

Review Article

What is (or perhaps should be) the Relationship between Legal History and Legal Theory?

A review of Maksymilian Del Mar & Michael Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart, 2016), 368pp, Hbk £80, ISBN 978-1849467995.

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Historical jurisprudence did not (seemingly) enjoy much status in the latter half of the twentieth century and this was probably due, inter alia, to three principal factors.¹ The first was its association with legal evolution,² a movement that became completely discredited, and secondly the philosophical difficulty of extracting an ‘ought’ (normative theory) from an ‘is’ (historical fact). A third factor was, and remains, the truism that one can be a very competent lawyer without ever having studied legal history (or legal philosophy). Any attempt to re-establish the link must, therefore, overcome these and other difficulties.

One very promising vehicle for doing this is epistemology, a topic (for want of a better term) that has been brought to the fore not just by the seminal work of the late Christian Atias³ but equally by comparative law theorists who have increasingly realised that traditional legal theory has been more of a hindrance than a help. What is it to have knowledge of law? This question is now central to comparatists striving to understand the ‘other’. It is, then, rather surprising that ‘epistemology’ does not feature in the index of a new work (or collection of works) on legal theory and legal history, the book under review, edited by Maksymilian Del Mar and Michael Lobban, which attempts to reopen the dialogue between these two domains. Nevertheless an index is one thing (although arguably not unimportant) and substance is another; the lack of an entry does not necessarily mean a lack of discussion in the texts

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¹ P Stein, *The Tasks of Historical Jurisprudence*, in N MacCormick & P Birks, *The Legal Mind: Essays for Tony Honoré* (Oxford University Press, 1986) 293. Note however that the traditional account of the decline of historical jurisprudence is challenged by Brian Tamanaha (335-6).

² On which see P Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980).

³ See in particular C Atias, *Épistémologie juridique* (Presses Universitaires de France, 1985).

themselves.⁴ What, then, is, or should be, the relationship between legal history and legal theory? The purpose of this review article is to examine this question in relation to this new publication.

I

Ronald Dworkin suggested, or at least implied, that just as one does not need to have a knowledge of the history of mathematics to be a good mathematician so one does not a knowledge of legal history to be a good legal theorist or lawyer. It is not a matter of knowing the details of the past but, he argued, one of ‘attitude’.⁵ Empirically speaking, there would seem to be much truth in this assertion in that it would surely not be difficult to find very competent legal theorists and lawyers who have never studied legal history. As Jonathan Gorman reminds us, this separation between history and theory is to be found in other disciplines besides law. In sciences, the ‘philosophers of science with an inheritance of logical empiricism sought to avoid reference to the history of science because it was seen as relativising science to its social or cultural background, so committing its practitioners to the partisan philosophical position of epistemological relativism.’ (93-94) Moving back from science to law, if law is a science—as many continental legal theorists have thought (and some still think) that it is—then almost by definition legal skill is something that transcends its historical foundations. As Dworkin asserted (although he did not view law as a science), it is a matter of attitude; and this attitude can be acquired independently of law’s history.

However an increasing interest in epistemology by some contemporary law theorists is challenging this Dworkinian assertion. There is the general question concerning attitude which is, perhaps, expressed, even if obliquely, by several of the contributors to this new volume. Is ‘attitude’ something that can avoid being informed by history? Can it be appreciated within a ‘historical vacuum’ (90)? More generally the Dworkin theory of law is being questioned by comparative lawyers who have realised that while they need a commitment to theory, traditional legal theory is unsuitable since comparative law is not concerned with a universal definition of law. What the comparatist needs is quite the reverse; she needs to be able to determine difference in legal knowledges.

This issue is well brought out in John Bell’s chapter. Discussing Dworkin, he makes the point that this theorist simply fails to provide a universal theory of law; ‘at best he produces a general theory of the common law legal family, which leaves members of other legal families completely bemused and unengaged.’ (134) It is easy to see why those outside the common law might be both bemused and unengaged, yet Dworkin is of importance to the comparative lawyer simply because his ideas bring out differences. His famous image of the chain novel as an analogy for what common law judges do does not fit with the image created in later civilian legal history which from the seventeenth century started to think of the lawyer as analogous to the mathematician.⁶ As a French professor points out, it is this movement that has resulted, within the civil law tradition, in the ‘dogmatic method’ or the ‘classic legal method’, itself founded on a highly formalistic view of law as a conceptual axiomatic structure.⁷

⁴ In fact references to epistemology are to be found in the contributions, if only in passing.

⁵ See generally R Dworkin, *Law's Empire* (Fontana, 1986).

⁶ *Ibid* 228-32; V Champeil-Desplats, *Méthodologies du droit et des sciences du droit* (Daloz, 2014) 58-75.

⁷ Champeil-Desplats (n 6) 63. See generally J Gordley, *The Jurists: A Critical History* (Oxford University Press, 2013) 165-194.

These images—what might be called non-symbolic knowledge⁸—are themselves vehicles which can act as a means for dialogue between comparative law, legal theory and legal history. They are, first of all, historically determined. In the civil law tradition legal learning—in particular method and theory—was largely in the hands of university professors who were engaged in ‘projects’ which not only ‘were attempts to understand and explain the law’⁹ but often were seen as having a practical element in that the works that they produced were designed as conceptual rational structures (based of course on Roman law) for the use by students, practitioners and judges.¹⁰ Such rationalisations made the law both easier to learn and to apply; for once one had reduced the law to a series of ‘axioms’ (*axiomata*), it was simply a matter of syllogistic logic.¹¹ It was the academics, in short, who provided the formalist models. In England there were no universities teaching the common law before the end of the eighteenth century and, indeed, law never really became a fully-fledged university discipline until well into the twentieth century. Accordingly the shaping of the common law was in the hands of judges. Until the nineteenth century this shaping was largely done through the historically determined procedural structure of the forms of action which consisted of matching the factual patterns of disputes with the model ones that underpinned each form. ‘Consequently,’ observes James Gordley, ‘while the Roman jurists developed a substantive law based on ... concepts that [were] largely independent of procedure, the English judges never developed a substantive law that stood apart from the procedural question of what writ the plaintiff could bring.’ History here is setting the scene for two rather different images.

There is the image of the top-down abstract model from which all practical case examples have been banished: one sees this in works such as Jean Domat’s *Les loix civiles*.¹² Here law is a matter of *regulae iuris*, increasingly seen as *axiomata*, and epistemologically complete in itself. There is no place in the model for the law-maker so to speak, for the application process is one of logic. History thus shows us when and how an independent formalistic model of legal knowledge—independent both from procedural rules (the law of actions) and from the empirical world of social fact—established itself.¹³ Opposed to this image is one in which the law-maker has a fundamental role, like the authors of a chain novel, in which the *regulae iuris* gradually emerge out of litigation facts thanks to the law-maker’s ability to bring together within a single construction both the past and the future. Even if the *ratio decidendi*—the basis of precedent—is never disengaged from the facts of its case,¹⁴ one nevertheless finds Dworkin asserting that the judge must ‘must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.’¹⁵ To be sure, Dworkin was not suggesting that the judge construct an axiomatic model from which the ‘right answer’ could be inferred syllogistically.¹⁶ His image was a literary rather than a mathematical one. Yet from a diachronic viewpoint his assertion seems not so far removed from the ‘top-down’ constructions that dominated civilian legal scholarship from the

⁸ J Delacour, *Le cerveau et l’esprit* (Presses Universitaires de France, 1995) 34-42.

⁹ Gordley (n 7) x.

¹⁰ *Ibid*, 147.

¹¹ See eg, Joham Gottlieb Heineccius, *Elementa Juris Civilis Secundum Ordinem Pandectarum* (1785 edn).

¹² Discussed in Gordley (n 7) 141-7.

¹³ Particularly important is H Doneau, *Commentarii de Jure Civili* (1596). For the development of logic in the medieval civil law see A Errera, *Lineamenti di epistemologia giuridica medievale* (Giappichelli, 2006).

¹⁴ See Lord Simon in Lord Simon in *Lupton v FA & AB* [1972] AC 634, 658-59.

¹⁵ R Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 116-17.

¹⁶ Dworkin (n 5) 412.

seventeenth century onwards.¹⁷ And once one sees the common denominator as ‘principle’—what the Romans labelled a *regula iuris*—the historical dimension is immediately revealed, as Ian Williams’ contribution on legal maxims reminds us (188). At first sight, as we have seen, Dworkin’s image of the judge as chain novelist seems completely at odds with the *mos geometricus* image of the civilian legal mathematician working with axioms and theorems. But equally he was effecting something of a shift. In separating ‘principle’ from ‘policy’ he was suggesting that there was an abstract model of rights ‘out there’ so to speak.¹⁸ However, this said, comparing Dworkin with the post-humanist civilians reveals one fundamental tension that underpins legal knowledge: the notion of a *regula iuris* (principle) reveals not just a tension between the synchronic and diachronic but, thanks to Dworkin, a tension between theories that embrace the law-maker and theories of law that do not.

II

Even if Dworkin was not subscribing to the idea that there is a ready-made model ‘out there’, a new generation of common lawyers, influenced by him, have moved in this direction.¹⁹ The separation between principle and policy—a separation insisted upon by Dworkin²⁰—when applied to a subject such as the law of tort, has resulted in a theory, as Steve Hedley indicates, where a functionalist (instrumentalist) policy approach is regarded as not being within the scope of legal knowledge (318). Indeed, again as Hedley observes, some see it as destructive of such knowledge. What is interesting about this ‘idea whose time may have gone’ (Hedley) is that it reveals not just a tension underpinning the question of what is law and what amounts to legal knowledge, but another tension as well. This is the dichotomy between holism and individualism. The law of tort according to this new generation is concerned only with corrective justice between individuals and thus the epistemological model is one consisting of ‘atomised individuals’ where ‘the corporate form has no significance’ and where the ‘emphasis [is] on rights’ (316, 319).

If there is one epistemological tension that links theory with history it is surely this old controversy. For ‘the history of law shows that legal individualism and holism are timelessly *intriqués*, the legal orders oscillating endlessly from one pole to another, searching inexorably the point of equilibrium – the moment where the individual interest and the collective interest no longer clash head on with each other.’²¹ Moreover this tension feeds into two (if not more) epistemological questions that are relevant to law. Are all universal fictions—the Post-Glossators thought that the corporation (*universitas*) was a *persona ficta*²²—and following on from this, are all legal notions and concepts fictions?²³ And, more ambitiously, is not the

¹⁷ P Stein & J Shand, *Legal Values in Western Society* (Edinburgh University Press, 1974) 100-2.

¹⁸ Dworkin (n 15) 22-28.

¹⁹ S Hedley, The Shock of the Old: Interpretivism in Obligations, in C Ricketts & R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart, 2008) 205.

²⁰ See eg, Dworkin (n 5) 244.

²¹ L Ravaux, L’exemple historique : Individualisme et holisme juridiques – Du très ancien droit romain aux préoccupations de la doctrine juridique moderne, éléments de réflexion sur l’intemporalité de l’« universelle contradiction », in J Le Bourg & C Benelbaz (eds), *De quelques grands débats doctrinaux: Réflexions sur l’intemporalité des controverses* (CDPPOC, Université Savoie Mont Blanc, 2016) 11, 13.

²² See eg, Paulus de Castro, *In Primam Digesti Veteris partem Commentaria*, D.3.4.2 no 3, D.3.4.7 no 1, D.5.1.76 no 6. English law would seemingly take the same view: see Lord Reid in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 170.

²³ JW Jones, *Historical Introduction to the Theory of Law* (Oxford University Press, 1940) 164-86.

tension between the whole and the part at the base of all the methodological debates and reasoning processes to be found in all the social sciences, if not the natural sciences?²⁴ Certainly the tension is fundamental both to history and to law and if historiography and legal theory are to have a dialogue it might be one good starting point.

III

Alternative Dispute Resolution (ADR) is equally contributing to a sceptical view of traditional legal theory. The tension here is between formalism and realism. What is the object of legal theory? Is it some *a priori* conceptual model of rules, or rights, or norms or whatever or is it what actors (or agents or participants) in law do and (or) think? As practising lawyers increasingly embrace alternatives to court or trying to resolve conflict through appeals to legal rights and rules, the very concept of what many theorists have regarded as law is, at one level, beginning to prove outdated. Many comparatists have had to banish the standard legal theories because of the danger of legal imperialism and indeed it may be that comparatists might be better off starting out not from the concept of law but from the more empirically grounded idea of dispute resolution. Fernanda Pirie indicates that, at least when looking at dispute resolution procedures in history, these may not fall within the ambit of ‘law’ (41).

Yet surely this begs a question. Why should a theory fashioned today determine what counts as law in the past? Is there not here a serious historiographical issue? In fairness she makes the reasonable point that examples from the past can be used ‘to test the boundaries of our own legal concepts.’ Yet perhaps Del Mar gets closer to the problem with two observations. The first concerns the ‘stark choice between either theory or history’ where he sees two problems: ‘1) it suggests that “our” concept of law does not have its own histories, as if it were unconnected with the past; and 2) it neglects the difficulties and virtues of attempting to understand what law ... meant for whom and why in different times and places.’ (29)²⁵ Quite so, one might say. Indeed, in a footnote, Del Mar references a suggestion by Sean Donlan that one might work not with ‘law’ but another concept (29 n 19). The second observation is that if one thinks of law in terms of professionalisation—and the history of the legal profession is as old as the history of law²⁶—why should one not ‘take seriously the idea that the character of law may change depending on the scale and extent of professionalisation’ (37)?

IV

Another epistemological issue revealed in this dialogue between legal theory and legal history is with respect to legal theory itself. As Sionaidh Douglas-Scott points out, one ought to acknowledge ‘that *legal theory itself* is capable of offering many different viewpoints for historians to work with, and the more viewpoints we consider, the more profound the dialogue with legal history may become.’ (48, emphasis in the original) There is no single dominating legal theory—at least when viewed over time—and this in itself means that contemporary legal knowledge is not as stable as one might think. There is no single dominating theory because

²⁴ B Valade, De l’explication dans les sciences sociales: holisme et individualisme, in J-M Berthelot (ed), *Épistémologie des sciences sociales* (Presses Universitaires de France, 2001) 357.

²⁵ It is perhaps to be regretted that the author makes no reference to Jones (n 23), which would have provided a nice footnote to his first outlined problem. He might also have referenced HF Jolowicz, *Lectures on Jurisprudence* (Athlone, 1963).

²⁶ See JA Brundage, *The Medieval Origins of the Legal Profession* (University of Chicago Press, 2008).

beneath the debates there are fundamental epistemological tensions in play, some of which have already been outlined. There is the tension, as the present volume itself attests, between the diachronic and the synchronic; there is the tension between ‘law’ and ‘law maker’ (a point seemingly noted by Sionaidh Douglas-Scott in her brief discussion of Dworkin) (46, cf 131); there is the tension between formalism and realism; there is the tension between holism and individualism; there is the tension between the authority and the inquiry paradigm;²⁷ and no doubt there are several other tensions as well. Once law is viewed in this way—that is through a range of what might be called epistemological tensions—there is surely an opening for a dialogue between theories of law and their histories.

Indeed, given these tensions, and given Douglas-Scott’s point about no single dominating theory, it might be useful to mention a work that is sadly neglected in this present volume. Walter Jones in his *An Introduction to the Theory of Law*²⁸ looks quite thoroughly at the history of the civil law and arranges his other chapters ‘not to provide a systematic treatment of the whole field of modern legal theory, but to serve as an introduction to certain aspects which the law has presented, when it has been approached from different points of view and for different purposes.’²⁹ The importance of that book, written at the beginning of World War Two, is that not only does it bring together virtually every aspect of the Western legal tradition but it also presents this material using viewpoints that are able to bridge the theory and history divide. For example, rather than having a chapter on positivism—although there is a chapter on the law of nature—Jones distributes these theorists across chapters on the sovereignty theory, the metaphysicians and the pure theory; this permits him to start out, not from the present as such, but from the past with an eye to the present. He thus begins his chapter on sovereignty theory with the following observation:

Just when legal writers, almost for the first time since the compilation of the *Corpus Iuris*, were once again treating private law as an ordered systematic whole, there appeared in the wider field of political theory clear signs of conceptions of law which we have come to regard as essentially modern.³⁰

This is bridging the gap between the past and the present in showing how our modern theories have been formed and how the elements on which they are based are the product of past discourses.³¹

The theorist would no doubt claim that such descriptive information does nothing to undermine the separation, but a response might be one analogous to Robert Blanché’s assertion that the epistemologist who takes a diachronic approach is adopting a research orientation that is essentially critical. The ‘goal is to distinguish, thanks to the teachings that the study of the past can bring to him, the elements which have come together in the formation of the science and of the scientific ideal itself.’³² If one replaces ‘science’ and ‘scientific ideal’ with Dworkin’s term ‘attitude’ the elements that make up this attitude have not come from nowhere. And this is a point insisted upon by Del Mar (108, 22ff). But of course, as Blanché went on to

²⁷ This tension is discussed in G Samuel, Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists? (2009) 36 *Journal of Law and Society* 431. For an overview see G Samuel, *A Short Introduction to Judging and to Legal Reasoning* (Edward Elgar, 2016) 109-16.

²⁸ Jones (n 23).

²⁹ *Ibid*, Preface.

³⁰ *Ibid*, 79.

³¹ On which see R Blanché, *L'épistémologie* (Presses Universitaires de France, 3rd ed, 1983) 36-39.

³² *Ibid*, 37.

say, much depends on what one means by history and here it is important to stress that the history of ideas cannot be written in the same way as the history of events, for the links are not of the same nature in each case (38). The movement of ideas is not governed like the movement of bodies, that is to say by causality; it is orientated by a search for what is ‘true’ which means that the history of ideas ‘cannot be written but only seized, so to speak, from the interior.’ (38) This is why, said Blanché, the history of all the sciences, other than those that are purely narrative, is already, to some extent, philosophic. This point is perhaps reflected, at least in part, in Jonathan Gorman’s contribution; if ‘there is merit in legal theory being informed by history, then it needs to be informed by history as theorised, by a philosophy of history.’ (103)

Del Mar puts it a little differently in saying that ‘how inevitably entangled theory is with history, and, equally, history is with theory.’ (26) One is tempted to go further: there is a history of law that can only be epistemological, while an epistemology of law can only be historical.³³ Many might object of course in asserting that there are several different ways of accessing epistemology, but what Jones’ book so clearly indicates is that a truly sophisticated examination and analysis of the history of legal theory—not an easy task once one appreciates the sheer breadth of Jones’ learning and linguistic abilities—is nothing short of a comprehensive introduction to legal epistemology. If there is to be a true dialogue between legal theory and legal history one might start with an updated edition of Jones’ book.

V

There is another tension that arises out of Gorman’s and Del Mar’s comments—and indeed out of some of the other contributions. This is the tension—and it is a general epistemological tension—between law as an object and the discourses on law. Christian Atias has asserted that confusing the two ‘has cost us dear’ in that such discourses can often be mistaken for the law itself.³⁴ The examples are numerous, a particularly notable one in the history of the common law being identified by the late SFC Milsom.³⁵ ‘Borrowed book learning in *Bracton*’, he said, ‘made its English law appear on the surface to be of the same nature as the developed Roman law’.³⁶ Del Mar, specifically recognising the distinction, indicates that failing to distinguish between the two means that we might fail to see that the discourse on law is ‘part of a scene of disagreement, of clashes of interests and outlooks’ and in consequence arrive at the conclusion that law is about consensus (125). He is surely right here; for as he says, while there may at times be temporary consensus, ‘what is much more common is that there are many different kinds of contests, with many different kinds of things at stake’ (125). Even the Glossators and Post-Glossators disputed for example the nature of legal concepts.³⁷ In the common law, it has to be said, the distinction was not so easy to see because for many centuries—perhaps still today—just what is the ‘law’ was not easy to see. Much therefore depended, and still depends,

³³ *Ibid* 39.

³⁴ C Atias, *De la difficulté contemporaine à penser le droit : Leçons de philosophie du droit* (Presses Universitaires d’Aix-Marseille, 2016) 219.

³⁵ Disappointingly SFC Milsom does not appear in the index of Del Mar & Lobban, a quite extraordinary omission given the introduction to his book: SFC Milsom, *A Natural History of the Common Law* (Columbia University Press, 2003). His opening words are: ‘The jurist, the lawyer looking at law from a distance, is a species extinct in the common law world. His habitat was annexed by philosophers as a playground for their own games... but historical jurisprudence has been discredited too long... to attract even the contempt due to the beliefs of one’s teachers.’ (xiii).

³⁶ *Ibid*, xiv.

³⁷ See eg, Bartolus, *In primam Digesti Novi partem Commentaria*, ad D.42.2.17.1 nos 4 and 5.

on the commentators.³⁸ In the civil law the distinction, at least at first sight, seems much easier to perceive since the rediscovery of Roman law. There was the *Corpus Iuris* and there were the commentaries on it.³⁹ And with codification, there are the codes and commentaries on these codes.

The tension between law and the discourse on law is of importance to the legal theory and legal history debate for the general reason given by Del Mar. But there are some more specific reasons as well. The first is that both theorists and historians are discourse writers; whatever the epistemological strength of say Blackstone's *Commentaries* or Kelsen's pyramid of norms neither of these texts is actually the 'law' itself. One only has to think of France where, as the contribution of Jean-Louis Halpérin and Pierre Brunet indicates (233), Kelsen's theory remains fundamental to public law thinking despite the fact that the conceptual pyramid does not actually represent the law because the theory does not recognise any distinction between public and private law in that it envisages a system of norms as a whole.⁴⁰ Yet the distinction between public and private law is very much part of the 'law' in France (and elsewhere in the civil law world) both at a substantive and at a procedural and institutional level.⁴¹ This means that the theorist and the legal historian are often engaged in the same enterprise, namely making sense of an object of investigation (law, whether past or present) using notions, concepts and (or) frameworks that are fashioned from the outside, so to speak. The historian might well be using a contemporary construct to understand the past—one thinks of works within the common law tradition that reinterpret the past using notions such as the 'law of obligations' or 'ownership'—while the theorist might well be using constructions from the past to fashion a contemporary theory. As Halpérin and Brunet show, the construction of the modern state has been built out of concepts going back to Roman law (244). The same can be said for notions such as ownership and the idea that contract has the force of legislation between the parties.⁴² At the level of discourse on law, then, the theorist and the historian often come together, even if they are unaware of it.

This coming together generates a second reason why the distinction between law and discourse on law is important. The distinction represents, for the most part at least, the distinction between the practice and the teaching (including explanation) of law. This of course is a distinction that goes back to Roman law: the student textbooks (*institutiones*) set out the law not just in a descriptive and abstract manner but, with Gaius, in a hierarchical and systematised way according to the seminal plan of *personae*, *res* and *actiones*.⁴³ Was this plan the 'law' or was it a discourse on the law? The Roman answer to this question would appear to be that these books were simply discourses on the law. Indeed there is a clear text stating that general rules (*regulae iuris*), the most important of which were collected together at the end of the *Digest*, did not represent the law; they were merely brief summaries of it.⁴⁴ In the late Middle Ages, when the Roman materials were rediscovered, the distinction between law and discourse remained but there had been a shift. The *Institutes* were no longer treated as a

³⁸ For an historical overview see J Baker, *An Introduction to English Legal History* (Butterworths, 4th edn, 2002) 175-92.

³⁹ For an overview see P Stein, *Roman Law in European History* (Cambridge University Press, 1999).

⁴⁰ E Desmons, Droit privé, droit public, in D Alland & S Rials (eds), *Dictionnaire de la culture juridique* (Presses Universitaires de France, 2003) 520, 524.

⁴¹ Jones (n 23) 139.

⁴² C Atias, *Questions et réponses en droit* (Presses Universitaires de France, 2009) 129-30.

⁴³ G.1.8. See generally HF Jolowicz, *Roman Foundations of Modern Law* (Oxford University Press, 1957) 61-81. Jolowicz's important work on the historical relevance of Roman law to modern law is not mentioned or cited in Del Mar & Lobban.

⁴⁴ D.50.17.1.

discourse on the law but part of the civil law itself, in turn attracting glosses and commentaries from the medieval jurists. Gradually these glosses and commentaries became part of the learned law; as Jones says, ‘what began by being *argumentum ab veritate* became *argumentum ab auctoritate*.’⁴⁵ The process did not stop. With Doneau the institutional scheme started to replace the plan in the *Digest* and *Codex* with the result that, with codification in the nineteenth century, the plan itself became a fundamental aspect of the ‘law’.⁴⁶ Post-Doneau discourses on law—in particular Domat’s *Loix civiles* and Pothier’s various books—equally became absorbed into the *Code civil* which acted as a ‘restatement’ so to speak of the civil law itself. But this ‘restatement’ was more than this; it was a deliberate attempt to cut off ‘law’ both from ‘discourses on law’ (Napoléon tried to forbid commentaries on the code) and of course from law’s history.⁴⁷

This distinction between law and discourse offers perhaps one of the most potent tensions for understanding the ambiguous attitude by codifiers (‘theorists’) towards history. They wanted to banish history and start afresh. As Christian Atias said, the loss of history is flagrant and so while there are a good many histories of law everything conducts itself as if the law never had a history.⁴⁸ ‘It [law] is’, he asserted, ‘studied and correlatively is formed outside of time.’⁴⁹ In the civil law world, what now becomes the ‘law’ is the system of rules; the rule has been elevated *au premier rang* and is presented as if it contained and absorbed the whole of the law.⁵⁰ Accordingly, the role of the judge in for example France is ‘to decide the litigation in accordance with the rules of law which are applicable to it.’⁵¹ Much the same is true of English law: the judge’s ‘primary duty... is to ascertain the statutory provisions and the principles stated in decisions that are binding on him’.⁵² Law is about statutory rules and precedent principles. Legal theorists of the last century simply reflected this epistemological and ontological idea: ‘law’ is, for example, the union between primary and secondary rules.⁵³ The rule (including the more abstract version, the principle) is what matters and a principal role of the theorist thus becomes one of identifying the sources of such rules and their differentiation from non-legal rules. The discourse on law—those *regulae iuris* identified by the Roman jurists—has over the centuries become the ‘law’ itself,⁵⁴ and this is surely one reason why perhaps a dialogue between legal theorists and legal historians is not traditionally seen as necessary. What started out as an exercise to make law easy to absorb for students and perhaps non-lawyers has, then, ended up as the law itself.

VI

However a third important reason why the tension between law and discourse on law is important is to be found in the need to justify, in epistemological terms, the authority of law. This was not a problem in the medieval period since texts had an absolute authority in

⁴⁵ Jones (n 23) 19.

⁴⁶ Jolowicz (n 25) 63; Stein (n 39) 79-82.

⁴⁷ R Van Caenegem, *An Historical Introduction to Private Law* (Cambridge University Press, 1992; trans DEL Johnston) 1.

⁴⁸ Atias (n 42) 204-205.

⁴⁹ *Ibid.*, 205.

⁵⁰ *Ibid.*, 167.

⁵¹ *Code de Procédure civile* art 12.

⁵² Vinelott J in *Derby & Co v Weldon (No.5)* [1989] 1 WLR 1244, 1250.

⁵³ HLA Hart, *The Concept of Law* (Oxford University Press, 1961).

⁵⁴ On which see P Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh University Press, 1966).

themselves (*legere in philosophia*),⁵⁵ especially if the text could be associated with the authority of God (in the case of law via Justinian).⁵⁶ In addition the existence and authority of law was tied to the notion of society itself: *ubi societas ibi ius*.⁵⁷ With humanism this authority broke down; the nominalist revolution of the Middle Ages had gradually led to the idea that society consisted of individuals and each of these had rights.⁵⁸ How could law retain its authority in this changed epistemological and ontological outlook?

If one looks at the discourses on law during the sixteenth and seventeenth centuries one sees, as Henry Maine observed, a reform of the law books.⁵⁹ Rather than long and detailed commentaries on the Roman sources, there developed a literature based on what Michael Lobban calls ‘right’ or ‘abstract’ reasoning (224-5). ‘This new methodology’, says Lobban, ‘was summed up in the preface to Sir William Jones’s *Essay on the Law of Bailments*, where he stated that he had sought to explain the subject analytically (tracing “every part of it up to the first principles of natural reason” or “the plain elements of natural law”), historically (to show how those principles were recognised by other nations) and synthetically (setting out clear rules).’ (225) As Lobban points out, ‘[s]uch writers were often influenced by models taken from civilian texts’ (225). These civilian writers belonged to the school of natural law, but what this meant was not some scheme ultimately traceable back to God; it was a scheme founded in natural reason⁶⁰ and owed much more to mathematical thinking. There were fundamental principles and the consequences flowing from these principles were discoverable using mathematical logic.⁶¹ Leibniz set out clearly the method to be applied:

Definitions or explanations of legal terms as set out in the books must be undertaken without mixing up propositions or rules (*praeceptis seu regulis*); this can be called: *divisions of law (partitiones juris)*. The method is not alphabetic but precise and sound. And just as admirable as this ability to explain one thing by another using this sound and scientific (*solida & naturali*) method, is its ability to aid memorisation. Moreover the table (*tabella*) has a practical function by which it is possible to obtain at a first glance a total overview of the whole of the area of knowledge just as one does with a geographical map, then one can proceed to examine each particular province so to speak.⁶²

The epistemological validity underpinning law had therefore shifted. It was no longer the authority that attached to a sacred text, but the rationality and coherence of the system of axiomatic principles and the sub-principles that could be deduced from the axioms.

⁵⁵ P Riffard, *Les méthodes des grands philosophes* (Ovadia, 2013) 115.

⁵⁶ Jolowicz (n 25) 51-54; W. Ullmann, *The Growth of Papal Government in the Middle Ages* (Methuen & Co, 2nd edn, 1962) 359–66.

⁵⁷ The expression itself does not seem to be medieval; it is found in a commentary by Henrici de Cocceji on H Grotius, *De Jure Belli et Pacis*, Prolegomena, para 8. The author would like to thank Professor Jaakko Husa for supplying this reference.

⁵⁸ See in particular H Doneau, *Commentarii de Jure Civili* (1596). On this nominalist revolution see M Villey, *La formation de la pensée juridique moderne* (Presses Universitaires de France, Quadrige, 2006). Villey’s exhaustive work is not without its critics, but it is absent from Del Mar & Lobban.

⁵⁹ H Maine, *Early Law and Custom* (John Murray, 1890 edn) 363.

⁶⁰ Jones (n 23) 105-106.

⁶¹ Champeil-Desplats (n 6) 60.

⁶² GW Leibniz, *Nova methodus discendae docendaeque jurisprudentiae* (JD Zunneri, 1667), Section II, para 7. (translation Geoffrey Samuel).

Yet what were these ‘fundamental’ or ‘scientific’ principles’? Williams provides one insight: it was the *regulae iuris* or maxims of law which by the sixteenth century had been elevated from being mere summaries—that is to say discourses on the law itself (which was seemingly the case for the Romans)⁶³—to become fundamental principles of legal science. As Williams notes, ‘[t]o claim status as a science, a discipline needed to fulfil the Aristotelian criterion of being based upon known principles’ and maxims ‘provided these principles’ (204). As one eighteenth century civil law writer put it, ‘if all the other law texts make up all the material of which the temple of Justice is composed, it can be said that the Rules [that is the *regulae iuris*] are the base and foundation of this building.’⁶⁴ As far as this civilian writer was concerned, these maxims were not just discourses on the law, for ‘all the Rules make up the laws, but all the Laws do not make up the rules.’⁶⁵ Given the frequent references to the principles underpinning the natural sciences by the jurists of the *ius naturale* school, it is hardly surprising that these maxims should assume something of an epistemological status. Yet did they represent the ‘law’ or were they a theoretical orientated discourse on the law?

In the civil law world these principles (*regulae*) became the ‘law’ with codification. However, as various French writers have shown, the developments after codification in France are more complex in that the discourse writers embark on the process that, from the historical viewpoint, is not dissimilar to the process that followed the rediscovery of Roman law in the eleventh century.⁶⁶ There is first a period of textuality; that is to say a period where the writing of the jurists on law regards the code as perfect and complete and the discourses simply repeat and paraphrase the code following the order of the articles. ‘Everything happens’, says Veronique Champeil-Desplats, ‘as if the work of scientific construction on law has been exhausted with the act of codification: the jurists have nothing more to add.’⁶⁷ A second period follows which is one of limited and literal interpretation; once the text in question has been clarified, it is regarded as an axiom to be applied in a deductive manner.⁶⁸ A third period sees a return to the idea of principles, but not as *regulae* or axioms existing in some *ius naturale* domain superior to the *ius civile* world of the code. Legal discourse was now a world of science and ‘[t]hanks to this science, the explorers of the code—who have now become in their own eyes *scientists*—can build a legal system and a harmonious system containing now neither gaps nor uncertain zones: there will always be a principle which they will be able to use when the texts remain silent on such or such practical question.’⁶⁹ These scientific principles are not external to the code but are internal to it. It is not a discourse on the law but an explanation of the inner workings of the law itself.⁷⁰ Consequently, from the viewpoint of legal method, this was the period of a *ratio legis* founded on a logical process where solutions are deduced from an axiomatic principle.⁷¹ Not only is there nothing but the law (and thus no separate discourse on the law); there is equally the epistemological authority of complete coherence within the context of a supposedly scientific mentality.⁷²

⁶³ See D.50.17.1.

⁶⁴ JB Dantoine, *Les règles du droit civil, Dans le même ordre qu’elles sont disposées au dernier Titre du Digeste* (1710) preface.

⁶⁵ *Ibid.*

⁶⁶ P Jestaz & C Jamin, *La doctrine* (Daloz, 2004) 91.

⁶⁷ Champeil-Desplats (n 6) 78.

⁶⁸ *Ibid.*, 78-79.

⁶⁹ Jestaz & Jamin (n 66) 94.

⁷⁰ *Ibid.*, 94-95.

⁷¹ Champeil-Desplats (n 6) 79.

⁷² *Ibid.*, 109.

VII

A fourth period is one where the formalism that resulted from this axiomatic method becomes both more entrenched thanks to legal theory and yet increasingly challenged, if only gradually, by a growing awareness of the importance first of induction and secondly of a different scheme of intelligibility, namely that of functionalism.⁷³ In other words there is an increasing separation, once again, between the ‘law’ and the ‘discourse on law’. What perhaps is different in terms of this new separation is that the discourse on law is more conscientiously philosophical in that it is either searching for a synchronic and *a priori* definition of law from an internal position or for an explanation of law through the vehicle of other disciplines.⁷⁴

Jones largely describes the synchronic theoretical approach under a chapter heading entitled the ‘metaphysicians’. This is particularly apt in the way that it illustrates how ‘the more widely the legal historian extends his field, the more convinced he will become of the impossibility and even absurdity of all attempts to formulate any concept of law.’⁷⁵ Legal history could make little contribution to the philosophy of law.⁷⁶ ‘Thus,’ Jones said, ‘when interest in the philosophy of law was revived towards the end of the nineteenth century, the only hope of advance seemed to lie in putting the investigation upon a purely positive basis by clearing the ground of the fictions and assumptions which, under the name of natural law, were blamed for having made philosophy suspect in the minds of lawyers.’⁷⁷ This fourth period is arguably the one that we are still in and it provides much of the context for the Del Mar and Lobban collection.

Some positivists might be surprised to find themselves classed as metaphysicians since one aim of positivism was not only to describe law ‘as it is’ but, for some, specifically to banish metaphysical elements from legal theory.⁷⁸ Yet, as Jones points out, ‘whatever else may be said of it, it is undeniable that a system of law endowed with the qualities of completeness and absolute freedom from contradictions is as much an ideal as the concept of a law of Nature.’⁷⁹ Accordingly positive law, ‘as it thus appears to the positivist, is (whether he is aware of it or not) a metaphysical notion involving a number of *a priori* assumptions.’⁸⁰ This metaphysical aspect is of importance in understanding the tension between legal theory and legal history in that it implicitly asserts that the theory is superior when it comes to looking both at the past and at other legal cultures. ‘Armed with this insight,’ suggests Del Mar (although he does not refer to Jones), the theorist ‘can venture forth and observe and describe—classify phenomena as either instances or not of jurisdiction-specificity.’ (31) The theorist is making, he continues, a ‘classificatory’ claim: ‘something that allows us to classify some things as law and others as non-law.’ (31)

A similar assertion appears to emerge again in Hedley’s criticism of Ernest Weinrib’s view ‘that a law of obligations not based on corrective justice is not really law at all.’ (318) An ‘instrumental approach’, Hedley says of Wienrib, ‘is politics rather than law, and [Weinrib] seems to think that one can no more be a little bit political than one can be a little bit pregnant.’

⁷³ See eg F Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 *Columbia Law Review* 809.

⁷⁴ Champeil-Desplats (n 6) 122.

⁷⁵ Jones (n 23) 204.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, 205.

⁷⁸ W Friedmann, *Legal Theory* (Stevens & Sons, 5th edn, 1967) 271.

⁷⁹ Jones (n 23) 207.

⁸⁰ *Ibid.* See also Gordley (n 7) 214.

(318) There seems here to be something of a clash between theory and legal history in that if Weinrib is right about a strict separation between ‘law’ and ‘politics’, then presumably when Bartolus asserted *civitas sibi princeps est* (and other similar comments) this is not law.⁸¹ Given the central role of Roman law in the development of political theory in Europe,⁸² arguing that political assertions are not law would seem to result in a legal history of Europe that, at best, would not match the relevant texts. Stephen Waddams makes the same point about the common law. ‘Where courts have been called upon to select among legal rules, or to formulate a new rule,’ he says, ‘they have frequently been influenced by practical considerations.’ (284) If one is going to insist that policy or functional reasoning is ‘not law’, then a considerable portion of the court judgments from the last two hundred years or more must seemingly be removed from the law syllabus. Now, none of this historical material can prove legal theorists wrong since it is impossible to falsify an *a priori* assertion about what is or what is not law. But it does suggest, as Waddams observes, that ignoring instrumental and functional reasoning in law, while perhaps an aspect of legal reasoning which a ‘commentator might regret’, nevertheless remains ‘as a matter of history... a pervasive feature of the law.’ (297) Can one really fashion a universal and *a priori* theory of law that ignores a clear pervasive feature revealed by history?

VIII

This question surely holds one key—if not the key—to the relationship between legal theory and legal history. What legal history can indicate are the pervasive features of the discipline. What law has been. This, then, is the underlying feature of the tension between the diachronic and the synchronic. It is a tension because the past cannot—ought not to—determine exclusively the future either of the discipline or of its theories. Equally the past must determine, at least in terms of the question of what it is to have legal knowledge, some of the elements (notions, concepts, institutions, reasoning methods and the like) that make up the discipline. However it is also important continually to keep in mind the relationship between a theory and the object of this theory since as the history of a discipline progresses through the centuries the theory tends to modify the object itself.⁸³ Now Ian Maclean has rightly argued that a jurist from 1460 could have coherently communicated with one from 1630;⁸⁴ but this does not mean that the two jurists would have viewed law in quite the same way. In reforming the law books one was reforming the object being described in these books.

Theories over time might, then, change the nature of law itself without, of course, necessarily changing the formal categories and concepts employed within the discipline.⁸⁵ Del Mar seems sensitive to this process and applies it to various aspects of law, one of the most interesting of these aspects being legal reasoning (118-21). What is interesting about legal reasoning is that it can seemingly be both sensitive and insensitive to asserted theories. For example, as we have just indicated, the use of policy reasoning by common law judges is a pervasive feature of reasoning despite the criticism of tort and other theorists, some of whom have suggested that such approaches are not ‘law’ (318).⁸⁶ Equally however reasoning reflects changes in epistemological orientations provoked usually by reform of the law books; there are

⁸¹ Bartolus, *In primam Digesti Novi partem Commentaria*, ad D.4.4.3.

⁸² See eg W Ullmann, *Law and Politics in the Middle Ages* (Sources of History, 1975).

⁸³ Cf Blanché (n 31) 121.

⁸⁴ I Maclean, *Interpretation and Meaning in the Renaissance* (Cambridge University Press, 1992) 205.

⁸⁵ But of course the substantive meaning of these formal notions, concepts and categories will change over time: C Atias, *Épistémologie du droit* (Presses Universitaires de France, 1994) 72.

⁸⁶ On the use of policy reasoning by judges see Samuel (n 27) 60-64.

noticeable differences between the forms of reasoning in the common law in the era of the forms of action and in the period after their decline and fall. Reasoning on the basis of whether or not the claimant has an action is different from reasoning founded on the application of a rule, or the determination of the parties' rights, or indeed the existence of various interests.⁸⁷ Del Mar adds a further dimension. He argues that legal reasoning always takes place in a temporal context in that it is at one and the same time backward and forward looking. It is a 'communication across time' (119). Is there, he asks, just 'one theory of legal reasoning, allegedly applicable to all kinds of courts in all kinds of political or economic or cultural contexts'? Or is it more accurate to say that there are 'a variety of distinct models of legal reasoning, indexed to variables (temporalised in different ways) such as the architecture of the courtroom, the state and organisation of any archive of past decisions, the state and level of training of advocates and other representatives, the state of assistance in the form of clerks and other resources (eg, libraries), and many other besides' (120)?

It is not difficult to be sympathetic to this argument and indeed these 'physical' and technological aspects must surely have their effects. But perhaps it overlooks the point that even if there is just one model of legal reasoning—which of course there probably is not—this model itself will be something of a time-capsule. It will be made up of the approaches and theories (construed widely) of generations of jurists. This point is often overlooked because legal education contains for the great proportion of its graduates no serious examination of law's rich history. Now this may seem to overlook Del Mar's point that one is communicating not just with the past but with the future. However the very purpose of a discipline is to communicate with the future; it is to carry a form of knowledge and its methods from the past to the present in order to cast it into the future. It is an instruction to future generations. This is particularly true of law and its concepts and institutions. As Atias observed, the law projects the person (*persona*) and its patrimony (*res*) into the future in order to protect for example creditors; the institutions of the legal subject and the legal object (property) are thus designed not to exist in the present but in the past, present and future.⁸⁸ They are anything but 'a-temporal' (to use Del Mar's expression). Del Mar is clearly right therefore to imply that the tension between the synchronic and diachronic is much more complex than it might seem. One is not talking just of the past and its relation to present legal thought. The issue is one of time. Law in several of its important aspects (legal reasoning, relations between legal units and discourses about law), he implies, needs to be modelled diachronically because it is 'a very effective method for generating variables that affect the character of law;' (126) and time is a context for understanding the 'communicative devices' that law employs. In short, how it provides 'flexible resources for future courts.' (119)

IX

This talk of law in terms of time, communicative devices and the like lead (or led) both Atias and Del Mar into a discussion of legal fictions.⁸⁹ This connects with one of Jones' other chapters in his own history of legal theory, namely fiction theory.⁹⁰ What is interesting about this theory is that it is one that can be approached, in terms of its intellectual construction, either from a bottom-up basis or from a top-down theory orientation. As regards the first approach, one starts with a concept such as legal personality which in both medieval Roman law and in

⁸⁷ See on this issue Samuel (n 27).

⁸⁸ Atias (n 42) 241.

⁸⁹ Unhelpfully there is no 'fiction' entry in the index; Atias (n 42) 239-41.

⁹⁰ Jones (n 23) 164-86.

modern English law is openly described as a fiction.⁹¹ Moving outwards from this central concept, one can soon ask if all abstract legal concepts are fictions. ‘If the *universitas* were at the same time both a *res incorporalis* and a *persona ficta*,’ asks Jones, ‘might it not be said that all *res incorporales* and indeed all legal concepts are fictions?’⁹² It may be that the medieval jurists never went quite this far,⁹³ but, as Jones went on to say, once one accepts that the corporation is a legal fiction, then it is possible to claim that ‘so is also the notion of a legal right, a legal duty, and of obligation generally; in short, that all that goes by the name of legal science, if not the whole of the law itself, is no more than a mass of fictions.’⁹⁴ Arguably this proposition can be defended.⁹⁵ However with respect to the more precise question of the relationship between legal theory and legal history, fiction theory ought perhaps to be a fundamental issue when considering law as a form of knowledge. For it might provide a key epistemological link when reflecting upon the tension between the diachronic and synchronic.

It is with respect to this link that the top-down approach to fiction theory becomes relevant. This theory, associated with the philosopher of science Hans Vaihinger (1852-1933),⁹⁶ is based on the notion of ‘as if’ and asserts that, again to quote Jones, that the ‘human mind ... is so constructed that it cannot dispense with fictions’ for there ‘can be no thought without abstract concepts and these concepts are nothing more than fictions.’⁹⁷ Perhaps theory is not quite the appropriate expression today and that, as a recent French work on Vaihinger suggests, it would be better to talk of an ‘epistemological attitude’.⁹⁸ What has provoked this approach is the recognition that many theory notions, such as infinity in mathematics, have no correspondence with reality; they are purely fictions. Yet they are fictions that are extremely fruitful. ‘How can one attain’, as Christophe Bouriau asks in his work on Vaihinger, ‘truth through falsity?’⁹⁹ The Vaihinger response is that all knowledge representations of the world are mental constructions and that the real remains unknowable. What matters therefore is not whether they are ‘true’ but whether they are useful in a functional sense.¹⁰⁰ If such intellectual constructions are useful—for example if a scientific model provides both an explanation and a prediction with respect to a phenomenon—then one should proceed on the basis ‘as if’ they are true.¹⁰¹

Can fictionalism, then, help bridge the gap between legal theory and legal history? It certainly offers possibilities. For a start, it helps situate legal theories in the context of time and place; and so for example the theories of Hart and Kelsen are, in the century after their formulation, already beginning to appear historically situated views of what is law and legal knowledge (233). As Lobban notes, ‘[i]ntellectual historians have long stressed the point that there are no essential, timeless ideas—such as liberty, democracy or the state—but that the meaning of these notions must be explored in context.’ (16) In other words the models formulated by ‘contemporary’ theorists such as Kelsen and Hart are ‘as if’ constructions whose

⁹¹ See eg, De Castro (22) D.3.4.7 no 1; *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 170.

⁹² Jones (n 23) 170-1. The Post-Glossators regarded the *persona ficta* as a *res incorporales*: see eg, De Castro (n 22) D.3.4.7 no 5.

⁹³ Jones (n 23) 171-173.

⁹⁴ *Ibid*, 173.

⁹⁵ See further G Samuel, *Is Law a Fiction?*, in M Del Mar & W Twining (eds), *Legal Fiction in Theory and Practice* (Springer, 2015) 31.

⁹⁶ H Vaihinger, *La philosophie du comme si* (Éditions Kimé, 2nd edn, 2013; translation C Bouriau).

⁹⁷ Jones (n 23) 166.

⁹⁸ C Bouriau, *Le ‘comme si’: Kant, Vaihinger et le fictionalisme* (Les Éditions du Cerf, 2013) 119.

⁹⁹ *Ibid*, 13.

¹⁰⁰ *Ibid*, 16-19, 31, 38-40, 84-85

¹⁰¹ *Ibid*, 106, 111.

utility may well become increasingly questioned as, say, more pluralistic models of law and legal knowledge begin to assert themselves. Put another way, the whole notion of a distinction between ‘contemporary’ legal philosophy and ‘historical’ visions of law is an ‘as if’ construction. This is not, it has to be said, a position adopted by most of the contributors in the present collection. On the whole the authors, or most of them, seem to accept that historians and philosophers acquire different ‘mental sets’ and develop ‘different techniques for asking questions and resolving problems’; there are, then, ‘two irreducible ways of knowing’ (24). Yet Del Mar, having identified the difference, is highly sceptical and is more interested ‘to show how inevitably entangled theory is with history, and, equally, history is with theory.’ (26) Perhaps the problem is situated in the idea—or perhaps ‘fact’—that there exist different techniques and that there are, as a matter of ‘reality’, two different ways of knowing. Of course there are different programmes, schemes of intelligibility and reasoning techniques, each of which can result in different knowledge. However, as Jones noted, today ‘the notion of legal reality is as vague and subtle as that of legal fiction.’¹⁰²

A second possibility offered by fiction theory, as indeed mentioned earlier, is that it can put into an epistemological perspective the tension between holism and individualism. This tension is particularly evident, as we have seen, in Hedley’s attack on the corrective justice thesis now being asserted by a school of tort lawyers. What is being offered are two quite different ontologies. The corrective justice theorists construct society as a collection of atomised individuals where all of private law is about relations between these individual units. Tort is about individual acts. Hedley, in contrast, is offering a different vision: society consists not just of individuals but also of institutional groups—for example insurance companies—whose roles ought to be envisaged as participants in activities as much as acts. Rather than argue about which ontology is ‘true’, it might be more fruitful to ask which ‘as if’ model will prove more pragmatic to lawyers specialising in the law of obligations.

This approach has the added advantage of bringing into play the historical perspective with regard not just to the long tension between holism and individualism,¹⁰³ but also to the economic implications of the tension, namely the dichotomy between the individual interest and the collective interest. The private law corrective justice model tends to emphasise the individual interest—often under the guise of a ‘right’—which in recent times has been elevated by neo-liberalism into the only interest that should count, for the public interest—the *bonum commune*—is nothing more than the aggregation of the former.¹⁰⁴ What Getzler shows is that such a view, whatever its merits, should not be attributed to Adam Smith’s historical legacy (250ff). ‘Adam Smith’s thought about the role of self-interest in human affairs’, writes Getzler, ‘was far more complex than the Chicago reading, with its parsimonious view of wealth maximisation as the sole concern of welfare economics.’ (263) Of course this is not to suggest that corrective justice advocates are consciously advancing neo-liberal economics; their model in theory specifically excludes economics. Law ‘is just like love’, says Weinrib, ‘because love does not shine in our lives with the borrowed light of an extrinsic end.’¹⁰⁵ But the ‘as if’ atomistic model they construct perhaps makes them, as Stalin might have said if he had not been manifesting his sense of humour, ‘useful agents’ for the neo-liberal cause. At any rate, Getzler helpfully reminds us that as ‘a prophet of capitalism (a label he never used), Smith was also its most powerful early critic’ (264), while Hedley suggests that the corrective justice theorists may ‘have preferred to have been born in a different century’ (317) since we now ‘live

¹⁰² Jones (n 23) 186.

¹⁰³ On which see Ravaux (n 21).

¹⁰⁴ *Ibid.*, 66-67.

¹⁰⁵ E Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 6.

in a world dominated by collectivities, where most serious economic activity, and most serious attempts to regulate it, must be dealt with at the collective level.’ (324)

A third possibility offered by fiction theory with respect to a dialogue between legal history and legal theory is one in which the patterns and structures of the ‘as if’ models can be seen as a product of the interaction between contemporary and past theories. Jones noted, in his chapter on Kelsen’s pure theory, that the ‘concept of a law of Nature is rejected as a “logical impossibility”’ but ‘the outcome is merely the transfer to the positive law of the characteristics which were thought to brand the old natural law systems as speculative and metaphysical.’¹⁰⁶ One dominant pattern to be found in theories old and modern is hierarchy. This pattern was particularly evident in medieval thought and found epistemological validity not just in metaphysical theological models but in the empirical world as well; bees, for example, had a king and there was even a pecking order among chickens. As Brien Tierney observed, the ‘argument from animal hierarchies to human hierarchies may be mere nonsense; probably it is nonsense; but it is not just medieval nonsense.’ For ‘the human mind has never ceased to be fascinated by natural hierarchy; and the point that hierarchical ordering is a near universal manifestation among human cultures seems self-evident.’¹⁰⁷

Roman private law had been presented in the *Institutiones* as a genus and species hierarchy and this pattern has not just survived via the civil codes into modern times but has been asserted by the late Peter Birks as the foundational structure of the contemporary common law as well.¹⁰⁸ Equally public law has since the medieval jurists been seen, if not as a genus and species hierarchy, then as a pyramid with the ruler (and later the *Grundnorm*) at its peak, all commands, rules or norms flowing from this peak. These were not just descriptive patterns. The development of dialectics in medieval learning, which put the emphasis on the *distinctio* and *subdistinctiones*, gradually turned the genus and species hierarchical scheme into an active analytical method which permitted the Post-Glossators to lay the foundations for an algorithmic approach to legal reasoning.¹⁰⁹ Such a visual pattern of reasoning directly links contemporary jurisprudential writing on legal method with the past.¹¹⁰ Another pattern—in some ways opposed to the pyramid¹¹¹—is *le réseau* associated with systems theory.¹¹² This pattern, circular rather than hierarchical, may seem less rooted in history, but there are aspects of Roman law that display the basic elements of a genuine system. There is the idea of self-referentiality; the institutional system of persons, things and actions had a dynamic aspect in that it could create its own elements. Thus the moment an intangible thing was given protection through the availability of an *actio in rem* it became a *res incorporalis*, that is to say a form of property;¹¹³ equally when towns were granted legal actions in their own name they became in effect legal *personae*.¹¹⁴ In addition to this circularity, Alan Watson has argued that Roman

¹⁰⁶ Jones (n 23) 231.

¹⁰⁷ B Tierney, *Religion, Law, and the Growth of Constitutional Thought 1150-1650* (Cambridge University Press, 1982) 44.

¹⁰⁸ P Birks, Definition and Division: A Meditation on *Institutes* 3.13, in P Birks (ed), *The Classification of Obligations* (Oxford University Press, 1997) 1, 9.

¹⁰⁹ See generally Errera (n 13).

¹¹⁰ See W Twining & D Miers, *How To Do Things With Rules* (Cambridge University Press, 5th edn, 2010) 44-45.

¹¹¹ G Timsit, *Système*, in D Alland & S Rials (eds), *Dictionnaire de la culture juridique* (Presses Universitaires de France, 2003) 1462, 1463-4.

¹¹² See generally G Teubner, *Law as an Autopoietic System* (Blackwell, 1993; trans, A Bankowska & R Adler).

¹¹³ See G.2.14.

¹¹⁴ Gaius appears to recognise that cities had the status of private persons: D.50.16.16.

law ‘divides naturally into self-contained and self-referential blocks’ and these blocks existed—and were transferred into medieval Europe—as separate bodies of substantive law.¹¹⁵ The texts on sale, hire, ownership, possession, servitudes and so on can all be approached and discussed as separate and self-contained units.

X

Three quite different epistemological patterns thus emerge from legal history and, as such, can act as the basis for a dialogue between historians and theorists. They are perhaps best approached in terms of fiction theory in that none of the patterns reflects any objective ‘reality’ or ‘truth’. Yet they are extraordinarily powerful ‘as if’ models that ought to help modern legal and political theorists understand both the past and the present. Moreover there is one pattern, that of systems theory, which has already gone some way in providing a basis for a dialogue between modern theory and legal history. In his work on law as an autopoietic system, Gunther Teubner argues ‘that a theory of legal evolution has great analytical and practical power if it stops claiming to be able to explain individual events and concentrates instead on structural patterns.’¹¹⁶ It ‘could explain or even predict general structures of the law’ even if it cannot ‘explain individual legal acts, court verdicts, laws, and administrative acts.’¹¹⁷

There is no doubt that Teubner has raised some fundamental issues in his work on systems theory. One in particular—which is bound up with the whole question of legal evolution¹¹⁸—is the relationship between law as an autopoietic closed system and the social, economic and political contexts in which it functions. Is law simply the product of social evolution? Those, like Watson,¹¹⁹ who have dared to suggest that the relationship between law and social context is more tenuous than it might seem have come in for considerable criticism.¹²⁰ Indeed one writer has asserted that ‘attacking Watson is like shooting fish in a barrel.’¹²¹ Consequently it is perhaps to be regretted that the Del Mar and Lobban collection does not really engage either with legal evolution or with systems theorists since these two interconnected areas would seem very fertile ground for nurturing a dialogue between historians and theorists. The Watson and Teubner theses equally have relevance for the comparatist in that, as Bell points out, ‘comparative law looks not just at rules and practices of different legal systems, but reveals the jurisprudential principles underlying them.’ (143) So one question prompted by Watson and Teubner which ought to be of concern to historians, theorists and comparatists is the extent to which law might evolve internally perhaps—and this is the big perhaps—with a certain isolation from cultural and economic contexts. Care must be taken here, for it would surely be idle to claim that there is no interaction between legal developments and social change or that law is not a product of culture. But structuralism, and systems theory in particular, suggest that, as with the natural sciences, conceptual movements do not in themselves always depend directly upon external factors; there are movements internal to the sciences.¹²²

¹¹⁵ A Watson, *The Making of the Civil Law* (Harvard University Press, 1981) 14-22.

¹¹⁶ Teubner (n 112) 49.

¹¹⁷ *Ibid.*

¹¹⁸ On which see Stein (n 2).

¹¹⁹ See eg, A Watson, The Importance of “Nutshells” (1994) 42 *American Journal of Comparative Law* 1.

¹²⁰ See eg, R Cotterrell, Is There a Logic of Legal Transplants?, in D Nelken & J Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 71.

¹²¹ L Friedman, Some Comments on Cotterrell and Legal Transplants, in Nelken & Feest (n 120) 92.

¹²² G-G Granger, *La science et les sciences* (Presses Universitaires de France, 2nd edn, 1995) 114-5.

These internal movements are arguably quite visible within the huge literature charting, over the centuries, the historical development of the civil law. One focal point, given Williams' chapter on legal maxims, are the *regulae iuris* and, as already mentioned, how they moved from being mere summaries of the law to becoming fundamental *axiomata*; the first and basic principles (*principia*) from which all other legal knowledge could be deduced.¹²³ The historical literature is fascinating, embracing as it does the Roman jurists, the Glossators, Post-Glossators, humanists, the jurists of the *usus modernus pandectarum* and the natural lawyers; and while, again, one cannot claim that the internal development was not influenced by external factors and cultural contexts, the changes in the language used by the jurists between the eleventh and the eighteenth centuries is a fascinating object of research in itself. Other internal developments have been noted by a range of writers, perhaps Maine's movement from status to contract being one of the most celebrated examples, although more detailed work on the literature over the centuries is the subject of a relatively recent monograph by Gordley.¹²⁴ Certainly such developments within the literature and language of the civilian writers would seem to support Teubner's argument that 'the autonomy of the legal system... is equipped with its own evolutionary mechanisms.'¹²⁵ And it is these mechanisms, as has been mentioned, that might furnish common ground for a dialogue between legal historians and legal theorists.

Yet, in fairness, it is not quite true to say that there is no engagement in the Del Mar and Lobban book with this issue. While there is no engagement as such with Teubner's book, Christopher Tomlins does take on structuralist approaches and uses Robert Gordon's post-structuralist criticism to attack the notion 'that legal ideas just 'evolved' according to some mysterious dynamic' (62)¹²⁶ Tomlins seems to conclude that the battle against structuralism has been won (63-64). But in declaring victory he has overlooked the fact that Teubner himself took on Gordon in his chapter on legal evolution. Teubner's point is that Gordon was making a fundamental historiographical error in failing to see that the two of them are 'dealing with two different levels of analysis.'¹²⁷ The source of the error is well described in a French introductory work on the social sciences. There is no one knowledge of say history; knowledge is possible only thanks to the *découpage* of reality and the techniques that apply to a particular point of observation which itself is always limited.¹²⁸ Different levels of observation produce different kinds of knowledge; and so when the level of observation changes the results obtained will be change.¹²⁹ As Dominique Desjeux points out, the historian who works on *la long durée* is not denying that there are no individual heroes just as the researcher focusing on an individual will not 'see' social classes or institutions.¹³⁰

This dichotomy is of course part of the more general tension between holism and individualism and so the point to be emphasised here is not that one or other is right or wrong in their assertions and critiques. Indeed Gordon's argument about evolution and a 'mysterious dynamic' remains an important warning to those who refuse to write off the whole notion of

¹²³ See Gribaldus Mopha, *De method ac ratione studendi libri* (1554) who perhaps is one of the first to see the *regulae iuris* as *axiomata* in the scientific and deductive sense.

¹²⁴ Gordley (n 7).

¹²⁵ Teubner (n 112) 57.

¹²⁶ However the actual quote is from Robert Gordon in a cited extract from: RW Gordon, *Critical Legal Histories* (1984) 36 *Stanford Law Review* 57, 122-3.

¹²⁷ Teubner (n 112) 51.

¹²⁸ D Desjeux, *Les sciences sociales* (Presses Universitaires de France, 2004) 91-92.

¹²⁹ *Ibid*, 5.

¹³⁰ *Ibid*, 95.

legal evolution.¹³¹ The point to be made is that any dialogue between legal historians and legal theorists must, in the end, be situated within the domain of epistemology, a domain that will require all participants to be acutely aware of the lessons emerging from science and social science epistemology—and of course historiography itself.

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What should be, then, the relationship between legal history and legal theory? And does the Del Mar and Lobban collection begin to answer this question? That there is an epistemological frontier between the two cannot, at one level, be denied and this is well brought out in some of the chapters. Moreover there is the empirical point that one can seemingly be a good legal theorist without ever having studied legal history. Yet other chapters rightly make the point that things are not quite so simple. There is more to legal theory than just Hart, Dworkin and Kelsen and even these philosophers owe more to the past than one (or even they) might think (130). At a more general level Del Mar rather convincingly argues that it is a mistake to see theories as situated in some kind of timeless zone and he hints that fictions—if not fiction theory itself—have the important role of communicating across time (119-20).

What perhaps is missing in this collection aimed at opening a dialogue is, maybe with the exception of Del Mar's contributions, any persistent sense that what is at issue is legal knowledge as opposed to legal theory and legal history. It is—surely?—in the realm of epistemology that the difficult question of the relationship between legal history and legal theory can be tackled in any sophisticated depth. First because epistemology as a topic in itself has as one of its major approaches a historico-critical analysis.¹³² This is not the only approach of course. But this in many ways is the point: epistemology embraces the tension—the debate—between a philosophical and an historical analysis and the debate itself forms part of any epistemological syllabus.¹³³ Secondly because an epistemological viewpoint is better able to embrace knowledge complexity. This complexity is not confined just to some concept of law, but equally includes the actors in the field. Do legislators, judges, practitioners and professors view legal knowledge in the same way?¹³⁴ If not, how might this impact on any discussion of the relationship between theory and history? For example, do those practising law (practitioners and judges) create an epistemological framework that is noticeably different from, say, the legal philosopher who has never been involved with practice and indeed may never have taught a positive law course? In addition the knowledge complexity is reflected in the very tensions that have been identified earlier: the tension between holism and individualism, between law and law-maker, between formalism and realism, and so on. These tensions invite one to embrace the diachronic as well as the synchronic.

At a more material level—although the link with epistemology remains—is a lack of any real discussion and analysis of the literature dealing with theory and history published during the last century. Reference to the absence of any mention of Jones' and Jolowicz's books on the history of legal theory has already been made, but there are a number of other works such as those of Peter Stein and Walter Ullmann which one might have expected to be

¹³¹ Although care must be taken here since it is equally easy for someone operating within say a culturalist or Marxist paradigm to dismiss any theory about the internal development of concepts as a 'mysterious' dynamic. See eg, Granger (n 122) 114-5.

¹³² Blanché (n 31) 36-39.

¹³³ *Ibid*, 119-24.

¹³⁴ On which see Atias (n 85) 43-46.

examined in some detail in an opening dialogue.¹³⁵ In fact the absence is surprising given some of the assertions in the various chapters. For example Daniel Priel and Charles Barzun say that their case study shows ‘the value and limits of philosophical categories like “legal positivism”, “legal realism” or “natural law”.’ (187) Indeed, but Jones’ book goes some way in doing what these two authors would like: that is to say it does not deal with theorists through the traditional categories, save in respect of its chapter on the natural lawyers. Priel and Barzun might have had some interesting observations on Jones if not Jolowicz. Brian Tamanaha also makes an interesting point. He takes issue with the idea that historical jurisprudence is no longer alive and asserts that it is only the label that has fallen into disuse (335). It remains very much alive, but within topics such as comparative law and sociological jurisprudence, for these subjects treat law in its social context which stretches ‘to include past, present and future.’ (336) In fairness his chapter is restricted to an ‘afterword’ on the contributions in the collection and so one cannot reasonably expect this author to digress into an analysis of Jones, Jolowicz, Stein, Teubner and the like. Yet his section on historical jurisprudence, if much expanded, would no doubt have proved insightful and, given his argument, could well have included the twentieth-century literature.

However these criticisms should in no way detract from the fact that the Del Mar and Lobban book is a fascinating and stimulating collection of papers that ought certainly to remind legal theorists that there is much more to their subject than the standard names that seem to dominate many jurisprudence courses (at least if the contemporary textbooks are to be believed). It may be that one can be a good lawyer without ever having studied jurisprudence and legal history, but what this present collection should confirm is that many professors involved in teaching the standard positive law courses have themselves much to contribute both to theory and to history. It is tempting to think that teachers such as Waddams, Hedley and Getzler could so easily re-orientate aspects of jurisprudence and legal history towards re-establishing a strong link with what are sometimes known as the ‘black-letter’ law subjects. This is not to suggest that one should abandon Hart, Dworkin and Kelsen (especially the latter in the light of the Halpérin and Brunet chapter); it is only to confirm, instead, that legal thinking is on the move as this collection of papers indicates. In France there are already courses on legal epistemology at a few law schools. Perhaps such a course will emerge in the common law world as well (although some comparative law courses are increasingly dealing with epistemological issues). If they do, then law in theory and history will certainly no longer be a neglected dialogue.

¹³⁵ See in particular W Ullmann, *Medieval Political Thought* (Penguin, 1975).