one hand, and inappropriate images of femininity, on the other” (pp. 23-24);

(c) The problem of fairness: “although law is often a means of treating people equally, it is simultaneously and equally often a means of treating them unequally. Treating different people as if they were the same, or treating different people in exactly the same way, is in effect a form of unequal treatment” (p. 24); and

(d) Two related forms of an intuition regarding the problem of fairness: “One holds that, keeping defendants rather than claimants in mind, it is unfair for the law to hold them to standards of behaviour which they cannot achieve... The other, related form of this intuition holds that it is unfair not to excuse good-faith wrong doing” (p. 25).<sup>5</sup>

Lucy proceeds to tackle the methodological question of “How?” Firstly, he advances: “The approach adopted here is jurisprudential or legal-philosophical”; but with an important constraint “law’s judgement is an aspect of legal institutional design”, which refers to “both to procedural and substantive doctrines, on the one hand, and more general features of a legal system, on the other” (p. 26). Secondly, he cautions: “The temptation among many contemporary jurists and legal philosophers is to assume that answers... must entail the construction of arguments from first principles” (p. 27). Instead, he explains: “What follows avoids immediate recourse to first principles. Our examination of LAJ aims to illuminate the values, if any, immanent within this aspect of legal institutional design or, at

approaches, in particular, see Brian Bix, *Jurisprudence: Theory and Context* (3rd ed, Sweet & Maxwell 2003) 217-236.

<sup>5</sup> Before proceeding to the following section, he advances the core of chapter 3: “Any adequate response to this critique must look closely at the law’s conception of liability-responsibility, law’s supposed impartiality and the role of mercy in the administration of law” (p 25).

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the very least, closely related to it”. Thirdly, he clarifies “The values I examine are normative —part of our moral, ethical and legal fabric—” and “I ignore non-normative sources of support for *LAJ*”, and even elucidates (p. 28):

My discussion of the values immanent within and supportive of *LAJ* is not in any sense foundational. It is not therefore concerned, as much moral philosophy is, with the epistemological or rational basis of those values. Rather, the principal burden is to elucidate those values and their relationship not just with this aspect of legal institutional design but also with one another.

Fourthly, he makes explicit one key aspect: “One way in which we can try to ensure a close fit between our normative and explanatory accounts of an aspect of legal institutional design, on the one hand, and that aspect of legal institutional design, on the other, is by embracing the participants’ point of view as our principal methodological injunction” (p. 29).<sup>6</sup> Lastly, he takes sides with those —like Ronald Dworkin— who think that contemporary legal philosophy does not have to be boring, but “should strive to be interesting” (p. 31, fn 79).<sup>7</sup> He adds (p. 32):

<sup>6</sup> See William Lucy, *Understanding and Explaining Adjudication* (Oxford University Press 1999).

<sup>7</sup> See Ronald Dworkin, ‘Hart’s Postscript and the Character of Political Philosophy’ (2004) 24 *Oxford Journal of Legal Studies* 1-37. (Reprinted in *Justice in Robes* (Harvard University Press 2006) 140-186.) Ibid 37 (185-186): “I believe that legal philosophy should be of interest to disciplines both more or less abstract than itself. It should be of interest to other departments of philosophy —political philosophy, of course, but other department as well— and it should be of interest to lawyers and judges. There is just now an explosion of interest in legal philosophy... But this explosion is taking place not within courses called “jurisprudence”, which I fear remain dreary, but within substantive areas of law... I don’t just mean that these courses engage theoretical as well as practical issues: they engage exactly the issues I have been discussing about the content of legality and its implications for the content of law. But legal philosophers who regard their work as descriptive or conceptual as distinct from normative have, in my view, lost an opportunity to join these discussions and debates, and in some universities the dominion of jurisprudence has shrunk in consequence”. See David Enoch, ‘Is General Jurisprudence Interesting?’ in David Plunkett *et als.* (eds), *Dimensions of Normativity: New Essays*

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[W]e cast our troth in with the proponents of the allegedly interesting jurisprudential project and focus upon illuminating some area of legal institutional design. The questions in this enterprise do not revolve around the existence conditions for law in general or for any conceivable legal system, but instead centre upon particular legal concepts and features of existing legal systems.

He finishes his introductory chapter one “Law’s Judgement” with a “Prospect”: “Chapter two addresses the legal person, examining the forms it takes and sketching the nature of its relation with LAJ”. “Chapter three distinguishes three charges of unfairness that LAJ often generates. One of the charges relates to legal-liability responsibility, [other] raises the issue of impartiality and the third invokes the idea of equity (or mercy)” (pp. 32-33). The remaining chapters explore —as advanced— the various connections between LAJ and some of our most important legal and political values, such as “dignity” in chapter four (pp. 123-162), “equality” in chapter five (pp. 165-203), and “community” in chapter six (pp. 205-242). “The final [concluding] chapter —chapter seven— recaps the arguments of the previous chapters and reiterates the claim that LAJ is nowhere near as morally and politically problematic as critics lead us to believe” (p. 34).

Clearly, his argument implies the adoption of a broader normative perspective, which can be characterized as “immanence” and distinguished from “consistency” (or “congruence” or “coherence”):<sup>8</sup>

*on Metaethics and Jurisprudence* (Oxford University Press 2019) (forthcoming); and Julie Dickson, ‘Why General Jurisprudence Is Interesting’, (2017) 49 *Crítica. Revista Hispanoamericana de Filosofía* 11-39. See also Pau Luque, ‘The Interestingness of the Non-Interestingness Objection to General Jurisprudence’ (2017) 49 *Crítica. Revista Hispanoamericana de Filosofía* 5-10.

<sup>8</sup> See Lon L. Fuller, *The Morality of Law* (rev. ed. Yale University Press 1969) 81-91 (originally published: 1964); and Amalia Amaya, *Tapestry of Reason. An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart Publishing 2015). See also Imer B Flores, ‘Sobre la coherencia en el derecho y en la argumentación jurídica’ in ‘Sobre *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, de Amalia Amaya. / *On The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, by Amalia Amaya’ (2017), 46 *Isonomía. Revista de Teoría y Filosofía del Derecho* 163-178.

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“The immanence (or embeddedness or embodiment) claim is stronger than the mere consistency claim in two respects. First, because it insists that the values in play are not merely compatible with, but make normative sense of *LAJ*; and second, because it holds that these values are indeed manifest or constrained in that social-institutional form” (p. 246).

What’s more, he adds: “an account of the moral and political company that *LAJ* keeps adds to the latter’s lustre because it endorses an holistic position about value. Such a position holds that both the worth and truth of each of our values is, either in part or in full, a function of how well each fits with the rest of our values” (p. 247). Immediately after, he refers to Dworkin —who espoused this kind of view— and quotes a couple of passages from *Justice for Hedgehogs* (pp. 247-248): “in political morality integration is a necessary condition of truth. We do not secure finally persuasive conceptions of our several political unless our conceptions do mesh.” And, “full value holism —the hedgehog’s faith that all values form an interlocking network, that each of our convictions about what is good or right or beautiful plays some role in supporting each of our other convictions in each of those domains of value”.<sup>9</sup> In the final chapter seven “Conclusion”, Lucy wraps his argument (pp. 243-245):

My attempt to place *LAJ* in a broader normative (moral-cum-political) perspective is intended to make some of its particular features less troubling than they might appear when viewed up close... Furthermore, this broader normative perspective prevents us viewing *LAJ* in isolation, helping us to see that it is not a free-standing, single ‘thing’ or discrete item but, rather, part of a more complex interconnected whole or amalgam comprising, at the least, notions of dignity, equality and community.

<sup>9</sup> See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 5-6 and 120. See Imer B. Flores, ‘Ronald Dworkin’s *Justice for Hedgehogs* and Partnership Conception of Democracy (With a Comment to Jeremy Waldron’s “A Majority in the Lifeboat”)’ (2010) 4 *Problema. Anuario de Filosofía y Teoría del Derecho* 65-103, 67-76; ‘The Legacy of Ronald Dworkin...’ (n 3) 173-181, and ‘Taking (Human) Dignity and Rights Seriously...’ (n 3) 107-111.



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III. LAJ REVISED

I agree almost completely with Lucy's claims, but I fear he is being extremely cautious and tends to avoid going deeper and stops short by adopting weaker versions, instead of the stronger versions. Let me be clear, I totally agree that law's judgement is abstract, and contains the three components described by Lucy, and so on, especially regarding the duty of the judges of fidelity to law and its purposes and values to the extent that I endorse completely the virtues of LAJ. As the reader can see I am sympathetic to the project, and will like to push it forward.

First, instead of endorsing unambiguously the claim that law's judgment—in addition to being abstract—is objective, Lucy affirms (p. 5, fn 8):

It is tempting to say that these features show that law's judgement is also objective and there is at least one credible sense of 'objective' in which this is right... However, the notion of objectivity when applied to law can have many other senses... and is undoubtedly complex. Although some significant points about law's abstract judgement can be made using various senses of that term... this runs the risk of unnecessary complication.<sup>10</sup>

He can easily respond that his claim is merely that law's judgement is abstract, without endorsing or neglecting that it can be objective as well. In any event, instead of saying that it is "undoubtedly complex" and "runs the risk of unnecessary complication", I will like to advise him on the contrary: to explore not only the dichotomies abstract-concrete, general-particular and objective-subjective, but also the close interconnections between abstract-general-objective, on the one hand, and concrete-particular-subjective, on the other hand. After all, these three components, in general, and the uniformity component, *i.e.* "law judges its addressees by reference to *general and*

<sup>10</sup> Lucy includes references to Matthew Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007) and Kent Greenwalt, *Law and Objectivity* (Oxford University Press 1992). See also Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87-139.

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*objective standards equally applicable to all*" (p. 4), in particular, are rooted in the interconnection between abstractness, generality and objectivity, which are at the core of law's formality and even legality.

Actually, in his "Abstraction and the Rule of Law", Lucy advanced: "That concept [*i.e.* the concept of the rule of law] consists of two constitutive claims: first, that the rule of law stands against arbitrary power and, second, that it consists of, at the very least, a limited number of principles, observance of which prevents law-makers from exercising power arbitrarily."<sup>11</sup> Furthermore, he acknowledged that Lon L. Fuller's and Joseph Raz's accounts of the rule of law do not explicitly support *LAI*, except implicitly through "the requirement that legal rules be general." He added:<sup>12</sup>

As a matter of both lawyerly and ordinary common sense, generality in this context can have at least two meanings... one idea in play is that the provision in question applies to all citizens or, perhaps, to all of its addressees (these two possibilities need not be the same)... Generality here is therefore *simple uniformity: the same rules bind all*...

But there is another sense generality can plausibly have here... [rules] are or must be applied in the same manner. Saying this is to say more than that the same rules do or should bind all citizens (or addressees). It is to insist upon *uniformity of application*. This second sense of generality turns attention from the rules themselves to their enforcement and interpretation...

Simple uniformity and uniformity of application can be advanced by, and are to some extent embodied in, law's abstract judgement. The uniformity component of law's abstract judgement is, after all, virtually synonymous with simple uniformity. The first —presumptive identity— component ensures a degree of uniformity of application by making it

<sup>11</sup> Lucy, 'Abstraction and the Rule of Law' (n 1) 494.

<sup>12</sup> *Ibid*, 495-496. See Fuller (n 8), especially 'The Generality of the Law' 46-49 and 'Congruence between Official Action and Declared Rule' 81-91; and Joseph Raz, *The Authority of Law* (Oxford University Press 1979). See also HLA Hart, 'Book Review' (1965) 78 *Harvard Law Review* 1281-1296; Ronald Dworkin 'The Elusive Morality of Law' (1965), Marshall Cohen 'Law, Morality and Purpose' (1965), and Lon L Fuller 'A Reply to Professors Cohen and Dworkin' (1965), in "The Morality of Law -A Symposium", 10 *Villanova Law Review* 631-639, 640-654, and 655-666, respectively.

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very difficult for liability decisions to turn upon particularities of the disputants' character or context...

Second, regarding Lucy's caveats, although he announces that "LAJ is not ubiquitous", he cannot really mean it, at least not without risking a contradiction, since he asserts "It is more deeply embedded in some areas of legal doctrine than in others. A more expansive survey would disclose areas in which it has little influence"; and, "Judged across entire legal systems, the abstract nature of LAJ is thus a matter of degree, of more or less" (p. 16). In that sense, the fact that LAJ is not as deeply embedded in all areas of legal doctrine, even if we grant that there are areas with little influence, does not disprove, but —on the contrary— proves that it is ubiquitous, *i.e.* present everywhere, where law is and its large or little presence, re-confirms that it is thus a matter of degree, of more or less.

Let me suggest a friendly amendment to this caveat: LAJ is ubiquitous, though more deeply embedded in some areas of legal doctrine than in others, including some in which it may appear to have little influence, and as such LAJ's ubiquity across entire legal systems is thus a matter of degree, of more or less. Furthermore, this way of framing his caveat is consistent with the book, in general, and the other two warnings, in particular: not only LAJ oscillates from more to less abstract and back, and can be contrasted with less abstract (but not pure particularistic) judgment,<sup>13</sup> but also has a close interconnection with moral or ethical judgement.<sup>14</sup>

<sup>13</sup> Let me suggest that this oscillation from more to less abstract and back brings to mind "something like" John Rawls' "reflective equilibrium", HLA Hart's "critical reflective attitude", and Ronald Dworkin's "three stages of interpretation". See John Rawls, *A Theory of Justice* (Harvard University Press 1971) 48-51; HLA Hart, *The Concept of Law* (Oxford University Press 1961) 56 (there is 2nd ed "With a Postscript": 1994) 57; and Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 65-68. See also Wilfrid J Waluchow, *A Common Law Theory of Judicial Review. The Living Tree* (Cambridge University Press 2007); Imer B Flores, 'In the Dark Side of the Conventionality Thesis?' in Enrique Villanueva (ed), *Studies in Social, Political and Legal Philosophy. Philosophy of Law and of Politics* (Rodopi 2002) 143-156, 155-156; and 'The Living Tree Constitutionalism: Fixity and Flexibility' (2009) 3 *Problema. Anuario de Filosofía y Teoría del Derecho* 37-74, 62.

<sup>14</sup> On the moral reading of law, see Ronald Dworkin, *Taking Rights Seriously*

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Third, despite his thorough defence of *LAJ*, Lucy tends to adopt the weaker versions, although stronger ones are easily available to him: “I do not claim that the three components of *LAJ* have marked each and every legal system known to human-kind. I claim only that *LAJ* is a more pronounced feature of liberal or bourgeois legal systems than it is of feudal legal systems” (p. 6). From my perspective, it is possible to adopt a stronger version of the *LAJ* claim to the extent that it is not only a pronounced feature of modern law, *i.e.* bourgeois or liberal, but also a prominent feature of law that has marked each and every legal system. He can again easily respond by repeating what his claim is and is not, but I will like to counsel him to the contrary. Let me be clear, I completely agree that “*LAJ* is a more pronounced feature of liberal or bourgeois legal systems than it is of feudal legal systems”, but it is still a prominent feature of law that has marked each and every legal system, including both feudal or medieval law and liberal or modern law. The problem seems to be that Lucy considers the former as rigid and the latter as not. In his voice (p. 20):

If the former was made up of different legal incidences tied to a variety of fairly rigid roles, one’s rights and obligations being determined by those roles, then the latter seems distinctive in its lack of such rigidity and because all addressees of the law are legally formally equal. Law’s abstract judgement in part embodies the latter idea and this could possibly be regarded as a constitutive characteristic of bourgeois law.

...There was no genuine sense in which all addressees of the law were regarded as the same before it; nor were addressees of the law always

(Harvard University Press 1977) (there is 2nd ed with “Appendix: Reply to Critics”: 1978) 149; (n 13) 90; *Freedom’s Law. The Moral Reading of the American Constitution* (Harvard University Press 1996) 1-38, 2; and, ‘The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve’ (1997) 65 *Fordham L. Rev.* 1249. See also James E. Fleming, *Fidelity to Our Imperfect Constitution. For Moral Readings and Against Originalisms* (Oxford University Press 2015); and Imer B. Flores, ‘Intelligent or Unintelligent Fidelity?’ in *Book Review Symposium on Fidelity to our Imperfect Constitution: Six Views and a Response* (2016) 31 *Constitutional Commentary* 407-423; and ‘Constitutional Interpretation, Intelligent Fidelity, and (Im)Perfection: On James E. Fleming’s *Fidelity to Our Imperfect Constitution*’ (2017) 11 *Problema. Anuario de Filosofía y Teoría del Derecho* 31-58.

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bound by the same laws. The law recognized a number of different legal statuses and these determined one's legal rights and duties, liabilities and immunities, in a fairly rigid way.

Certainly, in the feudal or medieval law there were different categories of legal addressees and the different legal statuses determined one's rights and obligations, whereas *prima facie* in the liberal or modern law all legal addressees were placed in the same (or similar) broad category and so had the same (or similar) bundle of rights and obligations.<sup>15</sup> Let me suggest that LAJ is independent not only of the rigidity or not of the categories but also of the multiplicity or not of legal addressees, since the abstractness is and will be present within each category regardless of being broadly or narrowly construed. Is this consistent with Lucy's position? And more importantly, is this true? I believe it does.

Bear in mind that in chapter two "Law's Persons", Lucy begins by clarifying "the legal person is not necessarily a natural person... Corporations are not natural persons —the kind of physically embodied human beings by which we are surrounded— yet they are certainly legal persons" (p. 35). Continues by distinguishing at least two in-

<sup>15</sup> Remember that in William Shakespeare's *The Merchant of Venice*, the Duke of Venice is glad to defer to the judgement of the foreign visitor, who is no other than Portia herself in disguise impersonating a male young "doctor of the law". After Shylock rejected the late payment of the principal and even twice and thrice as much, the court decides to grant his bond, *i.e.* a pound of flesh from Antonio. But Portia not only clarifies that Shylock is indeed entitled to remove with his knife only the flesh, *i.e.* exactly one pound, neither less nor more, and not the blood, but also cites a law under which he, as a Jew and hence an alien, having attempted indirectly and directly to take the life of a Venetian citizen, has to forfeit his property, half to the government and half to Antonio, and his life depends of the Duke's mercy... As you can see the final ruling derives completely of the legal statuses of both Shylock and Antonio. Imagine how different the outcome would have been if either Shylock was not an alien, but a Venetian citizen, or Antonio was not a Venetian citizen, but an alien. See William Shakespeare, *The Merchant of Venice*, IV, 1: "Por. Tarry, Jew; / The law hath yet another hold on you. / It is enacted in the laws of Venice, / If it be prov'd against an alien, / That by direct or indirect attempts / He seek the life of any citizen, / The party 'gainst the which he doth contrive / Shall seize one half his goods; the other half / Comes to the Privy coffer of the state; / And the offenders life lies in the mercy / Of the duke only 'gainst all other voice".

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stances of legal person-talk: “One encompasses what can be called ‘the person as presupposition’ (*PaP*), while the other is ‘the person as consequence’” (*PaC*) (p. 37).<sup>16</sup> Accordingly, the legal person is understood not only “as the precondition of legal regulation” (p. 39) (or the “common point of imputation” in Kelsenian terms) but also “as a consequence of legal doctrine [that] can yield numerous apparently quite different persons” (p. 52) (or “an artificial construction of jurisprudence” / “a construction of legal science” in Kelsenian terms).<sup>17</sup> Finally, he concludes: “‘the’ legal person is multiform and not identical with natural persons” (p. 53). In that sense, a “legal person” is a construction that does not correspond necessarily to a “natural person” (or a “human being” in Kelsenian terms), since legal systems do not grant necessarily “personhood” (or “personality” in Kelsenian terms) to all natural persons and even recognize non-natural persons as legal persons.<sup>18</sup> In Hans Kelsen’s words:<sup>19</sup>

It is said, too, that the human being has “personality”, that the legal order invests man with personality —and not necessarily all men. Slaves are not “persons,” they have no legal personality. Traditional theory does not deny that “person” and “human being” are two different concepts, though it asserts that according to modern law, as distinguished to ancient law, all men are persons or have personality.

It is worth noting that the legal person comprehends not only the broader category of *PaP* and different narrower categories of *PaC*,

<sup>16</sup> See Felix S Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia Law Review* 838: “the meaning of a definition is found in its consequences.”

<sup>17</sup> See Lon L Fuller, *Legal Fictions* (Stanford University Press 1967), especially chapter 3 “Is Fiction an Indispensable Instrument of Human Thinking?” 93-137.

<sup>18</sup> See Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trans, Oxford University Press 1992) (originally published in Vienna: 1934) 39-41, 46-52, especially 48 and 50; *General Theory of Law & State* (Harvard University Press 1949) 93-109, especially 99; and *Pure Theory of Law* (first published in Vienna 1960, Max Knight trans, University of California Press 1967) 168-192, especially 172 and 191. See also Stanley L Paulson, ‘Hans Kelsen’s Doctrine of Imputation’ (2001) 14 *Ratio Iuris* 47-63.

<sup>19</sup> Kelsen, *Pure Theory of Law* (n 18) 172.

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including both natural and non-natural persons, but also that the abstractness is and will be present within each category, with their respective set of rights and duties.<sup>20</sup> The fact that the category of legal persons has been extended from very few more or less rigid categories in ancient law<sup>21</sup> to several rigid categories in medieval law<sup>22</sup> to the not so rigid category of all—or almost all—legal addressees in modern law reinforces in my point of view that *LAJ* is independent both of the multiplicity or not and the rigidity or not of the categories.

What's more, the fact that nowadays boys and girls, citizens and foreigners, disabled and not-disabled, heterosexual and homosexual, men and women, poor and rich, religious and not religious, and so on, can fit into the same abstract and broad category of human beings does not mean that they are completely identical nor that there are any differences among them. Let me insist that abstractness—and even generality—should not be confounded with equality, as Lucy himself argues, by exploring the connection between *LAJ* and “equality” (pp. 165-203), and even seems to recognize, as

<sup>20</sup> In my opinion, it is a mistake to grant (or extend) the same bundle of rights and obligations from an individual (natural) person to a collective (non-natural) person, such as a for-profit corporation, as the Supreme Court of the United States apparently did in the Hobby Lobby case by extending the religious freedom of the individual owners to their enterprise. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. (2014). Analogously, in what I consider as a similar mistake, the Supreme Court of Mexico did grant (or extend) “moral damages” from individual (natural) persons to collective (non-natural) persons. See Contradicción de tesis 100/2003-PS.

<sup>21</sup> In Roman law, for example, the status of an individual legal person could be: a Roman citizen (*status civitatis*), unlike foreigners; a free individual (*status libertatis*), unlike slaves; or a member of a Roman family (*status familiae*) either as the head of the family (*pater familias*) or as any other member (*fili familias*). Cfr. Patrick William Duff, *Personality in Roman Private Law* (first published 1938, Rotham Reprints 1971) ¶ 1-25.

<sup>22</sup> In English law, for instance, as Lucy reminds us “The ‘legal sorts and conditions of men’ included, *inter alia*, that of Earl and Baron, Knight, serf, member of religious order, Clergy, Alien and Jew” (p. 20). See Frederick Pollock and Frederic William Maitland, *The History of English Law. Before the Time of Edward I*, Vol. I (first published 1895, Cambridge University Press 1968) 407.

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George Orwell puts it: “All animals are equal, but some animals are more equal than others.”<sup>23</sup>

Fourth, there are a couple of minor points, in which I prefer an alternative approach (or some other stipulations) and somehow a different conclusion. On the one hand, at first I was intrigued by Lucy’s use of the term “impartiality” (pp. 96-110), which in some contexts seemed to me to refer to “neutrality”. Then, I noticed —by revising the essay<sup>24</sup> from which that section draws upon— that Lucy conceded not only that “impartiality is often taken to be synonymous with the idea of neutrality” but also that “efforts to distinguish them appear merely stipulative, inventing a distinction not actually here.”<sup>25</sup>

Personally, I believe that complete neutrality is impossible in social sciences, in general, and in the law, in particular. It is neither possible nor desirable. The law is not neutral, it has purposes and values, and the legal officials cannot remain neutral by taking no position, they have to act upon and take some position, as Lucy points out: “Yet, although adjudication rarely, if ever, extends its judgement to every aspect of the disputants’ conduct and character, it always invokes (when done legitimately, at least) the law values. And the judicial duty of fidelity to law *must* include, if recourse to purposes and values is unavoidable in rule application and interpretation, fidelity to those purposes and values” (p. 100).<sup>26</sup> (I will return to the discussion on fidelity to law in section IV. Conclusion: *LAJ* Recognised.)

On the contrary, I consider that impartiality at least in the application and interpretation of law is not only desirable and possible

<sup>23</sup> George Orwell, *Animal Farm: A Fairy Story* (1945) X. *Cfr.* Lucy (p. 50): “One group (playing boys) is indulged by the law, in the sense that their heedlessness is accepted as a naturally occurring factor that usually negates liability, while other groups (the developmentally disabled and playing girls) are not so indulged.”

<sup>24</sup> See William Lucy, ‘The Possibility of Impartiality’ (2005) 25 *Oxford Journal of Legal Studies* 3-31.

<sup>25</sup> *Ibid* 5 and 13.

<sup>26</sup> *Cfr.* *ibid* 18: “Judgement is made in accordance with the values of the law. And the judicial duty of fidelity to law *must* include, if recourse to purposes and values is unavoidable in rule application and interpretation, fidelity to those purposes and values.”



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but also necessary.<sup>27</sup> Since the law is not neutral and the legal officials cannot remain neutral, it is necessary not only to guarantee “a minimal requirement of impartiality in the context of legal disputes, namely, an attitude of openness to and lack of pre-judgement upon the claims of the disputants” (p. 97)<sup>28</sup> but also to *audi alteram partem*, i.e. listen to the other party or side, in order to take a position on the dispute and not on the disputants, and much less to have an already biased, prejudiced or pre-established position on either the dispute or the disputants, as Lucy puts it (p. 106).<sup>29</sup>

Judgment must be based on the law and not some assessment, unless it is part and parcel of the law, of one or other of the disputants' moral or social status or virtue. Why? To ensure that disputants are treated in the same way regardless of their character or worth, their moral status, lifestyle or gender, ethnicity or religion. Judgement according to the law

<sup>27</sup> Elsewhere I have argued that the principle of impartiality *Nemo iudex in causa sua*, i.e. “No one should be judge in his/her own cause”, is and must be complemented by a twin principle *Nemo legislator in causa sua*, i.e. “No one should be legislator in his/her own cause”. See Imer B Flores, ‘Legisprudence: The Forms and Limits of Legislation’ (2007) 1 *Problema. Anuario de Filosofía y Teoría del Derecho* 247-266, 263. See also ‘The Quest for Legisprudence: Constitutionalism v. Legalism’, in Luc J Wintgens (ed), *The Theory and Practice of Legislation: Essays on Legisprudence* (Ashgate 2005) 26-52; and ‘Legisprudence: The Role and Rationality of Legislators — *vis-à-vis* Judges— towards the Realization of Justice’ (2009) 1:2 *Mexican Law Review* 91-110.

<sup>28</sup> Lucy (n 24) 15.

<sup>29</sup> Ibid 24. Please note that most of the times to be a part or parcel of the law will appear to require an explicit introduction of an exception to the rule, for example, the Mexican Civil Code of 1870 was revised in 1884 and modified later on in 1928-1932 to include an exception to the maxim *ignorantia iuris non excusat*, i.e. “The ignorance of law is no defence / excuse”, or alternately *ignorantia legis neminem excusat*, i.e. “The ignorance of law excuses no one” (p. 80), allowing judges to take into account extreme circumstances, such as notorious ignorance, misery or poverty. However, my take is that LAJ and the duty of fidelity not only to law but also to its purposes and values give much more room for action. In recent years, the Supreme Court of Mexico, in its First Chamber, in a majoritarian decision (4-1) granted the restitution of rights and obligations of a disabled person with Asperger syndrome who was previously incapacitated and decided to present its ruling in the traditional extended format and in an easy-reading version, considering his incapacity. See Amparo en revision 159/2013 (also known as Ricardo Adair's or RACR's case).

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therefore treats disputants impartially, not in the sense of taking no position on the rights and wrongs on the dispute, but in the sense of taking no position on the rights and wrongs of their character, commitments, moral standing, etc., except insofar as such considerations are relevant to the interpretation or application of the relevant law.

On the other hand, Lucy affirms at the beginning of the book “Law’s judgement is supposedly blind to these differences, treating Duke and pauper, man and woman, Christian and non-Christian, homosexual and heterosexual, aesthete and philistine alike” (p. 8); later on, he reiterates “The law and the courts are supposedly blind to differences in status and needs, treating both mighty and lowly in exactly the same way” (p. 99). And in his conclusion he asserts (p. 243):

The abiding motif of the various arguments presented in previous chapters is that law’s abstract judgement (*LAJ*) ignores much. What it ignores, and the ways in which it does so, is not, however, well captured in the traditional image of *Justitia*. That image most often tells us that the law has no gaze, for *Justitia* does not see: law and justice are blind. But they are patently not. When we stand before the law, facing its judgement, the law’s agents assuredly do see: they register all of those aspects of ourselves and our conduct made relevant by the law, both at conviction and liability stages, and at sentencing and remedy stages. The law sees, yet it almost never attempts to view us in all our detail and context, being satisfied only with glimpses of the real nature, character, experience and milieu of those it judges. This is not to suggest that the law’s agents—judges, magistrates, police officers, wardens and the like—deny the humanity and particularity of those with whom they interact. Yet they must often ignore aspects of that double-sided truth, setting aside or placing out of view many of the specificities of those before them.

Let me recall that the traditional image of *Justitia* is depicted by a goddess, Astrea, for the Greeks, and Themis, for the Romans, who is not blind but blindfolded, *i.e.* it is no that she does not see, but that she is not expected to see. Therefore, I am confident, on the contrary, that the traditional image of the blindfolded goddess *Justitia* does capture why *LAJ* ignores much and has to ignore much.

Last but not least, fifth, one of the many contributions of the book—as I’ve already said—consists in providing the first book-length

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pretty exhaustive analysis and defence of *LAJ*, and its connection not only with our most important legal and political values, such as dignity, equality and community, but also with some juristic conceptions embedded in the law, such as personhood, *i.e.* legal persons, and fairness, including responsibility, impartiality and equity (or even mercy).

Anyway, I have to confess that at some point I was speculating what about the connection of *LAJ* with liberty (and its many facets as autonomy, freedom, free will and even responsibility).<sup>30</sup> However, I was surprised that though it was not developed explicitly, it was found throughout the book in most of the discussions, but especially in two: 1) on the rationalist legal person (and *PaP*) and its rationality (pp. 63-67); and, 2) on liability-responsibility (pp. 81-82), and its three conditions: capacity (pp. 87-89), intentionality (pp. 82-85), and rationality (pp. 85-86).

On one side, after delineating three conceptions of rationality, from the “more demanding” to the “less demanding” and then to the “even less demanding”, Lucy affirms (p. 64): “To be an addressee of the law here, to be ‘response-able’, is to have the general capacity both to recognise reasons and have reasons as the basis for one’s beliefs and conduct”. On the other, after demarcating three conditions of liability-responsibility, Lucy cites Fuller at length (p. 90), but let me emphasize the relevant portions: “To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults”. “Every departure from the principles of the law’s inner morality [or legality] is an affront to man’s dignity as a responsible agent”.<sup>31</sup> Furthermore, Lucy clarifies (p. 91):

<sup>30</sup> See Benjamin Constant, “The Liberty of the Ancients compared with That of the Moderns” (1819), *Political Writings* (Biancamaria Fontana tras, Cambridge University Press 1988); Isaiah Berlin, “Two Concepts of Liberty” (1958), reprinted in *Four Essays on Liberty* (Oxford University Press 1969); and Dworkin, *Justice for Hedgehogs* (n 9) 219-252 and 364-378.

<sup>31</sup> Fuller (n 8), 162.

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Yet law traditionally does build-in a good deal of room for such choice because it normally attempts to engage with the practical reasoning of its addressees. It sets and communicates requirements to its addressees, but it is possible for its addressees to ignore these, to make and act upon other choices, albeit at the risk of sanction or other legal consequence. By building in room for choice, the law treats its addressees as (in Fuller's term) responsible beings, with (in Fuller's terms) dignity. In allowing the possibility of choice contrary to its guidance, law also respects freedom. This is freedom to act other than law requires, but it is no less a form of freedom for all that.

I found these discussions very illuminating and consistent with the revision of the classic literature done by Friedrich A. Hayek, who attributed to Marcus Tullius Cicero the most effective formulations of freedom under the law:<sup>32</sup>

- 1) The conception of general rules —*leges legum*;
- 2) The conception of obedience to law in order to be and remain free —*omnes legum servi sumus ut liberi esse possimus*; and
- 3) The conception of the judge as a law with voice and of the law as a voiceless judge —*Magistratum legem esse loquentum, legem autem mutum magistratum*.

#### IV. CONCLUSION: LAJ RECOGNISED

To conclude let me clarify that I not only applaud Lucy's pretty exhaustive analysis and defence of LAJ but also embrace it because he has the merit of "standing on the shoulders of giants",<sup>33</sup> in general,

<sup>32</sup> See Friedrich A Hayek, *The Constitution of Liberty* (The University of Chicago Press 1960, 166-167 and 462; Edward Coke, *The Selected Writings of Sir Edward Coke*, vol. I (Liberty Fund 2003); and Charles Louis de Secondat, Baron de la Brede et Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (Hafner Press 1949) (originally published 1750). See also Imer B Flores 'Law, Liberty and the Rule of Law in a Constitutional Democracy' in Imer B Flores and Kenneth E Himma (eds), *Law, Liberty and the Rule of Law* (Springer 2013) 77-101, 85-86.

<sup>33</sup> It is well known that Isaac Newton popularized the English expression "standing on the shoulders of giants". See 'Letter to Robert Hooke' (February 5, 1675): "If I have seen further it is by standing on the shoulders of giants." Available on line: <<https://digitallibrary.hsp.org/index.php/Detail/objects/9792>> (last

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and Dworkin and Fuller, in particular. On the one hand, in addition for adopting a form of “moral reading”, for his sympathetic but yet critical discussion of Dworkin’s conceptions of “dignity” (via Immanuel Kant) (p. 149),<sup>34</sup> of “equality” as “(the right to) equal concern and respect” (pp. 192-200),<sup>35</sup> and of “community” (or even “fraternity”) as “community of principle” (pp. 230-241).<sup>36</sup>

On the other hand, for his references to Fuller and the acknowledgment that the judicial duty of fidelity to law, *i.e.* to follow and apply the existing law, not to create new law, includes and must include fidelity to law’s purposes and values, which I have characterized — following Fuller— as an “intelligent fidelity” in contraposition to a “unintelligent fidelity”.<sup>37</sup> In Lucy’s words (pp. 100-101):<sup>38</sup>

accessed 02/02/19). But the Latin locution *nanos gigantum humeris insidentes* can be traced all the way back to the Twelfth century. See John of Salisbury, *The Metalogicon of John of Salisbury. A Twelfth-Century Defense of the Verbal and Logical Arts of the Trivium* (first published 1159, Daniel D. McGarry tr, University of California Press 1955) 167: “Bernard of Chartres used to compare us to dwarfs perched on the shoulders of giants. He pointed out that we see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature.” Actually, the metaphor has an even remoter origin, according to Greek mythology the giant Orion was able to restore his sight by traveling to the East guided by the dwarf Cedalion (or Kedalion) upon his shoulders.

<sup>34</sup> See Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press 2006); and, ‘Dignity’ in *Justice for Hedgehogs* (n 9) 191-218. See also Flores, ‘Taking (Human) Dignity and Rights Seriously...’ (n 3) 111-120.

<sup>35</sup> See Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Harvard University Press 2000).

<sup>36</sup> See Dworkin (n 13) 211-216; ‘The Liberal Community’ in *Sovereign Virtue...* (n 35) 211-236; and *Justice for Hedgehogs* (n 9) 311-323 and 382-385.

<sup>37</sup> See Lon L. Fuller, ‘The Case of the Speluncean Explorers’ (1949) 62 *Harvard Law Review* 616-645, 625-626. (Reprinted with commentaries by Paul Butler, Alan Dershowitz, Frank Easterbrook, Alex Kozinski, Cass Sunstein and Robin West as ‘The Case of the Speluncean Explorers Revisited’ (1999) 112 *Harvard Law Review* 1876-1923.) See also Imer B. Flores, ‘Intelligent or Unintelligent Fidelity?’ (2016), 31 *Constitutional Commentary* 407-422, 421-422; and ‘Constitutional Interpretation, Intelligent Fidelity, and (Im)Perfection: On James E. Fleming’s *Fidelity to Our Imperfect Constitution*’ (2017) 11 *Problema. Anuario de Filosofía y Teoría del Derecho* 31-58, 48-52.

<sup>38</sup> Lucy (n 24) 18-19.

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But, as soon as it is conceded that the law is a purposive institution, it becomes unavoidably normative: law in general and the law of particular jurisdictions consists not only of a collection of standards, requirements or prohibitions, but also of a range of purposes that animate them... what we expect of good judges deciding hard cases is *judgement*, where what is meant is not simply a resolution of the dispute, but a discerning assessment of what the law and its underpinning purposes or values require in the particular case.

Certainly, in hard cases, factual or fictional, such as the Elmer's case,<sup>39</sup> the Ida White's —or the vanished legacy— case,<sup>40</sup> the Speluncan explorers' case,<sup>41</sup> and even the “No dogs (in the airport/railway station/subway)” rule<sup>42</sup> or the “No vehicles in the park” rule,<sup>43</sup> the fidelity to law and to its purposes or values necessitates *LAI*. It will guide the judge in doing a virtuous judgement from the abstract to the concrete and back of what the law and its purposes or values truly need not only in most cases but also in exceptional ones that cry for a mitigation of the rigidities of the written law. In sum, I endorse Lucy's *LAI* and will like to push the argument even further.

<sup>39</sup> See *Riggs v. Palmer* 115 N.Y. 506, 22 N.E.188 (1889). See also Dworkin, *Taking Rights Seriously* (n 14) 23 and (n 13) 15-20.

<sup>40</sup> See Fred L. Gross, ‘The Vanished Legacy’, in *What Is the Verdict?* (MacMillan Company 1944) 115-161. See also Luis Recaséns Siches, *Nueva filosofía de la interpretación del derecho* (Fondo de Cultura Económica 1956) 256-269, and *Tratado general de filosofía del derecho* (Porrúa 1959) 647-654; and Imer B. Flores, ‘La técnica jurídica en la aplicación del derecho’ (1995) 45: 201-202 *Revista de la Facultad de Derecho de México* 17-55, 20-21.

<sup>41</sup> See Fuller (n 37) 616-645. See also Peter Suber, *The Case of the Speluncan Explorers. Nine New Opinions* (Routledge 1998).

<sup>42</sup> See Imer B Flores, ‘The Problem about the Nature of Law *vis-à-vis* Legal Rationality Revisited: Towards an Integrative Jurisprudence’, in Wil Waluchow & Stefan Sciaraffa (eds), *The Philosophical Foundations of the Nature of Law* (Oxford University Press 2013) 101-126, 118-122. See also Recaséns Siches (n 40) 645-647.

<sup>43</sup> See HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593-629, 606 (reprinted in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 49-87, 63); and, Hart (n 13) 124 (127). See also Imer B Flores, ‘H.L.A. Hart's Moderate Indeterminacy Thesis Reconsidered: In Between Scylla and Charybdis?’ (2011) 5 *Problema. Anuario de Filosofía y Teoría del Derecho* 147-173, 157-158 and 171-172.