

PROBLEMA

Anuario de Filosofía
y Teoría del Derecho **2**

**THE SPATIO-TEMPORALITY OF OBJECTIFICATION
IN LEGAL THEORY: CONCEPTS OF LEGALITY
BETWEEN THEORY AND PRACTICE**

Maksymilian DEL MAR*

Resumen:

En este artículo se sostiene que los conceptos de legalidad, dentro de la teoría del derecho, pueden entenderse con mayor provecho si se piensa que están determinados por modos de objetivación espacio-temporal. En la primera parte se presenta un esquema de tales modos y, de esa manera, se ofrece un mapa de las investigaciones iusfilosóficas. En la segunda parte, se analizan dos conceptos de legalidad —determinados por dos modos diferentes de objetivación espacio-temporal—. El análisis muestra cómo ambos conceptos de legalidad conducen a diferentes conjuntos de fuentes prescriptivas para la evaluación y el diseño de los sistemas jurídicos. Finalmente, se sostiene que la respuesta de la teoría del derecho a los problemas prácticos del ámbito público no puede basarse en un solo concepto de legalidad. Por el contrario, es necesario ser pluralistas sobre los conceptos de legalidad y reconocer las limitaciones de cada uno de ellos —representados, en este ensayo, por la objetivación espacio-temporal que los suscribe—. No se puede asegurar que la teoría del derecho esté en crisis sobre la base de una presunta falta de correspondencia entre algún concepto de legalidad y la realidad. Por el contrario, aquella se generará en la medida en que la teoría del derecho llegue a estar dominada por un imperialismo teórico, a saber, por la creencia de que cual-

* School of Law, University of Edinburgh. I am grateful to Keith Culver and Michael Guidice, at whose workshop at the 2007 IVR Congress in Kraków, Poland, Zenon Bańkowski and I made a brief presentation. Although this paper takes some inspiration from the work presented in that workshop, its arguments are substantially different, and I take full responsibility for what is said here. I am particularly grateful to Keith Culver for his very helpful and extensive comments on earlier drafts of this paper.

quier concepto de legalidad es capaz de capturar el mundo tal como es, y, por lo tanto, que es capaz de erigirse como fundamento para una agenda prescriptiva. El vicio de un imperialismo teórico induce una inquietud sobre la identidad de una disciplina, y conduce a sofocar la diversidad teórica que se requiere para dar una respuesta ética a la complejidad concreta del ámbito público.

Abstract:

This paper argues that concepts of legality in legal theory can be profitably understood as being underwritten by modes of spatio-temporal objectification. In the first part of the paper, a scheme of such modes is provided, and a map of jurisprudential inquiries is thereby offered. In the second part of the paper, two concepts of legality – underwritten by two different modes of spatio-temporal objectification – are analysed. The analysis shows how both concepts of legality lead to different sets of prescriptive resources as to the evaluation and design of legal systems. Finally, it is argued that the response of legal theory to practical challenges within the public sphere cannot afford to be based on any one concept of legality. Rather, we need to be pluralists about concepts of legality, recognising the limitations of any one such concept – represented, in this paper, by way of spatio-temporal objectification that underwrites those concepts. A crisis in legal theory cannot be claimed on the basis of any alleged lack of correspondence between any one concept of legality and reality. On the contrary, a crisis will ensue to the extent that legal theory becomes dominated by theoretical imperialism, namely, by the belief that any one concept of legality is capable of capturing the world as it is, and, therefore, also capable of standing as a foundation for a prescriptive agenda. The vice of theoretical imperialism induces anxiety over the identity of a discipline, and leads to a quelling of the very theoretical diversity that is required for an ethical response to the specific complexity of the public sphere.

SUMMARY: I. *Introduction*. II. *Part I: Spatio-Temporal Objectification in Legal Theory*. III. *Part II: Legality Between Theory and Practice*. IV. *Conclusion*.

I. INTRODUCTION

Even the most rudimentary reflection on the physicality of borders points us towards recognising their irreducibly spatio-temporal nature – an observation, at first blush, so obvious it risks being invisible to us. Borders, as we know, can be embodied in the form of walls, frontiers, crossroads, doorsteps, checkpoints. Borders may also be twilights, sunsets, the first day of spring, deadlines, curfews, the eves of uprisings. But notice that a wall is itself of a certain thickness. The borders between nation states are themselves spaces. Dusk and dawn are not neatly demarcated phenomena: the process of transition from lightness to darkness, or vice versa, is simplified by us as a kind of border-line.

There are two elements to these observations. On the one hand, we are able to recognise that any physical border is itself of an irreducible, inevitable thickness, of an ongoing process, a continuous movement in time. On the other hand, in everyday life that irreducible spatio-temporality of physical borders is made invisible to us – in using borders to orient ourselves, to see and represent reality, to track and control the ceaseless movement of phenomena, we are prone to forget the artificiality, the arbitrariness of border-making. The insight to be gained is as follows: the making of borders does not provide us with access to the way the world is; nor is it an end in itself. Rather, the practice of border-making is an artificial process that makes us see and represent reality in a certain way, and that can thereafter be used for various ends.

Recognising the inevitable limitations of one's own way of seeing can be painful, and attempts have been made – in legal theory, but of course also generally in the social sci-

ences – for grand unified theories. Once we recognise the limitations of the social scientific concepts of agency and structure, say, we should then, it is thought, come to realise the necessity for a unified theory, *e. g.*, structuration (as in the work of Anthony Giddens), or the *habitus* (as in the work of Pierre Bourdieu). The problem with any attempt at unification is the correlative loss of explanatory power: structuration may avoid some of the extreme assumptions made by either an agency-driven or a structure-driven explanation of social behaviour, but in doing so, it also foregoes the insights that such arguably more focused theoretical emphases can produce.

The activity of theoretical border-making is, then, inevitable. We could not do theory without circumscribing, classifying, appropriating, objectifying reality. The more stringent and well-defined our theoretical borders, the more we can explain, and, arguably, the more useful our theoretical explanations can be, but, in doing so, we move further and further away from reality. Recognising the limitations of our theoretical pictures may make us think we should avoid well-defined theoretical borders – that we should attempt, as I have noted above, unifications, holistic grand theories. To do this, however, is to fall into a trap, risking the utility of theory. Rather, the utility of theory lies precisely in the gifts of its constraints.

Crucially, however, we come to see the limitations of theory – of the artificiality of theoretical borders, of the enabling constraints of theoretical pictures – when we subject our theoretical pictures to the scrutiny of practical contexts. Theoretical questions are, inevitably, of the following kind: what is law? What is legal work? What is a legal order? Such questions demand the disciplined construction of a theoretical vision: one that uses a well-defined constrained set of theoretical tools to represent phenomena in a particular way. However, we would be performing a deep mistake should we attempt to use this one theoretical vision as the foundation for prescriptions in response to the

scrutiny of a practical context. That we are tempted to do so is common enough: *e. g.*, human beings are, by nature, rational; therefore, we need to design our legal and political systems such that they cater for the calculating and deliberating capacities of human beings. In doing so, the practical context, say, of political participation, is made all the poorer for its exclusion of those that do not meet the standards of rationality, as defined in our theoretical picture of human nature, *e.g.*, the disabled, the inarticulate, the poor. It is only by subjecting our theoretical pictures to the scrutiny of practical contexts that we can see the limitations of our theoretical pictures. In coming to recognise those limitations, what we ought to do is become comfortable with the enabling constraints of theory: we need to keep pursuing the talents of theory to help us see and represent reality, while simultaneously restraining ourselves from thinking that any one of our theoretical pictures captures the nature or essence of some phenomenon, such that it can form the foundation for a prescriptive agenda. Rather, we should combine the discipline of theory as theory, while defending theoretical pluralism in the light of practice.

To say all this is to both introduce the first part of this paper – that of providing a spatio-temporal schema for categorising theoretical border-making (I call it here, objectifying) in legal theory – and to prefigure some of the conclusions I shall draw as to the way we should consider the relationship between theory and practice, and the effect that this might have on our understanding of the concept of legality. To prefigure the conclusion more accurately: I shall argue that the concept of legality is itself informed, if not determined, by spatio-temporal objectification. Characterising such modes of objectification in legal theory will help us see the limits of any one theoretical picture of legality. Seeing the limitations of any one theoretical picture of legality will help us to be theoretical pluralists: we shall not see concepts of legality as rivals, but as potential collaborators. The scrutiny of practical contexts, I shall argue, demands

we be theoretical pluralists: it demands, in other words, that we combine the limitations of theoretical pictures of legality, thereafter using that plurality to offer more robust responses to practical contexts.

One further preliminary matter must be mentioned before going on to present an initial diagram of spatio-temporal objectification in legal theory. The presentation of such methods is an exercise in looking back, *i. e.*, in characterising traditions of jurisprudential inquiry in certain ways. Any such characterisation is, of course, one out of many ways of drawing the map of a discipline. The one I shall offer does seem to me to be both a persuasive and a useful one, but I do not present it as the only or the correct or even the most useful exercise in a historical description of methods of objectification in legal theory. In other work, I develop other ways of looking back, of mapping methodological tendencies, assumptions and insights in the long-standing traditions of understanding law, legal work and legal order.¹ The limits of the historical enterprise are the limits only of our imagination.

II. PART I: SPATIO-TEMPORAL OBJECTIFICATION
IN LEGAL THEORY

I begin with a simplified diagram of spatio-temporal objectification in legal theory:

	SHORT-TERM	LONG-TERM
INTERNAL	BOX 1 Reasons Deliberation Decisions	BOX 2 Habits Dispositions Skills

¹ To offer one example, in a paper entitled “Between Tradition and Discourse” (in progress) I use the concepts of tradition and discourse as guides to mapping the works legal theory written in the last fifty years.

Continuation

	SHORT-TERM	LONG-TERM
EXTERNAL	BOX 3 Spaces Procedures Biological factors	BOX 4 Systems Structures Institutions

The horizontal axis is the mode of spatial orientation, with the temporal orientation illustrated by the vertical axis. In proceeding below to explain the basic tools and instruments of its each box, I shall also attempt to locate – no doubt, in some cases, controversially – works of legal theory capable of being said to fall within each box.

In the short-term internal box (*Box 1*) we can locate, for example, the work of Joseph Raz.² Here, law is analysed (and the boundaries of the legal drawn, at least partly) by reference to the role that norms (derived from the momentary snapshot of a legal system) play or should play in the short-term deliberation of agents – *i. e.*, they need to function as pre-emptory reasons, and for them to do so, we need a particular conception of authority to support the exercise of that function. The point is that the conception of the law-giving authority is itself already conditioned by prior spatio-temporal objectification – in this case, of limiting one’s theoretical attention to the short-term internal. Arguably, much of contemporary legal theory locates itself – either reflectively or unreflectively – within this box. The norms of rationality are commonly evoked, and the supposed internal machinations of thoughts are analysed via the use of the formalisation of such norms, including that of both propositional and deontic logic. Such formalisations reach their apogee with game theory or rational choice the-

² See, in particular, Raz, Joseph, *Practical Reason and Norms*, 2nd. ed., Princeton, Princeton University Press, 1990.

ory. Thoughts are typically said to precede actions: reasons function as causes of behaviour. The traditional Cartesian split between mind and body is followed, with mind given priority. Of course, these tendencies are hardly specific to legal theory: both contemporary moral and political philosophy tends to be dominated by reflection upon the status, structure and role of propositionally expressed rules and principles, most commonly used for the resolution of traditional problem cases or moral dilemmas. Those falling short of the excellence demanded by adherence to the norms of rationality, tend to be excluded – as has been argued, for example, in the context of political philosophy, by Martha Nussbaum in her criticism of John Rawls' methodology.³ The revolt in moral philosophy against the narrowing of its domain to that of the production of rules and principles, thereafter used by atomised agents in the justification of decisions, has been taken up, in the last quarter century, by thinkers (themselves very diverse) such as Iris Murdoch,⁴ Alasdair MacIntyre,⁵ Nel Noddings,⁶ Owen Flanagan,⁷ Steven Fesmire,⁸ and others who have looked back to Aristotle or John Dewey.

Indeed, much of the criticism of those works one could identify as falling within the short-term internal box, has come from the long-term internal box (*Box 2*), where long-term learning is given explanatory priority. Here, the emphasis is on know-how, rather than know-that. Apart

³ See, Nussbaum, Martha, *Frontiers of Justice: Disability, Nationality, Species Membership*, Harvard, The Belknap Press, 2006.

⁴ See, Murdoch, Iris, *The Sovereignty of the Good*, London, Routledge, 1970.

⁵ See, MacIntyre, Alasdair, *After Virtue*, 2nd. ed., Notre Dame, University of Notre Dame Press, 1984; and MacIntyre, Alasdair, *Whose Justice? Which Rationality?*, Notre Dame, University of Notre Dame Press, 1988.

⁶ See, Noddings, Nel, *Caring: A Feminine Approach to Ethics and Moral Education*, Berkeley, University of California Press, 1984.

⁷ See Flanagan, Owen, *Varieties of Moral Personality: Ethics and Psychological Realism*, Cambridge, Harvard University Press, 1991.

⁸ See Fesmire, Steven, *John Dewey and the Moral Imagination: Pragmatism in Ethics*, Bloomington, University of Indiana Press, 2003.

from Dewey, including, most prominently, his work on active habits in *Human Nature and Human Conduct*,⁹ and the importance he placed on education in works such as *Democracy and Education*,¹⁰ the philosophical heroes here include Gilbert Ryle, whose criticism of the “ghost in the machine” —*i. e.*, the prioritisation of thought (know-that over action (know-how))— is seen as valuable as his positive contribution based on the language of dispositions.¹¹ There is, it must be said, a dearth of legal theoretical literature that one can identify as belonging to this box. One as yet unpublished contribution is that of Sundram Soosay’s PhD thesis at Edinburgh, entitled *Skills, Habits and Expertise in the Life of the Law*.¹² Soosay’s work, in turn, acknowledges a debt to some of the American and Scandinavian Legal Realists. Soosay’s work is mentioned, and briefly discussed, by Neil MacCormick in his most recent magnum opus, *Institutions of Law*.¹³ There, MacCormick reminds us of the importance of not forgetting, while also warning us against relying too much on, habits – the latter being arguably the case in Austin’s work. As MacCormick is quick to point out, however, the concept of habit is by no means used in the same way by Austin as it is by Dewey, or, for that matter, Soosay. The latter (Dewey and Soosay) view habits as active, not merely responsive to the environment, but also an-

⁹ Dewey, John, *Human Nature and Conduct: An Introduction to Social Psychology*, Amherst, Prometheus Books, 2002.

¹⁰ Dewey, John, *Democracy and Education: An Introduction to the Philosophy of Education*, New York, The Free Press, 1944.

¹¹ See Ryle, Gilbert, *The Concept of Mind*, London, Hutchinson of London, 1949.

¹² See Soosay, Sundram, *Skills, Habits and Expertise in the Life of the Law*, PhD thesis, University of Edinburgh, 2005; see also, Soosay, Sundram, “Is the Law an Affair of Rules?”, in Leskiewicz, Max (ed.), *The 2005 Annual Publication of the Australian Legal Philosophy Students Association*, Brisbane, ALPSA, 2006, pp. 24-40.

¹³ See MacCormick, Neil, *Institutions of Law*, Oxford, Oxford University Press, 2007, ch. 4. See also, MacCormick, Neil, “Does Law Really Matter?”, in Leskiewicz, Max (ed.), *The 2005 Annual Publication of the Australian Legal Philosophy Students Association*, Brisbane, ALPSA, 2006, pp. 9-23.

ticipatory –a view similar to that of the argument made by Krygier in his criticism of Hart’s dismissal of habits.¹⁴

Under the above long-term internal perspective, theories of legal language and, in turn, for instance, theories of adjudication, will be different to those whose focus is the short-term internal. Meaning is more likely to be explained as the result of the accumulation of habits of seeing facts in certain ways, as it is, for example, in the work of Geoffrey Samuel.¹⁵ The fluidity of judicial behaviour is more likely to be noticed, *i. e.*, the way in which senior judges (and lawyers) will quickly visualise the facts provided by a witness, claimant or client in such a way that will immediately suit the imposition of certain normative standards. Occasionally, that visualisation is expressed in the form of a construction of a narrative, assisted, once more, by the accumulation of stocks of typical narrative images that find their expression in case law. The work of Bernard Jackson is exemplary here,¹⁶ but there have been other contributions, some to the importance of the skill of narrativisation in law and literature studies, and some to the importance of judgement (seen as a set of skills developed over long periods of time), as championed by Ronald Beiner¹⁷ and usefully summarised most recently by Leslie Thiele.¹⁸

It is important, however, to remember that the location of works within this second box, *i. e.*, that of the long-term in-

¹⁴ See Krygier, Martin, “The Concept of Law and Social Theory” (1982) 2(2) *Oxford Journal of Legal Studies*, pp. 155-180.

¹⁵ See Samuel, Geoffrey, *Epistemology and Method in Law*, Dartmouth, Ashgate Publishing, 2003.

¹⁶ See Jackson, Bernard, “Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence” (2000) 13(4), *International Journal for the Semiotics of Law*, pp. 433-457; and Jackson, Bernard, *Law, Fact and Narrative Coherence*, Merseyside: Deborah Charles Publications, 1988. See also “Legal Narratives”, chapter 11 of Neil MacCormick’s *Rhetoric and the Rule of Law*, Oxford, Oxford University Press, 2005.

¹⁷ See Beiner, Ronald, *Political Judgement*, Chicago, University of Chicago Press, 1983.

¹⁸ See Thiele, Leslie, *The Heart of Judgement: Practical Wisdom, Neuroscience, and Narrative*, Cambridge, Cambridge University Press, 2006.

ternal, is not one that relies on any kind of straightforward causal representation of stimulus and response. Works in this second box emphasise the explanatory potential of internal machinations – of skills, habits, dispositions, and so on, that are in some sense owned by the agent – but acquired only over long periods of time, and thus unable to be detected by an exclusive focus on short-term deliberation. The device of the agent is still here, though the engine of agency has changed: it is, for example, anticipatory rather than merely calculating. The long-term internal focus is thereby well contrasted with the third box, namely that of the short-term external perspective. Behaviourism is the most obvious example of the third box: the behaviour of car drivers at traffic lights is explained on the basis of their stopping, starting, slowing down or speeding up in response to the stimulus of the traffic lights going green, red, or orange. The explanatory device used here is that of causes, which, moreover, are external to the will of the agent, but influence, or more commonly, determine, behaviour.

One should be careful here about the term “external”. Externality does not refer to anything outside of the person, but rather to that which falls outside of the will (or control) of the person. Thus, it may, as it often does, include genetic makeup, but it will also include the structure of spaces within which people work, or the procedures under which they are required to produce certain outcomes. So, for example, the funding schemes of universities are used to explain the behaviour of academics, where the use of citation metrics is said to result in the proliferation of publishing (often said to be of lower quality as a result) and to the detriment of teaching. The configuration of legal spaces is deemed to be of causal relevance,¹⁹ e. g., the design of

¹⁹ See, for example, Manderson, Desmond, “Interstices: New Work on Legal Spaces” (2005) 9, *Law, Text, Culture* 1-10, and the other papers in that issue.

court-rooms is said to cause certain kinds of outcomes.²⁰ Certain procedures, such as that of the recruitment and appointment of judges, or of promotion and mobility, or management and governance (e. g. role of judicial clerks), are all hypothesised to cause certain kinds of outcomes.²¹ The entire tradition of empirical legal studies,²² including that of socio-legal studies,²³ and some approaches to the sociology of law, falls reasonably neatly into this short-term external box.²⁴

At first glance, there is a good deal of overlap between the short-term external and the long-term external perspective. The second, it might be thought, is just as much focused on the causal relationship of stimulus and response, but simply on a larger time-scale: e. g., the focus may be on how (in the context of a theory of adjudication) judges are educated (whether they are career judges or appointed from the bar). Indeed, there is overlap, but it must not be overstated. As noted above, works in this box tend to focus on the causal relevance of, for example, markets or systems said to be relatively autonomous (once again, external to the will, or control, of the agent).²⁵ It may be, of course,

²⁰ See, for example, Rudden, Bernard, "Courts and Codes in England, France and Soviet Russia (1974)", 48, *Tulane Law Review* 1010. More recently, Robert Summers has pointed to the causal relevance of (amongst many other things) the form of institutions, which includes spaces and procedures: see, Summers, Robert, *Form and Function in a Legal System: A General Study*, Cambridge, Cambridge University Press, 2006.

²¹ For a wide ranging comparative study of such factors, see Bell, John, *Judicialies within Europe*, Cambridge, Cambridge University Press, 2006.

²² See, for example, Baldwin, John and Davis, Gwynn, "Empirical Research in Law", in Cane, Peter and Tushnet, Mark (eds.), *The Oxford Handbook of Legal Studies*, Oxford, Oxford University Press, 2003, p. 880.

²³ See, for example, Galligan, Dennis (ed.), *Socio-Legal Studies in Context: the Oxford Centre Past and Future*, London, Blackwell, 2000.

²⁴ Following the work of Donald Black in *The Behaviour of Law*, London, Academic Press, 1976; see, for example, the more recent collected edited by Cass Sunstein, *Behavioural Law and Economics*, Cambridge, Cambridge University Press, 2000.

²⁵ Systems theory is the best example: see Luhmann, Niklas, *Law as a Social System*, Oxford, Oxford University Press, 2004; but see also Teubner, Gunther, *Autopoietic Law: a New Approach to Law and Society*, Berlin, Walter de Gruyter,

that some may wish to combine the alleged causality of structures with the short-term internal or the long-term internal perspective. In other words, the causal effect of these structures could be said to impinge on decision-making or deliberation, or, alternatively, on skills, habits, dispositions, and so on. More often than not, however, the focus is on the explanation of that which causes: on structures and systems. Of course, one cannot neglect to mention the Marxist insistence on the priority of the economic super-structure – a typical example of theoretical focus on the long-term external.

Before long, any contemporary reader of legal theory becomes dissatisfied with such an initial classification. The borders of each box seem relatively clear, and are, thereby, arguably more useful both in the historical exercise of identifying methodological tendencies and assumptions as well as in accumulating and reconciling theoretical tools for the purpose of meeting certain practical challenges. For example, in seeking to meet the practical challenge of the constraint and direction of power (of those who govern), one may wish to use all four kinds of inquiry, making one's response to that practical challenge arguably more robust. However, the price of clarity (of conceptual border-making) here is that we miss many other traditions of jurisprudential inquiry – on the whole more recent ones, and ones that tend to offer a more complex spatio-temporal objectification. As we shall see, however, together with the increasing spatio-temporal complexification of these relatively recent theoretical contributions, the boundaries of these concepts blur, arguably placing at risk the utility of these contributions in response to practical contexts. What are the more complex contributions I am alluding to? They are illustrated below in boxes 5 to 9 (grey-shaded):

1988. Teubner's paper, "How the Law Thinks: Toward a Constructivist Epistemology of Law" (1989) 23(5), *Law & Society Review* 727-758 makes this stance particularly clear.

	SHORT-TERM	LONG-TERM	ONGOING
INTERNAL	BOX 1 Reasons Deliberation Decisions	BOX 2 Habits Dispositions Skills	BOX 7 Growth Development Personality / Character
EXTERNAL	BOX 3 Spaces Procedures Biological factors	BOX 4 Systems Structures Institutions	BOX 8 Institutional ways of life Complexification Organisations
INTER-SUBJECTIVE	BOX 5 Communication Discourse Argumentation	BOX 6 Epistemes Paradigms Models	BOX 9 Traditions Practices Social Imaginaries

The complexity ensues along both the spatial and the temporal axis. Spatially, an attempt is made to shatter the distinction between the internal and external by appealing to the inter-subjective. This inter-subjective focus can be further divided into three different kinds of temporal division, illustrated above in boxes 5, 6 and 9. *Box 5* refers to the contribution of Jürgen Habermas and Robert Alexy (and their followers), both of whom emphasise the norms of rational discourse, argumentation and communication.²⁶ The

²⁶ See Habermas, Jürgen, *The Theory of Communicative Action*, Boston, Beacon Press, 184 (volume 1) and 1987 (volume 2); and Alexy, Robert, *Theory of Legal Argumentation*, Oxford, Clarendon Press, 1989.

literature on speech acts²⁷ is, naturally, important for that contribution, and resides comfortably within this short-term inter-subjective box. The temporal focus is short-term because the focus of analysis tends to be on the extent to which excerpts of dialogue or argument or discourse comply with the norms (whether under the guise of communication, discourse or argumentation) that stipulate the ideal speech act situation.

Box 6, in turn, is that of the long-term inter-subjective. Here, one can call upon the work of Michel Foucault (on epistemes),²⁸ and his precursors, as well as the work of Thomas Kuhn on paradigms in the philosophy of science,²⁹ some of which resonates (though of course with important differences) with the work of Ian Hacking.³⁰ Epistemes and paradigms are neither properly classifiable as internal or external: they are shared, but they become visible only by way of long-term periodisation, often also within certain geographical limitations. It is said by these theorists that what counts as an object, and equally what is said to satisfy the conditions (indeed, determines the content of the conditions) of knowledge, truth and correctness, is specific to certain times and social groupings. At first glance, there is little legal theory that takes up this tradition – Foucault, for example, is most commonly used through the rubric of his writings on power,³¹ rather than the social epistemological argument we receive in *The Order of Things* or *Archaeology of Knowledge*. However, more recent work in comparative law, particularly that of Pierre Legrand,

²⁷ Following the work of John Searle.

²⁸ See, for example, Foucault, Michel, *The Order of Things*, London, Tavistock, 1970, and Foucault, Michel, *Archaeology of Knowledge*, London, Routledge, 2002.

²⁹ Kuhn, Thomas, *The Structure of Scientific Revolutions*, Chicago, University of Chicago Press, 1996.

³⁰ See, for example, Hacking, Ian, *Historical Ontology*, Cambridge, Harvard University Press, 2002.

³¹ A recent example of this in the context of international legal theory is that of Hammer, Leonard, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*, Aldershot, Ashgate, 2007.

Geoffrey Samuel, and others,³² who use such concepts as legal mentalities to focus on the long-term inter-subjectivity of legal knowledge, can be readily included here. One may also invoke the work of Alvin Goldman on legal knowledge seen through the optic of his account of social epistemology.³³

There is yet a third temporal classification of the inter-subjective focus, illustrated in the above table by *Box 9*. I shall return to this box by way of an investigation, first, of boxes 7 and 8, which will also help us to clarify the temporal dimension at play in this vertical axis. *Box 7* refers to the ongoing internal theoretical focus. By ongoing, I wish to invoke the sense, in some theoretical works, of the embeddedness of the momentary in the historical, of the sense of the present as continuously moving. The origins of this kind of thinking are ancient: Heraclitus and Lucretius, to mention but two, stand out as early spokespersons for the continual flow of reality.³⁴ In modern times, the work of Whitehead,³⁵ himself drawing on ideas such as the *long durée* of Bergson,³⁶ and of course the evolutionary epistemology of Hayek,³⁷ are all typical examples of theoretical emphasis on this notion of temporality. *Box 7* takes something of this notion of the ongoing, the evolving, and uses it to focus on the development (moral or otherwise) of persons, whether thereafter explained in terms of personality or character. The work of John Dewey once more stands out here (in particular by virtue of his focus on “growth”),³⁸ but

³² For a good overview, see Van Hoecke, Mark (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, Hart Publishing, 2004.

³³ See Goldman, Alvin, *Knowledge in a Social World*, Oxford, Clarendon Press, 1999, ch. 9.

³⁴ See, *The Fragments of Heraclitus and Lucretius' De Rerum Natura*.

³⁵ Whitehead, Alfred, *Process and Reality*, New York, Macmillan, 1929.

³⁶ See Bergson, Henri, *Duration and Simultaneity*, Manchester, Clinamen Press, 1999.

³⁷ Hayek, Friedrich, *Law, Legislation and Liberty* (3 volumes), Chicago, Chicago University Press, 1973.

³⁸ See Dewey *supra* noted 9 and 10.

it has some contemporary adherents in legal theory, the most forceful (in my view) being Philip Selznick's work.³⁹

Indeed, Philip Selznick's work cuts across boxes 7 and 8. On the one hand, Selznick tries not to lose sight of the notion of personal development (*Box 7*), but without minimising the importance of what he referees to as the organic nature of organisations (as opposed to the rule-structured and rule-governed concept of institutions).⁴⁰ Zenon Bankowski's more recent work⁴¹ on institutional ways of life may also fit well within this box. The focus here is on the ways in which institutional ways of life develop in particular kinds of communities, e.g., the Red Army. Early precursors of this view may be those who emphasised the changing nature of forms of life (as the concept is used, but never really elaborated upon, in the latter Wittgenstein),⁴² and of course the equivalent *Lebenswelt* in Habermas.⁴³ One may also refer to Roger Cotterrell's notion of certain kinds of trust developing in certain kinds of communities.⁴⁴ Finally, work being undertaken by John Bell at Cambridge on European legal development,⁴⁵ and indeed other work, such as that of Suri Ratnapala's, on evolutionary jurisprudence (building on Hayek),⁴⁶ are also very relevant here. The common ele-

³⁹ See the role that Dewey and the literature of developmental psychology play in Selznick, Philip, *The Moral Commonwealth: Social Theory and the Promise of Community*, Berkeley, University of California Press, 1992.

⁴⁰ See Selznick, Philip, *Leadership in Administration: A Sociological Interpretation*, New York, Harper & Row, 1957.

⁴¹ Bankowski, Zenon, "Bringing the Outside in: The Ethical Life of legal Institutions", in Gizbert-Studnicki, Tomasz and Jerzy Stelmach (eds.), *Law and Legal Cultures in the 21st Century: Unity and Diversity*, Poland, Wolters Kluwer Polska, 2007, pp. 193-217.

⁴² Wittgenstein, Ludwig, *Philosophical Investigations*, London, Blackwell Publishing, 2001.

⁴³ See Habermas *supra* note 26.

⁴⁴ See, Cotterrell, Roger, *Law, Culture and Society*, Dartmouth, Ashgate Publishing, 2004.

⁴⁵ See, www.cels.law.cam.ac.uk/research/ahrb_research_grant_on_european_legal_development.php, last accessed by the author 23 November 2007.

⁴⁶ See Ratnapala, Suri, "The Trident Case and the Evolutionary Theory of F A Hayek" (1993) 13, *Oxford Journal of Legal Studies*, pp. 201-224.

ment is that the theoretical attention is drawn to the structural aspects of these modes of organisations, with the important difference that the structures are conceived of as internally dynamic, ever-changing, and organic – complexifying any particular sphere of governance (e. g. the rise of bureaucratic forms and procedures in certain areas, such as tax or corporate regulation), and often, therefore, requiring de-complexification, the latter being illustrated neatly by the return to various forms of self-regulation in company law.⁴⁷

The final box is *Box 9*. It is here that we reach, arguably, the most difficult, the most vague, possibly the most nuanced views – but, equally, thereby also the most difficult to apply, or the most difficult to use to meet the challenge of certain practical contexts. It is no surprise that Patrick Glenn, whose concept of legal tradition⁴⁸ is a perfect example of this ongoing inter-subjective focus, celebrates the “precision of vagueness”,⁴⁹ referring to such devices as fuzzy logic, and denouncing such theoretical devices as incommensurability.⁵⁰ Legal traditions, Glenn argues, are flows of information that are not subject to the same kinds of analytical standards as, say, an analysis of the momentary snapshot of a legal system would be – e. g. legal traditions may in some sense be coherent, but that coherence is not dependent on logical systematicity; it need not rely, for example, on the logical law against contradiction (or so argues Glenn). Moreover, legal traditions may leak and develop between nation states, and may express themselves in many kinds of forms, by no means restricted to abstract

⁴⁷ See Braithwaite, John *et al.*, *Regulating Law*, Oxford, Oxford University Press, 2004.

⁴⁸ See Glenn, Patrick H., *Legal Traditions of the World: Sustainable Diversity in Law*, 2nd. ed. Oxford, Oxford University Press, 2004.

⁴⁹ The phrase was used in a recent interview with Glenn: Hildebrandt, Mireille, “The Precision of Vagueness, interview with H. Patrick Glenn” (2006) 35(3), *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie*, pp. 346-360.

⁵⁰ See Glenn, Patrick H., “Legal Traditions and the Separation Thesis” (2006) 35(3), *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie*, pp. 222-240.

articulation.⁵¹ One might think that an early precursor for Glenn is Eugene Ehrlich's concept of living law,⁵² whose experience of living in Bukowina—a hotbed of pluralisms (legal and otherwise)—and an ever-changing polity (with various kinds of political ramifications), made him conceive of legality in strongly inter-subjective and evolving terms. The concept of practices, too, though perhaps not as obviously, may fall within this box. The work of Pierre Bourdieu is most obvious here,⁵³ but there is a growing theoretical literature with sympathies to the perspective of evolutionary-interactionism. Most recently, George Pavlakos sought to offer a "Practice Theory of Law",⁵⁴ and though much of it retains elements that would fit much more neatly into *Box 1*, his notion of the ongoing practice of rule-following (he has in mind, in particular, rules of grammar) within (and only within) certain domains may come close to the theoretical attention that characterises this box. Finally, one should mention Charles Taylor's relatively recent recourse to the concept of social imaginaries, by which he means, as he says, "something broader and deeper than the intellectual schemes [arguably, the models, paradigms, and epistemes of *Box 6*] people may entertain when they think about social reality in a disengaged mode".⁵⁵ He is thinking, he says, instead "of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and im-

⁵¹ As an example of alternative forms of expression, consider Glenn's discussion of the tradition of Kuchipudi in "Law and Kuchipudi" in Leskiewicz, Max (ed.), *The 2005 Annual Publication of the Australian Legal Philosophy Students Association*, Brisbane, ALPSA, 2006, pp. 77-81.

⁵² See Ehrlich, Eugene, *Fundamental Principles of the Sociology of Law*, London, Transaction Publishers, 2002.

⁵³ Bourdieu, Pierre, *The Logic of Practice*, Stanford, Stanford University Press, 1992.

⁵⁴ Pavlakos, George, *Our Knowledge of the Law: Objectivity and Practice in Legal Theory*, Oxford Hart Publishing, 2007.

⁵⁵ Taylor, Charles, *Modern Social Imaginaries*, Durham, Duke University Press, 2004, p. 23.

ages that underlie these expectations”.⁵⁶ There is much to be said, then, for the similarity between the concepts of traditions, practices and social imaginaries.

The above map, then, offers a classification of legal theoretical works on the basis of objectification made in accordance with spatio-temporal emphases. Of course, I have, necessarily, made many omissions. Some may think, for example, my omissions of Ronald Dworkin, Jules Coleman, Frederick Schauer, Lewis Kornhauser, Brian Leiter, and many others, to be most negligent; still others might try to see where they fit into the above schema. Furthermore, and as I noted in the Introduction, I acknowledge that there are many —indeed, no doubt, an infinite— array of possible backward-looking classifications. Each such classification will produce different maps, different understandings of the discipline, and therefore allow us to use the insights (as we characterise them on the basis of the map we use) for different purposes. I turn now, to consider the utility of the map that I offer above – to consider, in other words, how awareness of these different forms of spatio-temporal objectification might help us to understand the gifts and limitations of concepts of legality.

III. PART II: LEGALITY BETWEEN THEORY AND PRACTICE

Paul de Man begins his wonderful collection of literary criticism, entitled *Blindness and Insight*, by noting how the “well established rules and conventions that governed the discipline of criticism and made it a cornerstone of the intellectual establishment have been so badly tampered with that the entire edifice threatens to collapse”.⁵⁷ One is tempted, he says, to speak of Continental criticism in terms of crisis.⁵⁸ Such crises have been identified many times be-

⁵⁶ *Idem.*

⁵⁷ De Man, Paul, *Blindness and Insight: Essays in the Rhetoric of Contemporary Criticism*, 2nd. ed., London, Routledge, 1983, p. 3.

⁵⁸ *Idem.*

fore, in many disciplines. So-called Copernican revolutions, paradigm shifts, epistemic breaks, and many other such notions, are used to indicate the need for a completely new theoretical construct – one that recognises that the centre of the world, as we know it, has cracked. A call to arms is raised: we better get hold of new theoretical instruments to meet the impending floodwaters. Every so often, such a crisis is also said to emerge for legal theory.

What this way of conceiving of a crisis in any discipline—including that of legal theory—assumes is that there is a sense in which we can speak of the correspondence of concepts to reality; in the case of legal theory, of the concept of legality to the world as it, arguably, now is (or is becoming). The most important point of this paper is that to think this way is to perpetuate the crisis, not to overcome it. No concept of legality can correspond to the way the world is, because we have no such access to reality. All concepts of legality are underwritten by a mode of objectifying reality. As I have noted above, we can characterise those modes of objectification in various ways. In the first section of this paper I have provided a map on the basis of modes of spatio-temporal objectification. Below, I shall provide two examples of concepts of legality underwritten by two such modes (broadly speaking, that of agency and structure, respectively), and proceed, thereafter, to show how we need both. The resulting theoretical pluralism about concepts of legality will equip us with more effective resources for responding to certain practical problems, and will thereby resist the mistake—made often with tragic consequences—of adopting just one concept of legality as a foundation for a prescriptive agenda. The only crisis, then, that we should avoid is that of disciplinary identity: criticisms made on the basis of the alleged unfaithfulness of concepts of legality to the world as it is carry with them a conformist tendency; such criticisms fuel an anxiety that can only lead to the quelling of the very theoretical diversity

that is required for an ethical response to the specific complexity of the public sphere.

Perhaps the most dominant concept of legality in the Western world is the one that locates legality in the existence of rules authorised by the State. The way to understand the specificity of legal orders is to see them as systems of relatively closed norms, the existence of which can be ascertained by tracing their pedigree back to a Rule of Recognition, a Grundnorm, or any other way of circumscribing the authority of the State. Whereas the source of the articulated, institutionalised norms of a legal system may be traceable to the practices of norm-users, the object of legal theory should be the articulated, institutionalised, formalised rules, set down and published in accordance with defined procedures. This concept of legality, in turn, is sometimes, though not always, explicitly combined with a prescriptive agenda. We need well-defined rules in order to avoid recourse, by officials, to “raw moral argument”;⁵⁹ or, we need well-defined rules in order to avoid allowing Leviathian to become Frankenstein’s monster—an unpredictable, uncontrolled power—that can lead, as, for example, Jeremy Bentham saw it, to wide-spread corruption amongst the judiciary. Such rules are most effectively defined, it is argued, when limits are placed on how they can be produced: hence the call, in Bentham’s work, for complete and perfect codification.⁶⁰ Further, we need well-defined rules because citizens—and not just officials—require guidance in their everyday life: the maintenance of social order, it is thought, requires agents to act in accordance with relatively co-ordinated reasons. When faced with the question of what they ought to do, both officials and citizens ought to be given resources in the form of reasons for action (articulated rules), because in the

⁵⁹ MacCormick, Neil, “The Ethics of Legalism” (1989) 2(2), *Ratio Juris*, pp. 184-193. A similar point is made by Tom Campbell: see Campbell, Tom, *The Legal Theory of Ethical Positivism*, Brookfield, Dartmouth Publishing Company, 1996.

⁶⁰ See Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation*, London, Athlone Press, 1970.

absence of such resources the possibility of social order will be placed in jeopardy.

It takes some work to recognise the limitations of such a concept of legality. In accordance with the first of the paper, we may now characterise those limitations as being based on a mode of objectification that understands the outcomes of human behaviour to be determined by the reasoning and deliberation engaged in by intentional and conscious agents. In itself, this is not a problem: in fact, we would not have the benefit (and, as I stress once more, it is a benefit) of that concept of legality without that mode of objectification. The problem is that theorists working within that concept of legality are prone to forgetting that a mode of objectification is just that, a mode, a set of assumptions allowing for the production of certain insights. It is tempting, in defending that vision of legality, to argue that human beings are by nature rational and deliberative agents, and that the outcomes of human behaviour really are caused by the reasoning engaged in by such agents. One of the most important purposes of this paper is to remind theorists never to lose sight of the fact that a concept of legality is never capable of corresponding to the world, for it always involves some manner of prior objectification—in this paper, a manner of objectification circumscribed in spatio-temporal form—that, in itself, necessarily offers just one way of seeing.

Consider, now, an alternative concept of legality – that is, one based on a different mode of spatio-temporal objectification. In a recent book,⁶¹ Scott Veitch explores, amongst other things, the link between behavioural outcomes and social structures. He shows, for example, how the infliction of mass suffering —*e. g.*, the suffering inflicted on the Iraq people as a result of the imposition of the UN sanction regime in the 1990's— was the result not of any one or even an accumulation of deliberations of individual intentional

⁶¹ Veitch, Scott, *Law and Irresponsibility: On the Legitimation of Human Suffering*, London, Routledge Cavendish, 2007.

agents, but a complex array of legally authorised bureaucratic procedures. Of course, there is a long and rich tradition —no less so in sociologically informed theories of law— of social structural analyses of behavioural outcomes (indeed, I mentioned some of them in the first part of the paper). Many theorists have pointed to the causal efficacy not of the reasoning process of intentional agents, but of socialised habits, institutional ways life, firm cultures, forms of governance, and so on. This has led to an altogether different concept of legality: law is what the courts do; the law is the living law; law is not the law on the books but the law in action; and so on.

It is deeply unfortunate that the prescriptive resources of such a concept of legality are all too often overlooked. There are two principal strands to such resources: first are the warnings by theorists of the effect of rule-based systems of regulation and education. One example, at first blush perhaps an unlikely one, is that of John Stuart Mill's warnings, in his perennially important work, *On Liberty*,⁶² of the ethical blindness of embedded normative language⁶³ – when such a language becomes too embedded in a culture, we tend to hide behind it, become comfortable with its capacity to lead us, to relieve us of the necessity to maintain ethical awareness. Living under systems of rules, we tend to become subservient, as Lon Fuller noted, to the morality of duty.⁶⁴ Theorists of legal professional ethical education, or even company regulation, speak of the inefficiency of codes – when we are taught that the right thing to do is to act in accordance with a set of predetermined rules, we tend to hide behind them, letting them do the “ethical” work for us, sometimes going further to fit our more or less sinister ambitions under the justificatory canopy of those rules. Theo-

⁶² Mill, John Stuart, *On Liberty*, London, Penguin Books, 1974.

⁶³ *Ibidem*, at 86-7, where he speaks specifically of religious norms.

⁶⁴ Fuller, Lon, *The Morality of Law*, New Haven, Yale University Press, 1964. More generally, see also Shklar, Judith, *Legalism*, Cambridge, Harvard University Press, 1986.

rists speak then of the importance of moral particularity,⁶⁵ of situation ethics,⁶⁶ of moral attention,⁶⁷ of the moral imagination,⁶⁸ of moral perception,⁶⁹ of moral vision,⁷⁰ of the power of love,⁷¹ of the naked face of the other.⁷² Such emphases can lead to programs of ethical education that do not rely on teaching knowledge of the rules and developing capacities to manipulate them (to use them to orient or justify one's behaviour), but rather focus on the development, say, of situational awareness and the empathetic imagination. The resulting concept of legality is one that is more likely to emphasise the importance of more broadly articulated rules. Rules that are too well-defined, it is argued, have a tendency to produce mentalities of irresponsibility, and blindness to the purposes of the rules. Further, such a concept of legality can also lead to calls for an increase in self-regulatory systems, where organisations take the responsibility of drafting and maintaining the rules, rather than the rules being imposed externally.

The second strand of such a social structural concept of legality places emphasis on institutional design. Given the causal efficacy of social structures, we need to be more careful in how we design institutions, for, over time, the design of those institutions leads to certain ways of life. Related to this recognition of the importance of institutional

⁶⁵ See the work of Jonathon Dancy, but see also the collection of essays in Hooker, Brad and Margaret Olivia Little (eds.), *Moral Particularism*, Oxford, Clarendon Press, 2000.

⁶⁶ Fletcher, Joseph, *Situation Ethics*, Philadelphia, The Westminster Press, 1966.

⁶⁷ Weil, Simone, "Attention and Will", in Weil, Simone, *An Anthology*, London, Penguin Classics, 2005, pp. 231-237.

⁶⁸ Fesmire, Steven, *John Dewey and the Moral Imagination: Pragmatism in Ethics*, Bloomington, University of Indiana Press, 2003.

⁶⁹ Blum, Lawrence, *Moral Perception and Particularity*, Cambridge, Cambridge University Press, 1994.

⁷⁰ Murdoch, Iris, *The Sovereignty of the Good*, London, Routledge, 1970.

⁷¹ Bañkowski, Zenon, *Living Lawfully: Love in Law and Law in Love*, Dordrecht, Kluwer Academic Publishers, 2001.

⁷² Levinas, Emmanuel, *Totality and Infinity*, translated by A. Lingis, Pittsburgh, Duquesne University Press, 1969.

design is a call —raised also by Scott Veitch— for reconsideration of legal responsibility, away from its individualisation, and towards a set of standards imposed on complex organisations, and perhaps even to citizens, whose payment of taxes and, thus, funding of military programs by their governments, may provide a link for finding them complicit in the infliction of mass suffering by government policies such as that of the UN sanctions regime.⁷³

As important as these prescriptive resources enabled by a social structural concept of legality are, they also have their limits. We cannot afford to rely solely on designing institutions, on holding complex organisations responsible, on systems of self-regulation, or on non-rule based ethical pedagogies. Similarly, we cannot afford to rely exclusively on those prescriptive agendas —*e. g.*, extensive codification, more and more detailed and abstract rules, critical analyses of the justifications offered by judges in their decisions, etcetera— induced by a concept of legality that conceives of it as a system of appropriately authorised, articulated, and institutionalised norms. Neither concept of legality can be said to correspond to the world more correctly than any other: rather, each is underwritten by some mode of objectification, and each, thereby, provides different kinds of prescriptive resources. To use one, and only one, concept of legality, as a foundation for our response to certain practical contexts would be to fall foul of the worst possible kind of theoretical imperialism. Rather, what we need is recognition of the fundamental importance of theoretical pluralism.

The crucial point, in the context of this part of the paper, is the dual function of the concept of legality in theory and practice. We can only come to recognise the limitations of any theoretical picture of legality when we subject that concept to the scrutiny of practice. Within theory —and without the scrutiny of practical contexts— we are prone to see concepts of legality as rivals: which one, we are tempted to

⁷³ See Veitch, *supra* note 61, ch. Four.

ask, corresponds to the world more correctly, more faithfully? Within the world of theory this question makes sense (indeed, the very problem is that it makes too much sense). The discipline fostered by the desire for correspondence is productive: it motivates us to push our theoretical visions further and further, to explain more and more. But we cannot remain in the world of theory – to do so is to risk not seeing the limitations of our theoretical pictures. And, to risk not seeing those limitations is to risk using our theoretical pictures as foundations for prescriptive agendas.

IV. CONCLUSION

I have sought in this paper to provide resources thanks to which we can see the limitations of concepts of legality. Those resources appeared in the form of one out of many ways of mapping jurisprudential inquiries, i.e., in this paper, a way of mapping that shows how the insights produced by legal theoretical works are underwritten by forms of spatio-temporal objectification. In itself, such an exercise may seem trivial: perhaps, at best, a form of historical navel-glazing. But the classification performed in the first part of the paper is not offered for its own sake. Different ways of characterising the traditions of inquiry within a discipline allow us to produce a different patchwork of assumptions and insights. I happen to think that a mode of characterising jurisprudential inquiries on the basis of their mode of spatio-temporal objectification is particularly helpful. It is surprising how well-matched certain modes of spatio-temporal objectification are to concepts of legality, and to the correlative prescriptive agendas induced by those concepts. It is also surprising, I think, to come to see that those prescriptive agendas need not be rivals; indeed, that they should not be rivals. The way forward, I have sought to suggest, in becoming more responsive to the challenges of the specific complexity of the public sphere, is to recognise

the value of theoretical pluralism, and the resulting richness of prescriptive resources that such recognition enables.

The reference to the specific complexity of the public sphere is important. No one denies the complexity of our everyday personal life, the life of the private sphere. And yet, in the private sphere, at least it seems so to me, a more straightforward link between belief and action may be warranted. I form beliefs about the value of certain things, which lead me to act in certain ways: I value education, and so I enrol in a doctoral program; a certain religion provides meaning for my life, and so I practise it; I enjoy playing and watching football, and I become a member or a fan of a certain football club. To say this, of course, is not to say that all of my actions are the result of my forming certain beliefs: to say so would be to forget that I was born into a particular culture, in a particular place, to a particular family, to a mix of traditions and practices that formed my predispositions, my habits, my likes and dislikes. It is to say, however, that having a certain identity allows me to decomplexify my private life – without which I may be paralysed into inaction by the sheer infinity of possibilities.

However, in the public sphere, one set of beliefs about how we are or what makes life valuable should not be used as a foundation for action. We must be more circumspect, more careful – we must continue to revise values by recognising their limitations. That task is an endless one: we can never reach the horizon of practice; the responsibility to see and respond to the infinite variety of suffering and vulnerability is not one that we can ever satisfy. The theoretical project of finding answers to questions of the form, what is a human being, what is a legal system, and so on, is a worthwhile, perhaps even an indispensable, endeavour. But when it comes to social governance, we cannot afford to rely

on any one such answer to any one such question. Rather, the horizon of practice demands of us that we be theoretical pluralists, forever moving back—in a form of reflective equilibrium— between the challenge of practical contexts in the public sphere and the gifts of the inevitably limited scope of theoretical pictures.