

One Myth of the Classical Natural Law Theory: Reflecting on the “Thin” View of Legal Positivism

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Abstract. Much controversy has emerged on the demarcation between legal positivism and non-legal positivism with some authors calling for a ban on the -as they see it- nonsensical labelling of legal philosophical debates. We agree with these critics; simplistic labelling cannot replace the work of sophisticated and sound argumentation. In this paper we do not use the term ‘legal positivism’ as a simplistic label but identify a specific position which we consider to be the most appealing and plausible view on legal positivism. This is the view advocated by Gardner in his paper ‘Legal Positivism: 5½ Myths’ (Gardner 2001, 199), where he carefully scrutinises the most convincing and unifying postulates of legal positivism, which he calls “the thin view”. The study shows that this thin view presupposes an empirical conception of action that is untenable and implausible since it makes acts of engagement with the law unintelligible to an observer of such acts.

1. Introduction

Much controversy has arisen about the demarcation between legal positivism and non-legal positivism, with some authors calling for a ban on the (as they see it) nonsensical labelling of legal philosophical debates. We agree with these critics: Simplistic labelling cannot replace sophisticated and sound argumentation. In this paper we do not use the term *legal positivism* as a simplistic label, but identify a specific position which we consider to be the most appealing and plausible view on legal positivism. This is the view advocated by Gardner (2001, 199) in his paper “Legal Positivism: 5½ Myths,” where he carefully scrutinises the most convincing and unifying postulates of legal positivism, which he calls “the thin view.” The study shows that this thin view presupposes an empirical conception of action that is untenable and implausible since it makes acts of engagement with the law unintelligible to an observer of such acts. The paper is divided into six sections. Section 2 aims to give an accurate and charitable overview of Gardner’s thin view

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of legal positivism, which includes the possibility of recognising actions of engagement with the law that are inert. Section 3 sets the stage for the critical discussion using the example of a fictional country called Dystopia where King Positus promulgates law with the aim of disseminating chaos in the lives of the citizens. The question we ask is, what enables an imaginary observer to recognise what Gardner calls “acts of engagement” with the law? In order to provide a plausible answer to this question, we argue in Sections 4 and 5 that Gardner’s thin conception of legal positivism presupposes an empirical view of human action, and that the sound conception of human action cannot be an empirical one. We adopt what we call Anscombe’s “institutional transparency thesis” defended in “On Brute Facts” (Anscombe 1958, 69) to show that the intelligibility of human action presupposes an institutional context *but does not entail* a description of that context. In Section 5 we continue with the example of Dystopia to show that an imaginary observer cannot know whether or not there is a legal system in Dystopia without understanding the purpose of an institution placed within an institutional context. This conception of action is purposeful as opposed to empirical. Section 6 argues that the paradigm or central-case methodology, as opposed to the necessary and/or sufficient conditions methodology, used to understand social practices, including law, has at its centre the nonempirical view that human action and its purpose is given rather than discovered. By means of this indirect argumentative strategy, one myth of classical natural law is therefore dispelled. We argue that classical natural law does not aim to discover through moral facts or moral ideals the suitable ends to the kind of creatures we are, because this is not the role played by ends in our practical reasoning and actions. On the contrary, ends are given, and our laws, games, ways of loving, thinking, enjoying, and living our lives all aim at better understanding these given ends.

2. John Gardner’s Thin View of Positivism

In “Legal Positivism: 5½ Myths,” Gardner attempts to confine the positivist concept of law to its very essence, getting rid of “five and a half theses” wrongly attached to positivism that, taken together, turn legal positivism into a grotesque caricature. This strategy departs from a description of the institutional nature of law that Gardner reprises in the legal positivism thesis (henceforth LP), according to which:

in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practised it, invoked it, enforced it, endorsed it, or otherwise engaged with it. (Gardner 2001, 200)

According to LP the facts of engagement with the law are the exclusive sources of the law, where “source is to be read [in LP] broadly such that any intelligible argument for the validity of a norm counts as source-based if it is not merits-based” (ibid.).

Gardner focuses on the nature and extent of the source (not merits)-based thesis of LP and reformulates it as a thin, *inert* LP thesis (henceforth the LP* thesis). The most relevant statements of LP* are the following:

LP* (a) is inert with respect to the moral value of both (i) legal norms and (ii) the facts of engagement with the law, that count as sources of the law.¹

LP* (b) is inert with respect to the moral value of the positivity of law.²

LP* (c) does not by itself provide moral reasons for action.³

Based on these additional clarifications of the inertness of positivism, Gardner insists on the thinness of LP*: “Notice that as it stands, (LP*) is not a proposition specifically about laws. It is a proposition about what makes norms valid as legal norms, and hence as part of the law” (ibid., 206). In short, legal positivism is presented not as a complete theory of law, but only as a thin and basic starting point for the construction of a complete theory of law. In this respect Gardner explicitly states that positivism is concerned neither with denying nor affirming the possibility of studying law to further ends, such as establishing its moral point. Moreover, he states that these further approaches to law are not relevant for positivism, which is concerned only with identifying the criteria for membership of legal systems.

The narrowness of LP* should not mislead the reader as to its methodological relevance. If LP* were true, any theory of law intending to assess the moral reasonableness of law should divide its analysis into two parts. First, it should use LP* to confine law as an object of study and evaluation. Second, it should apply its own evaluative criteria to this already confined object of study. These two-step methodological proposals rest on the assumption that human action can be identified and understood in its performance without reference to its purposes, including moral and ethical purposes. In other words, in defining and understanding human action, the “what” is detachable from the “why.”

At this stage we should ask whether it is really feasible to validly define types of action and to identify the nature of human actions in isolation from their purpose. In order to answer this question, we should first seek an in-depth understanding of the assumption that the “what” is detachable from the “why.” With this in mind, the next two sections of the paper present a charitable account of Gardner’s proposal and explain two sub-theses of LP*: (d) the concept of acts of engagement with the law that serve as sources of the law; (e) the nature of the process leading to the identification of acts of engagement, *qua* sources of law. This analysis allows a further refinement of the idea that LP* is inert.

2.1. The Concept of Acts of Engagement with the Law (AEL)

Following the general statement of LP, *acts of engagement with the law* that have the power to posit law (hereinafter AELs) are instantiated in more specific types of actions such as announcing, practicing, invoking, enforcing, endorsing the law, all

¹ Gardner (2001, 201) asserts: “In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).”

² Gardner (2001, 207) points out: “the truth of (LP*) must be granted, at least *arguendo*, before the argument over [the value of the positivity of law] can even begin.”

³ Gardner (2001, 202) puts it as follows: “although a proposition about the conditions of validity of certain norms that may be used in practical reasoning is itself normatively inert. It does not provide any guidance at all on what anyone should do about anything on any occasion. Sometimes, like any proposition, it does of course serve as the minor (or informational) premise in a practical syllogism.”

of which include the condition of being performed by the relevant agents, at the relevant time and place (Gardner 2001, 200).

Judges and legislators are the most ordinary *relevant* agents of AELs. While judges engage with the law “by mounting a defense of them partly in terms of other legal norms” (ibid., 217), legislators do so by straightforwardly pronouncing the law.

After signalling which of the most typical AELs are possible, Gardner states sub-thesis (LP*d) according to which acts of engagement with the law are not qualified as such by any direct intention of positing:

Hart [...] argued (I think successfully) that in all legal systems at least some valid legal norms are posited and hence validated by being practiced or used rather than by being articulated, and that the relevant uses of these norms need not be regarded or intended as norm-positing acts by the relevant users. (Ibid., 218)

Consequently, there is a feedback relationship between the use and the existence of law. Law comes into existence through its use by the relevant agents, at the relevant time and place, and the use of law reinforces its existence. The intention of positing the law is a necessary condition neither when the use of law creates new law, nor when it reinforces its existence. Judicial enforcement and legislative pronouncement count among the most powerful ways of giving life to previously nonexistent law and of reinforcing its existence. In neither judicial enforcement nor legislative pronouncement is the direct intention of positing (LP*d) a necessary condition of the definition of an AEL.

Sub-thesis LP*d may be still further developed when read in the light of sub-thesis LP*a and LP*b. In effect, if the general practice of positing law through specific acts of engagement is normatively inert (LP*b), it is because the concrete AELs that make up this inert practice are not consciously intended towards the realization of any moral value (LP*a). To put it in a more precise way, if an AEL were consciously intended to realize a moral or political value, this *further intention* would be irrelevant for its classification as a source of law.

Along these lines, sub-thesis LP*d can be expanded as follows: “Neither the intention to posit, nor any other intentions apart from the nude intention of engaging with the law are necessary conditions of the concept of AEL.”

2.2. *Individualizing the Sources of the Law*

After redefining the concept of AELs in LP*d, the focus is on how the relevant instances of use or engagement with the law become intelligible to a third person, *qua* sources of the law. Any answer to this question should take into account once again the initial statement of LP according to which, “‘source’ is to be read broadly such that any intelligible argument for the validity of a norm counts as source-based if it is not merits-based” (Gardner 2001, 200); and LP*d, according to which neither the intention to posit, nor any other intention apart from the nude intention of engaging with the law, are necessary conditions of the concept of AEL. While LP*d asserts the nonevaluative nature of AELs, LP asserts the nonevaluative nature of the process of its identification.

From these two premises follows sub-thesis LP*e according to which the process leading to the identification of acts of engagement *qua* sources of the law is either:

- (a) Purely empirical knowledge focused on the exterior or physical performance of actions, not essentially different from the kind of knowledge that leads to the identification of physical events, such as the falling of a stone. To use classical hermeneutical distinctions, the identification of AELs is a kind of knowledge that lies within the field of “explanation” and not within the field of “understanding”

or:

- (b) A specific kind of understanding that consists of abducting the naked (*nude*) purpose of “engaging with the law” from the exterior performance of actions. The naked purpose of engaging with the law is different both from any kind of moral/value purpose and from the purpose of creating law. Hence, even though the identification of an AEL falls within the field of “understanding,” it is a nonmoral/evaluative kind of understanding.

All AELs are by definition acts of engagement *with the law*. That which is proclaimed in a legislative AEL is a law, and that which is argued and/or enforced in a judicial AEL is a law. However, it is not just any proclamation of a law, nor any defence mounted upon existing law that is an AEL: It is only those proclamations and defences performed by the relevant agents, at the relevant place, and at the relevant time. On these grounds, neutrally identifying AELs involves neutrally identifying both the (previous) law stating which these relevant agents, places, and times are for each type of AEL; and the (subsequent) law that is being engaged with.⁴ A close look at thesis LP*c reveals the extent to which the identification of both previous and subsequent law framing AEL may be deemed to be non-merits dependent.

2.3. LP* May be Used as a Minor Practical Premise

LP*c states that LP “does not provide any guidance at all on what anyone should do about anything on any occasion. Sometimes, like any proposition, it does of course serve as the minor (or informational) premise in a practical syllogism” (Gardner 2001, 202).

In other words, LP* has nothing to say about the obligatory nature of law, nor about law’s guiding function generally. It only states that as long as a legal theory, moral theory, or legal practice states that law is a mandatory reason for action, (then) LP* advances a sub-thesis LP*a, according to which the membership of a legal system on the part of a norm is independent of both the moral value of its sources *and the moral value of the law itself*. We have already discussed how the neutrality of the sources of law impacts on both the abstract meaning of AEL (LP*d) and its identification (LP*e). LP*c focuses not so much, or not only, on the neutral process of identification of AEL, but on the neutral process of the identification of its product, i.e., the posited legal norms. In so doing, it offers a new understanding for LP*d and e.

⁴ The requirement that an AEL be performed by the relevant agents, at the relevant time, and at the relevant place echoes Kelsen’s (1969, 8–9) observation that natural facts are converted into legal ones only when they are performed according to existing rules which confer legal meaning to natural facts.

As in the case of Hart, Gardner (*ibid.*, 221) admits that given that gaps are “endemic to law,” judges will *sometimes* have to go beyond the mere application of posited norms (including legal norms). Had Gardner taken notice of the contextual nature of meaning, he might have considered replacing the adverb *sometimes* with *always* (Austin 1962, 100–1).⁵ In any case, even if judges were always (and not only sometimes) forced to go beyond the mere application of posited norms, Gardner can still reply that this fact is not a huge problem for LP*. LP* only states that, “insofar as judges should apply legal norms when they decide cases, the norms they should apply are source-based norms. But that leaves completely open the vexed questions of whether and when judges should only apply legal norms” (Gardner 2001, 213).

Accordingly, the true challenge for LP* is to clarify both the meaning and the possibility of neutrally identifying legal norms, a challenge that Gardner tries to meet by advancing sub-thesis LP*f:

Interpretative activity straddles the distinction between the identification of existing legal norms and the further use of them to make new legal norms. To the extent that a judge can determine what the First Amendment means by relying exclusively on the relevant source-based norms (i.e. by relying on the text of the First Amendment together with judicial interpretations of it and judicial interpretations of those interpretations and applicable laws of precedent and interpretation), that judge is merely identifying the First Amendment in interpreting it. But to the extent that the judge is left with conflicts among or indeterminacies in the applicable source-based norms—including those of precedent and interpretation—the process of legal interpretation necessarily takes him beyond the law. (*Ibid.*, 221)

On these grounds, applying or identifying source-based norms may be described as a two-step process consisting of: (i) identifying the AEL that operates as the source of the norms being interpreted, e.g., the First Amendment, and (ii) determining its meaning relying on (a) its text, (b) judicial interpretation of it, (c) judicial interpretation of its judicial interpretation, and (d) applicable laws of precedent and interpretation. Provided that the First Amendment is a constitutional statute, identifying its AEL/source amounts to *identifying its straightforward pronouncement by the relevant agents, at the relevant time and place*, that is to say, its straightforward pronouncement by the congressmen who approved the Bill of Rights at the Congress of Philadelphia on 15 December 1791. In the absence of clues regarding the neutral identification of the laws granting the congressmen at Philadelphia the power to pass a Bill of Rights, it seems appropriate to apply the same interpretative guidelines generally proposed by Gardner in LP*f, that is to say, (i) identifying the AEL that posited this norm, and (ii) determining its meaning relying on the text, the judicial interpretation, and applicable laws of precedent and interpretation.

2.4. Restating the Thin LP * Thesis and Its Epistemic Assumption

If all statements of LP* from (a) to (f) are reconstructed, we may restate LP* as follows:

- (1) The acts of engagement with the law (AEL) performed by the relevant agents, at the relevant place, and at the relevant time are the exclusive

⁵ For a further development of this argument, see Zambrano 2009, 56.

sources of law. Previous law specifying the relevant agents, places, and times, and subsequent law posited through AEL may be neutrally identified without any reference to extra-legal criteria.

- (2) The neutral identification of both previous and subsequent law is a two-step process consisting in: (a) recognizing the concrete AEL that posited this part of the law; (b) determining its meaning by using its text, its judicial interpretation, the interpretation of its judicial interpretation, and norms of precedence.
- (3) Leaving aside the naked intention of engaging with the law, neither the intention to posit the law, nor any other intention is a necessary condition of the concept of AEL. As a result, the process leading to the identification of an AEL *qua* source of the law is either a kind of explanation purely focused on the exterior or physical performance of actions and on its causal relationship with law, or a specific kind of understanding that consists of abducting the purpose of “engaging with the law” from the exterior performance of an AEL.

According to (1), AELs are taken to be the exclusive sources of law in its entirety, including that part of the law that states the properties of AELs (“secondary rules” in Hart’s terms). In other words, the meaning of AELs is only *legal* inasmuch as it is stated in and through previous AELs. The problem with this conclusion is its tautological nature. The tautology lies in the fact that the concept of “law” is used both in the explanation of the *cause* or source of law, that is, the AEL, and in the identification of its effect, that is, positing the law.

In the interpretative stage (2) this tautology turns into infinite regress, for if AELs are the exclusive sources of law they are also the sources of that part of the law stating the meaning of an AEL. As a result, identifying the AEL of a special norm, let us say the First Amendment, involves identifying the valid law that states the properties of the AELs that have the power to create constitutional norms, such as the First Amendment, that is, the law that states that the relevant agents, time, and place of the constitutional congress, such as the Congress of Philadelphia, may be identified as one instantiation of these requirements. This involves identifying the law that defines the properties of the AEL which validated the law stating that a congress, for example the Congress of Philadelphia, has the power to pass a Bill of Rights, and so on.

There are at least two ways of halting this regress. One consists of using a meta-positive (and unconventional) concept of law and its correspondingly meta-positive concept of AEL. However, this way out is openly contrary to LP*’s central claim of law’s exclusionary nature and, hence, relying on it would be logically invalid. The other alternative is to assume LP*e (3) in its crudest version, according to which AELs may be recognizable in their type through a purely receptive cognitive process that is much closer to “explanation” than to “understanding.”

3. Recognizing AEL in Dystopia

Let us imagine an imaginary country, Dystopia, and its legal practices and judicial system. Since LP* has nothing to say about the general purpose of law, we can

imagine King Positus, the supreme political authority in Dystopia, promulgating laws to disseminate chaos in the activities of the citizens of his realm. Hence, he has promulgated a norm (A) that establishes “All the Subjects of the Kingdom, without exception, are required to pay their taxes” and also norm (B) that establishes “Citizens resident in District 1 of the Kingdom are exempt from paying their taxes.” The citizens of District 1 are confronted with two contradictory norms. They are asked “to pay their taxes without exception” by norm A, but they are exempted from doing so by norm B. This is not a problem for King Positus, since his aim is for his subjects to be unable to coordinate their activities.

In Dystopia, legal theorists are fully convinced of the soundness of the thin thesis (LP*). Hence, when consulted by law-abiding citizens about how they should act in order to comply with the law, they do not bother to ask why they are so worried about how to comply with contradictory laws. They confine themselves to what they consider to be their proper job, which is to show that LP* is only as a minor premise in their practical reasoning and that the major premise is not part of their job. Legal theorists are therefore only concerned with identifying the relevant AEL that bestows legal validity on norms in Dystopia, and with identifying the law that has thus been posited.

Since it is a “public fact,” they are fully aware that King Positus has supreme legislative power in Dystopia and that as a result he is the relevant agent of all AELs in Dystopia. They also know that King Positus has promulgated both norms, A and B, as they were published in the last edition of the law reports housed in the Palace Library. They therefore identify the facts of promulgation as a valid AEL, and they identify its product, norms A and B, exclusively relying on its text. In identifying these norms, they leave aside judicial interpretation and norms of precedence because norms A and B have not yet been interpreted by the courts of Dystopia, and Dystopian judicial practice has not yet established uniform norms of precedence applicable to the fact of contradictory norms.

4. Hume’s Epistemic Premise Lying behind LP*

In the background of the source thesis LP* is Hume’s epistemic premise according to which: “truth consists in agreement either to relations of ideas, as that twenty shillings make a pound, or to matters of fact, as that you have delivered me a quarter of potatoes” (Anscombe 1958, 69).⁶ Hume was aware that this epistemic premise makes deontic propositions unintelligible. In Anscombe’s words, “Hume had two theses about promises: one, that a promise is ‘naturally unintelligible,’ and the other that even if *per impossibile* it were ‘naturally intelligible’ it could not *naturally* give rise to any obligation” (Anscombe 1978, 318).⁷ According to Anscombe, Hume identified two problems. First, (H.i) that the link between the fact of uttering a promise (or any other normative proposition) and the emergence of an obligation to comply with it is not empirically observable. Second, (H.ii) that if utterances have the power to create obligations, providing that obligations are

⁶ Anscombe’s example intends to illustrate Hume’s conception of human understanding as deployed in Hume 1993, sec. IV, p. 14.

⁷ Hume’s argument concerning the unintelligible nature of promises is deployed in Hume 1993, sec. III.

not physical necessities, they are unintelligible from an empirical point of view. The third problem (H.iii) with Hume’s epistemic premise was not so clearly perceived by him, although it has equal, or perhaps more serious, consequences for legal theory. If human knowledge is confined to sensible facts, concepts denoting types of actions and singular human actions instantiating those types become unintelligible, for neither concepts nor human actions are reducible to sensible facts.⁸

These three difficulties apply to the social sources thesis affirmed in LP*, insofar as it entails Hume’s epistemic premise. Starting with H.i, inasmuch as LP* contends that law is created through different types of discursive actions, such as announcing, enforcing, practicing, or proclaiming the law, it needs to explain the logical link between the naked utterance of the law, on the one hand, and its obligatory force on the other. Concerning H.ii, LP* needs to explain the nature of law’s obligatory force and, particularly, its transparency or intelligibility. Regarding H.iii, LP* needs to explain the “factual” criteria that make individual acts of engagement with the law intelligible.

The analytical legal theory in both Hart and post-Hartian analysis can be defined without overstatement as a Herculean attempt to overcome H.i and H.ii, i.e., as an effort to explain how the fact of uttering words gives rise to legal obligations, and what kind of necessity a legal obligation is (a “beast,” in Anscombe’s words).⁹ These two lines of response have been discussed at length over the last three decades both by nonpositivists and, more recently, by positivists. In both cases, the discussion has centred on the extent to which H.i and H.ii can really be preserved.¹⁰

Our present point is, however, not centred on H.i and H.ii. In our view this criticism has already been explored with positive effects. Our argument centres instead on H.iii. Our criticism of the very “thin” social sources thesis is concomitantly a very thin criticism, a criticism that can even be succinctly summarised (paraphrasing Anscombe) as follows: *Even if per impossibile the fact of engagement with rules of recognition could naturally give rise to the obligatory force of law; and even if the concept of legal obligation were naturally comprehensible without any resort to substantial and content-dependent reasons for action, the specific facts of engagement with rules of recognition that are deemed to be sources of law are not recognizable as instances of the general type “engaging with the law” on purely empirical grounds.* As a result, the criticism of Gardner’s social sources thesis depends not on the fact that the thesis fails to recognize the moral merits of the law, but rather on the fact that Gardner’s “thin view” lacks plausibility.

⁸ The logical connection between conventional semantics and the unjustified nature of cognitive judgments (be they moral or not) is insightfully argued in Spaemann 2001, 52.

⁹ Joseph Raz is perhaps the leading post-Hartian author involved in this task in, among many other works, Raz 1999.

¹⁰ Hence, John Finnis (1980, 238–44) has argued that the fact of social convergence upon moral convictions is still a fact after all, and that the gap between facts and norms (H.i) is thus still there. From within positivism Schauer (2015, 93) has overtly incited Hart’s followers to abandon all intentions of grounding law’s moral authority, stating that law only offers motives construed as empirical facts to obey it.

5. The “Why” Is Detachable from the “What”: Intelligibility in Dystopia

If LP* is actually working in Dystopia, then it should achieve its limited purpose in a self-sufficient way, i.e., it should be able to identify existing law through the AEL that posited it, including the fact that King Positus promulgated the law. LP* establishes that we do not need to know the aims or goals of King Positus in order to identify his acts *qua* AELs.

In the following, however, we argue that the thin view is not actually doing any identification work in Dystopia, and in doing so we aim to show that even in a more chaotic, malevolent, contradictory, and nonsensical legal system, LP* cannot fulfil the function it sets out to perform.

Let us imagine an external Observer who comes to Dystopia and asks about the legally valid norms of the legal system. We invite her to apply LP* but, after being presented with multiple contradictory norms of the system as identified by LP*, the Observer will correctly point out that in Dystopia she does not recognize any legal system nor, as a result, any AEL. She identifies actions taken by King Positus that resemble the promulgation of laws, but given that these actions seem aimed at disseminating chaos in the activities of the subjects, she does not identify them as a part of a legal system, nor as AELs. We may insist that the task of LP* is merely *to identify* the legally valid norms that have being posited through the AEL performed by King Positus. However, the Observer insists that *she cannot identify* the norms because she cannot identify the AEL of Dystopia, and she cannot identify the AEL because she is unable to identify anything as a legal system in Dystopia.

The Observer’s position is puzzling. How does she reach the conclusion that there is no legal system because all the public acts she observes aim at disseminating chaos? Paradoxically, this means that *somehow she has identified the AEL and the norms* of the system. Otherwise, she could not have reached the conclusion that Dystopia has neither AELs nor a legal system. The LP* thin view of the law seems correct. Arguably, the Observer had to use LP* and identify AELs and the norms of the system in order to subsequently assert that there is no legal system.

We will argue, however, that *contrary to appearances* the Observer has not used LP* to identify the norms, but a thicker conception of law which we will call Natural Law Theory* (NLT*). NLT* can be expressed by the following:

(NLT*.) “We cannot identify what the law is without identifying *why the law is what it is.*”

We will argue that because the Observer knows what a legal system is for, that is to say, she can answer the “*why?*” question, she is able to identify *what* the law is and, more specifically, what an AEL is.

We will aim to show that there is no possible neutral or “pure” observation of the acts that create the law and as a result the identification of the laws of a legal system requires a thicker view closer to NLT*. In the following section we will try to provide an account of why the Observer could not identify the law with LP* *but only because* of NLT*. Along these lines, we will deny LP*e, according to which the human act of promulgation can be recognised as a “pure act of engagement with the law” in a manner substantially equal to that by which physical events are recognised.

5.1. An Outsider in Dystopia

Let us go back to our example of Dystopia. The Observer is invited to apply LP* and identify or determine the AELs and corresponding laws of the legal system. She walks around the capital city of the kingdom, looking around for buildings that might resemble a parliament or a court, but finds nothing of the kind. She goes to libraries to look for something similar to statutes or law reports and similarly comes up with nothing. Finally, in the law library of the capital city of Dystopia she learns from legal textbooks that there is neither a parliament nor courts. All laws are promulgated by the King and published in law reports kept in the archives of the Palace Library. On Monday afternoon, the Observer witnesses an act of lawmaking by King Positus during which he appears on his balcony, raises his hands in an authoritative manner, and pronounces the following words: “All the subjects of my Kingdom, with no exception, are under an obligation to pay their taxes.” Six weeks later, King Positus once again appears on the balcony and this time proclaims the following: “Citizens of District 1 are exempt from paying their taxes” and “All of the laws promulgated in the last twelve months remain valid.”

The question that arises is how the Observer can ascertain that:

- (a) King Positus is the relevant agent.
- (b) Promulgating the law is an act of engagement with the law (AEL), which is a source of law.
- (c) There is a subset of the King’s speeches that are promulgated laws.

Let us recall, LP* establishes that only the sources of law enable us to determine what the valid law is. The Observer is somehow aware that King Positus is the relevant agent and that his actions are the relevant sources to identify and determine the laws of Dystopia. Furthermore, the Observer can distinguish AELs among all the acts of King Positus because she already *knows what acts of promulgation should look or sound like*. She could not identify either the AEL or the laws being engaged with *without already somehow knowing what laws are*. If the Observer had never heard about laws or promulgation, monarchs, parliaments, or courts and did not already possess these concepts, she would not have been able to ascertain that King Positus was promulgating laws. But how does the Observer know what AELs and laws are? AELs are human actions, as in the case of the speeches and actions of King Positus, and we do not learn about human actions in the same way as we learn about cells, dogs, cats, atoms, or molecules. In both cases, abstract knowledge of the nature of things departs from and incorporates the data of experience. In both cases, the intelligibility of things is necessarily connected to their empirically observable physiognomy. However, physical objects as “objects of knowledge,” in the most genuine sense of *objectum*, stand *in front* of the subject. They are neither the subject him/herself, nor the object of his/her tendencies. This explains that, while the observable physiognomy of physical objects and their mutual connections is the nerve centre of experimental knowledge or explanation, the observable physiognomy of actions is, by contrast, only a bridge to their inner form where *understanding and intelligibility* lie.

Human actions are not merely the physical movements of a body, the sounds of words, or the mere mental states of actors. They are all of these physical phenomena perceived as a unit of intelligibility that springs from the inner dimension of human actions and, more concretely, from the *choice and intention* of the agent. The nature or species of human action is determined, in other words, not by the physical movements involved in it, but by the inner choice that the physical movements are intended to express.

If this is so, the relevant question for social sciences is how this inner dimension that gives form to human action is intelligible to third persons. The idea is that it is intelligible because the underlying or grounding reasons, or *logos of intentional actions*, are made manifest through the intelligible connection of their exterior performance with the social contexts where performance takes place.

Let us consider the Observer's situation as follows. In "On Brute Facts" Anscombe (1958, 69–72) defends a subtle and important conception concerning the relationship between actions and institutional facts or social context. We will rely on this view to cast light on the situation of the Observer and to show the deficiencies of Premises 3 and 4 of LP*.

5.2. Anscombe's "Institutional Transparency Thesis" and the Unity of Intelligibility

One of the significant conclusions of the argument advanced by Anscombe in "On Brute Facts" is what we will call the "institutional transparency thesis." The thesis entails the view that even though the description of an action "A" in terms of facts *is not a description of the institution behind "A"* (Anscombe 1958, 72), the *existence* of the description of action "A" *presupposes* institution A. In terms of intelligibility, understanding the nature of third persons' individual actions inevitably entails understanding the social or institutional context in which these actions are performed. However, this understanding takes place at a practical and not a theoretical level. Let us explain.

What is the *institution behind the description*? Let us begin with the simple example provided by Anscombe: I Owe the Grocer Five Pounds for the Potatoes that the Grocer Has Supplied to Me.

I order a sack of potatoes from the grocer and the grocer puts the potatoes in his delivery van, rings my doorbell, unloads the potatoes and gives me a bill for five pounds.

Let us say that you are at my house and observe both the actions of the grocer and my actions. As an Observer you establish that I owe the grocer five pounds. How did you reach that conclusion? Is it because you ask me what am I doing? This question only makes sense when my behaviour is unintelligible to you. When my actions are intelligible to you, you grasp the meaning of my bodily movements and the reasons why I am moving my body in the way I am moving it as a unitary whole. The problem is that if you do not already possess the concepts of "supplying," "owing," and "five pounds," mere observance of the bodily movements of the grocer and my bodily movements of receiving the potatoes and bill will not tell you anything about the fact that "I owe the grocer five pounds for the potatoes he has supplied." If you are able to grasp the action of supplying as a reason for the existence of the obligation of "owing" and make it

intelligible to yourself, it is because the concepts "supplying," "owing," and "five pounds" constitute a set of concepts that you, the Observer, myself, and the grocer have learned in the context of the social institution of "buying and selling." We learned these concepts at an early age when we learned that obligations arise from the exchange of goods in our society. The bodily movements and the grounding or underlying reasons "why" we buy, sell, and fulfil our obligations that arise from purchasing contracts are learned as a unitary whole. In the example, the bodily movements of the grocer and the grounding reasons or logos are grasped as a whole. As an Observer, when you grasp the unitary whole of physical movements and its corresponding grounding reasons, you are not describing the institution of "buying and selling." You are, instead, using this background institution as the basis for your judgment concerning the intentions that stamp a logos in the physical movements: The background institution confers transparency on the inner dimension of human actions, that from an empirical point of view is opaque.

The action is practical and as a result it needs to be grasped as practical. The action is practical because it is about the intentions of the grocer and the buyer. The buyer and the grocer aim to produce a state of affairs and they know why they are doing what they are doing. The grocer knows why he is putting the potatoes in the delivery van and unloading them at my house, and I know why I am ordering the potatoes, taking them from the grocer, and receiving the bill. Both of us know what the other is doing and why they are doing it because both of us share a common understanding of the background institution that lends sense to the whole scene.

Anscombe (1958, 70) asks whether there is a difference between this scenario and a similar scene in a film where an actor is supplying potatoes and another actor is taking delivery of them. In the case of the scene in the film we would not say that the actor who takes delivery of the potatoes "owes" the actor-grocer five pounds. The difference is in the intention of the agents. The actors do not intend with their bodily movements to generate obligations or a purchasing contract. By contrast, when I receive the bill I know that I owe five pounds to the grocer. The Observer grasps the difference between one situation and the other because she understands the difference between the background institutions in each case.

5.3 More about the Intelligibility of Intentional Action: One Action, Two Perspectives

For Anscombe, as for Aquinas, there is no separation between the bodily movement and the answer to the question "why" the agent is doing what he or she is doing. If the question "why" has no application, then most likely there is no intentional action. In other words, there are not two acts but only one action that can be analyzed from different perspectives that are one and the same thing. That which we call the "exterior action" is, in fact, not essentially different from the "interior will." It is, instead, its performance and manifestation (Aquinas 2006, I-II, qq. 17–20, esp. q. 17, a. 4; qq. 18 a. 6 and q. 20).

What exactly is the choice or will that the exterior action manifests and performs? The first question that requires our attention is whether there is a

distinction between an intention to act, where my will is active and involved in the action, and a voluntary action. Actions can be voluntary or involuntary. Examples that illustrate involuntary actions are the movements of my stomach, the respiratory functions of my lungs, and so on. Walking, talking, raising my arms, and so on, all exemplify voluntary actions. But is it the case that for all voluntary actions the will is involved, and in particular a choice? (Aquinas 2006, I-II, q. 18, particularly, aa. 2 and 7h; cf. Finnis 1988, 65–6, and Rhonheimer 2008, 41).

Let us imagine two different cases. In the first I intend to move my arm but my foot moves instead. In the second, I move my arm and my arm moves. In both cases my actions are voluntary. However, in the first case my action does not reflect my choice, i.e., the moving of my arm, and my choice is not fulfilled. Let us now suppose that you are observing what am I doing, i.e., you are observing my foot and then my arm moving. How do you know whether my will is satisfied in one case and not in the other? We can assert that a volitional act is one initiated by a person whereas a wilful act is a volitional act performed with a choice. But can we know this distinction by merely observing from the third-person perspective what a person is doing? The only thing you can observe is that I move my foot and arm but you cannot observe, so to speak, my will: You cannot observe that I have moved my arm intentionally.

It may be postulated that the way to identify whether or not the will is involved in an action is to understand the action as described by the agent. However, even if the agent's testimony is the surest way of ascertaining the choice or will performed in her actions, agents are rarely required to explicitly describe it. Why is this so? Because the institutional background, combined with the typical physical movements performed, speak for themselves: They are "transparent." In some contexts, such as the legal one, the transparency of the connection between individual actions and their institutional background may even make the agent's description of her inner choices irrelevant.

5.4. *Davidson in the Vein of Hume*

LP* states that the process leading to the identification of AEL is much closer to "explanation" than to "understanding." Accordingly, AELs are identified in their species through a cognitive process that does not aim so much at identifying *choices* performed in actions but, rather, at identifying special kinds of actions as "effects" of previous events. Donald Davidson's (1963) account of intentional action is one of the most serious attempts to sustain this causal theory of action as a correlative theory of the interpretation of concrete actions.

It is because Davidson relies on some of Anscombe's ideas and because of the inherent difficulties in understanding Anscombe's work, that it was assumed by many that Anscombe and Davidson were saying the same thing about intentional action (Annas 1976). Nevertheless, Davidson's account of intentional action and the interpretation of action is fundamentally different from Anscombe's.

Like Anscombe, Davidson explains intentional actions in terms of the reasons that the agent provides when explaining what he did. Also like Anscombe, Davidson understands that these reasons make actions "intelligible" both to the agent and to a third person. The aim is to rationalise the action. From this point on,

Davidson’s theory departs from Anscombe’s in a radical, though perhaps subtle, way. According to Davidson (1963, 285), the agent has a reason whenever he can be characterised as (a) having a pro-attitude toward the action and (b) believing (or knowing, perceiving, noticing, remembering) that his action is of that kind. The belief/desire pairing is called a primary reason and Davidson asserts that “a primary reason for an action is its cause” (ibid., 685).

Davidson argues that beliefs and desires are mental events that (may) *cause* a subsequent corresponding event, the “exterior” action. The causal relationship between mental events and actions is hence just a special kind of causal relationship between events (Davidson 1963, 691). Thus the action “I flip the switch” is caused by my intention to flip the switch and my belief that my action is capable of doing so. Even though we can only observe the result of the action, i.e., the flipping of the switch, observing the effect (the action) enables us to identify the cause (the mental events). Accordingly, the cognitive process leading to the ascertainment of the nature of actions is not essentially different from the cognitive process leading to the explanation of physical events.

Davidson’s view on intentional action has been extremely influential in the last forty years during which time the tendency has been to assimilate practical reasoning into intentional action as a mental state (ibid., 285).¹¹ This assimilation has two main important advantages over other competing views, such as Anscombe’s unitary model. First, it has enabled neo-Humeans (see Blackburn 1988; Harman 1986a,b; Smith 1994) to explain in a more sophisticated form the Humean view that our pro-attitudes or desires are the key motives for, and explanation of, our intentional actions. Second, and more importantly, it is compatible with a scientifically neutral and purely descriptive explanation of action as caused by our mental states. However, the major flaw of this view is that it cannot ensure that the causal connection between a reason and the corresponding action is of the right sort.¹²

To conclude: Davidson’s attempt to place at the same level human actions and physical events, or “understanding” of human action and “explanation” of causal relationships, does not ensure the successful ascertainment of human actions. To the extent that Gardner’s thesis LP*e assumes a theory of action of this sort, it needs further argumentation.

5.5. *The Inescapable Role of Nonsocial Sources in Identifying the Law*

As already mentioned, the most genuine way to identify the will that is involved in action and in structuring action is to understand the action in terms of the description provided by the agent himself. We elicit such a description when

¹¹ For example, Jay Wallace (2014) in the entry on “practical reason” of the *Stanford Encyclopedia of Philosophy* points out: “Practical reasoning gives rise not to bodily movements per se, but to intentional actions, and these are intelligible as such only to the extent they reflect our mental states.”

¹² The first person to discuss deviant causal chains was Chisholm (1976). Some scholars are more radical and deny that intentional actions are causes: See, for example, Dancy 2000.

we ask “why”¹³ such-and-such an action is performed. This way of eliciting the description of the action is called the “why-question methodology” and is Anscombe’s central device in *Intention* (Anscombe 1957) for elucidating the connections between the different parts of an action and (our) practical reasoning.¹⁴ There are a number of considerations that need to be taken into account to fully grasp this methodology:

- (a) an intentional action is, paradigmatically, a successive series of (partial) actions directed towards the final end of the action;
- (b) we do not have different actions but only one action unified by the final end as a reason for action formulated in terms of good-making characteristics;
- (c) it is a reason that might be given to others in a genuine way within a framework of justification, but it is also the reason that the agent gives to her/himself.

Taking these considerations into account, let us now explain the why-question methodology. Anscombe seeks to understand how we can identify intentional actions and demarcate them from nonintentional actions. The logical step is to understand what it means to say that “I have acted with an intention.” Anscombe identifies acting intentionally with “acting for a reason” or “reasons for actions” and such acting involves the view that the question “why?” applies (Anscombe 1957, § 4–6). In other words, when we act for reasons, we act intentionally and therefore we are sensitive and responsive to a justificatory framework. If I perform an action Φ and the answers are genuine, for example, either of the following: “I did not know I was doing Φ ” or “I was not aware I was doing Φ ,” then we have neither an intentional action, nor an action performed and guided by reasons: We might have a *voluntary* action, but not an *intentional* one (ibid., § 17). But if the response takes, for example, either of the following forms: “in order to Φ ” or “because,” then we might have a *prima facie* case for an intentional action or an action done for reasons. In other words, reasons, so to speak, show themselves in intentional action and indicate, by “showing themselves,” how they are able to operate and be part of the agent’s practical reasoning.

Social sciences seek to understand third persons’ actions, and assume that it is possible to grasp the intentions/reasons that make these actions intelligible. The problem, then, is whether we have any control over the truthfulness of the answer given in response to the question “why?” and, furthermore, whether we can give a plausible answer to this question without counting on the agent’s testimony.

Anscombe points out that we have a set of *contextual conditions* that enable us to say whether or not the person has expressed his genuine intentions (ibid., § 25). These contextual conditions are learned through our participation in social

¹³ Moran and Stone (2009, 148) explain the why-question methodology as follows: “Hence all psychic forms are performance modifiers: insofar as they are employable in action-explaining answers to the question ‘why?’, they express forms of being on-the-way-to-but-not-yet having Φ -ed, of already stretching oneself toward this end.”

¹⁴ Anscombe’s exposition closely follows Aquinas’s explanation of intentional action. Kenny (1979) points out that Aquinas’s model should be understood more as a Gestalt psychology.

practices at an early age. We learn that we need money to buy things, and that if we order goods to be delivered to our house, then we will owe the supplier the price of the goods. In our example of potatoes being delivered in the scene of a film, we know that in the contextual conditions the actor-buyer is not genuine in saying that “he owes five pounds to the actor-grocer,” because we are aware that his speech act is part of (the practice of) drama. In short, we understand third-person actions when we understand their reasons for actions. Reasons for actions become intelligible when they are contextualized within a social practice/context that the Observer takes part in, at least up to a certain point.

This still leaves unanswered the problem of the unitary nature of actions. Intentional action (or an action done for a reason) involves a successive number of steps or actions and subsequently a successive number of reasons that explain each step, but when do we know that the explanation provided by the agent can stop? Once again, the answer is to be found in the concept of intention/reason for action.

Anscombe tells us that explanation and justification come to an end when the end of the action is described in terms of what is good or desirable in itself. The final end of the action is something, i.e., a state of affairs, an event, fact, or object that seems or appears to be good or desirable to the agent (see Grisez 1967, 177). Along these lines, when the grocer delivers the potatoes to my house, he puts the potatoes in his delivery van, drives down the road, parks the van at my house, gets out of the van, unloads the potatoes, knocks at my door, and leaves the potatoes in my kitchen. The successive steps of the action find unity and intelligibility in his reason as “good-making characteristics,” for example, he needs to earn money, sell the potatoes that he bought from the wholesaler, and so on.

Returning to our original concern, how is it possible that the agent’s intention/choice that gives form to his actions becomes intelligible to the Observer, allowing her to validly identify their nature? Intelligibility is arrived at only insofar as (i) both the agent and the observer share a common understanding of the “good-making characteristics” that may be intended or chosen in action and, (ii) the good-making characteristics that are intended in each particular action are to some extent manifest. The first condition entails that the good-making characteristics are not purely conventional but, to some extent at least, a given object of human intelligence. Otherwise the good-making characteristics could not even be named by the agent. The second condition entails that the good-making characteristics intended in action should be an instantiation of the good-making characteristics of the social practices or institutional background giving actions their final form or *logos*.¹⁵

On these grounds, the core motivation behind the why-question methodology is to draw attention to the structure or articulation of an intentional action (Vogler 2001). It is not the case, in our example, that the grocer reflects at each stage of his bodily movements on why he is doing what he is doing. In the social context he grasps the relevant bodily movements of “selling and buying” and the good-making characteristics that explain *why we human beings* “buy and sell.”

¹⁵ See Anscombe 1957, 174. A further development of these arguments is to be found in Rodriguez-Blanco 2014, chaps. 1–4.

As a result, the matter is neither to discover the propositional attitudes, i.e., the beliefs and desires that explain the action of “buying and selling,” nor even to explicitly describe the institution of “buying and selling.” The issue is to understand whether there is an intentional action or not, and to understand which choice is intended in action. Leaving aside the agent’s testimony, understanding his choice is only possible when the action is taken to be an instantiation of the good-making characteristics that justify the social practice within which it takes place. Only then can we assert that the Observer grasps the unit of intentional action as a unit of bodily movements and *the grounding logos* or answer to the question “why?”

This reflection allows us to dispel at least one myth about classical natural law theory.

6. The Myth that Natural Law Theory is Defined by Sufficient and/or Necessary Moral Conditions or by a Moral Ideal Contained within Law

The paradigm or central-case methodology, which is present in the works of Aristotle, Wittgenstein, Anscombe, and Finnis, rejects the idea that we can advance a *definition or explanation* of a thing such as law, friendship, or games, in terms of conventionally constructed, necessary, and/or sufficient conditions. In the case of law, we cannot provide a definition of the contingent or noncontingent conditions, including moral conditions, that make law possible. Why is this so? Two reasons may be cited. The first is that these distinctions, i.e., necessary, sufficient, contingent, and noncontingent, are too close to a scientific-explanatory and theoretical understanding of human action and social practice, and the proper understanding of law is thus distorted. The second is that a source-based conception of the necessary and/or sufficient conditions of the law and, particularly, of AEL entails an infinite regress, as shown when discussing LP*e.

According to the paradigm-methodology, the movements of human bodies individually and collectively are unintelligible *unless* we consider them from the point of view of the man or woman exercising practical reason.¹⁶ In other words, due to his/her form of life and capacity to exercise practical reason,¹⁷ every human being is able to attribute an end or point as value to an action. Since social practices are constituted by human actions, we cannot understand social practices unless we understand the point or value in terms of value from the first-person perspective, i.e., when *I* am acting, which is the privileged position of practical reason (Finnis 2013, 486).

Accordingly, understanding human action involves a set of judgments that cannot be broken down into merely theoretical reason, i.e., an outside point of view that considers features, including moral features, as necessary, sufficient, contingent, or noncontingent. We cannot see our own activity, nor that of others from the outside as a spectator or *as a representation*, i.e., as mere observers. The understanding of our actions and that of others pertains to practical reason, that is to say, to reason applied to action and, hence, to something *that is still to be done*

¹⁶ For a thorough historical analysis of natural law in the twentieth century and the idea of practical reason in the twentieth century, see Viola 2016.

¹⁷ Practical reason should not be understood as a morally committed view. See Rodriguez-Blanco 2014, chap. 9.

(Grisez 1967). Thus, so long as a mere description-explanation of the necessary and/or sufficient conditions of any human activity, i.e., a social practice like law, is detached from the values/goods/ends that confer both unity and intelligibility on any action, it is doomed.

This is so, because it presupposes that we can make intelligible our activities by only “observing them.” By contrast, *our activities are known to us*, i.e., the agent knows *why* and *what* we are doing when we are doing them.

To the extent that the paradigm or central case methodology used by Hart and most of his followers entails a confusion between theoretical and practical knowledge, then it is equally objectionable. To our mind, not even the participant’s understanding as a moral ideal conception of law, as a plausible interpretation of this central case-methodology, accurately reflects the essence of the central case or paradigm-methodology, i.e., the key role of practical reason in making the practice or object of study intelligible according to our human form of life.

In fact, it only makes sense to point to paradigms or central cases that organise the diversity and multiplicity of our social practices if the paradigms are taken to be instantiations of the underpinning *logos* of social practices. Since we have a specific form of life, e.g., we eat, walk, love, play, make friends, write, think, mourn, and so on, this form of life can only be understood if we understand (because in some way or another we share) the underlying grammar or logic of our activities (*logos*). By contrast, empirical investigations such as sociological, economical, biological, chemical, and physical research aim to cast light on their subject. The *inner logic* of such investigations is not given to us in the ordinary practice of actions: We need to discover it. *The case of human activity is at variance with this since the internal logic or grammar of our activities is given to us and defines the limits of what we can make intelligible.*

Along these lines, central cases or paradigms of activities are not mere examples of socially constructed classes or types of actions. On the contrary, paradigms are illustrative cases of the inner *logos* of both the social practice wherein actions are specified in their type and of the actions themselves. As such, they help us to organize our actions and social practices, and marginal cases, e.g., where law is the absence of coordination, law is unjust, law is norm-subjected, law is coercion, *are all intelligible* when we place them in relation to the paradigmatic or central case of the law that instantiates its inner *logos*, i.e., law that intends to coordinate and be just. Our forms of life determine the limits and internal logic of our actions and social practices. There remains, however, room for fluidity, openness, and multiplicity.

Nor is law as a moral ideal the correct interpretation of the central case-methodology, because this presupposes a point outside practical reason where we are guided by the contemplation of “good” and “absolute” platonic entities and where this gives intelligibility to our actions. Within the central-case methodology, the limits of what we can say and describe are determined by our practical reason and social practices due to the kind of creatures we are.

This brings us to the second reason why we should reject a *social source-based* conception of the necessary and/or sufficient conditions of the law and, particularly, of AEL: that it entails an infinite regress. In effect, if necessary and/or sufficient conditions that make up both a social practice and the concrete acts of engagement within that practice are purely conventional, then there are two

ways of signalling what those conditions are, i.e., either by using other socially-constructed concepts, or by giving paradigmatic examples. In both cases the use of language is inevitable and is therefore supposed to be grounded on expertise in the use of those language conventions which attribute a distinct list of features or a paradigmatic reference—depending on the variety of conventionalism—to each of the individual things denoted by these concepts. This knowledge in turn entails a certain expertise in the use of those other concepts denoting the meaning of each item in the distinct list of features or paradigmatic cases. This leads to the use of other words and concepts at a third level of explanation, and so on.¹⁸

The only way out of this regress is to admit that paradigm cases are not examples of a purely conventional *logos*, but manifestations of an intrinsically intelligible given *logos*, that is to say, a *logos* that language can show but not further describe.

This reasoning reinforces our previous conclusion regarding LP*e according to which the only way of remaining loyal to LP's exclusionary social sources thesis is to assume an empirical conception of human action and a correlative explanatory conception of human action and the interpretation of human action. Otherwise, either LP* assumes a given *logos* for law, or it falls into an infinite regress. Taking into account that the very nature of LP* is the exclusion of nonconventional/nonsocial source(s) elements, then it should once again be concluded that it assumes the empirical conception of social practices and human action.

Contra the empirical conception, however, we have tried to show that there is no gap between the description of an action and the evaluation of an action, because only our practical reason establishes the intelligibility of our actions and social practice while we are acting.¹⁹ If the intelligibility of any action (either our own or that of others) stems from its intentions-reasons-ends-goods, then there is no neutral place from where we can “observe” our own doing, including our engagement with specific social practices, *while* we are doing the action. In short, practical reasoning determines the limits of what can and what cannot be stated in social science research.

7. Conclusion: Dystopia and the “Pure Fact” of Promulgation

Let us now return to the kingdom of Dystopia. The “pure fact” of the act of promulgation is problematic. The premise lurking behind Anscombe's (1958) article “On Brute Facts” shows us that there is a dense and thick fabric underlying our actions and their intelligibility to ourselves and to others. This has been identified as the *logos* or *answers in terms of reasons to the question “why”* of the practice, which are learned in the context of social institutions.

Even though Observers do not need to describe the background institution in order to understand the individual actions of others, the intrinsic intelligibility of the good-making characteristics of the institution as seen by the participants is the primary condition of the intelligibility of the former. The “institutional transparency thesis” has become clearer and we can now turn our attention to trying to understand how the Observer can grasp the facts of promulgation in Dystopia. The

¹⁸ For a further argument of this point see Zambrano 2015, 330.

¹⁹ For a full development of this idea, Rodriguez-Blanco 2014, chap. 3.

Observer grasps King Positus’s bodily movements and speeches promulgating laws and their underlying reasons or *logos* as a unit of intelligibility. The Observer is aware that laws are promulgated *in order to coordinate the activities of the laws’ addressees*.

As a result, LP^e is false and this means that LP* is false. Let us recall that LP*^e states that the process leading to the ascertainment of acts of engagement with the law *qua* sources of the law is either purely empirical knowledge focused on the exterior or physical performance of actions, not essentially different from the kind of knowledge that leads to the ascertainment of physical events, or a specific kind of understanding that consists of abducting the naked purpose of “engaging with the law” from the exterior performance of actions.

Applying LP^e in Dystopia, the Observer should have expected to observe the relevant actions of promulgation as “pure facts” and identify the sources of law from this observation. We were puzzled by the Observer’s statement in Dystopia when she claimed that *there is no legal system in this country*. At first glance it seemed that the Observer was able to grasp the law according to LP^e, or, in other words, the identification of the pure act of engagement with the law.

However, if the view of intentional action and the “institutional transparency thesis”²⁰ defended in this paper are correct, then the Observer could not have identified the law as a “pure act of engagement with the law” since pure empirical observations of human actions presuppose that we can observe human actions. We have argued that, even if we do not need the description of social and institutional conditions to make human action intelligible, these conditions are presupposed by human actions. The reason for this is that the answers to the question “why?” in terms of reasons as the grounding for the set of bodily movements of our human activities are intrinsically intelligible and consequently are presupposed in all of our judgments. As a result, we perform different human activities through human actions, including acts of engagement with the law. These human actions are not so much physical bodily movements in the sense of observed bodily movements detached from their *logos*, but rather *integrated* physical movements plus the underlying or grounding *reasons* or *logos*. They can only be grasped as a unity because this is *how* we have learned them. This learning is possible because, in the end, there is something intrinsically intelligible in the good-making characteristics that give unity to human actions and to the social practices that human actions instantiate.

The position of the Observer in Dystopia now seems less puzzling. She was able to grasp as an intelligible unit the promulgation acts of King Positus and apprehended that the promulgation of *only* contradictory norms manifests a clear intention to disseminate chaos and lack of coordination in the activities of the citizens and that, therefore, Dystopia cannot have a legal system. She was able to make sense of the promulgation acts of King Positus because she learned the bodily movements and *logos as integrated in a unit of*: promulgation acts, legislative acts, actions of law creation, and understanding *why* human beings adopt laws. She learned in her own social and institutional contexts all these human actions and

²⁰ For a recent alternative understanding of the “institutional thesis” in the context of the law, see Ehrenberg 2016.

this integrated knowledge enabled her to grasp and make sense of the idea that Dystopia had no legal system.

Like LP* our criticism of Gardner's thin view is also based on a thin thesis which we might call NLT*. This thin thesis establishes that we cannot identify what the law is without identifying *why the law is what it is*. It does not state that unjust laws are not laws because of their unjust and/or immoral nature. Rather, it only states that neither just nor unjust laws can attain their just/unjust purpose if, at least to some extent, they do not share the *logos* of the law. Neither just nor unjust laws can attain their just/unjust purpose if, at least to some extent, they do not attempt to instantiate a specific, intrinsic, nonconventional, "good-making characteristic" or presumed "good-making characteristic" of the institution of law.

We have tried to show, in other words, that even in defective or evil systems the identification of the law requires an underpinning nonconventional understanding of the general *logos of the practice of law* and of the way in which each AEL and each law instantiates this general *logos* or *why* the law is what it is.

This is difficult to understand at first glance because the *why* of human actions is normally not explicitly used in the reasoning of the third person who aims to make sense of social phenomena, i.e., the set of social actions that she seeks to explain. Neither is the *why* learned or identified once we have identified the human action of promulgation. On the contrary, the *why* has already been learned, in the specific case of the law as the result of human actions, while becoming citizens and participants of the legal rules and norms of a specific state and this learned *why* or *logos* guides the identification or determination of the key features of human action in other legal systems.

Similarly, King Positus's acts of promulgation as a source of the law of the legal system of Dystopia could be identified by the Observer because *she already knew what law is and therefore why law is what it is*. This knowledge is working and in operation every time we need to make intelligible human action and since the sources of law are the result of human action, the identification of legal sources cannot occur without this underlying given, nonconventional, intrinsically intelligible *logos*. We reject Gardner's thin legal positivist thesis not because it conceives law as disconnected from an evaluative or moral perspective, but because we have convincingly shown that it entails an implausible view of human action.

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References

- Annas, J. 1976. Davidson and Anscombe on “the Same Action.” *Mind* 85(338): 251–7.
- Anscombe, G. E. M. 1957. *Intention*. Oxford: Blackwell.
- Anscombe, G. E. M. 1958. On Brute Facts. *Analysis* 18(3): 69–72.
- Anscombe, G. E. M. 1978. Rules, Rights, and Promises. *Midwest Studies in Philosophy* 3(1): 318–23.
- Aquinas, T. 2006. *Summa Theologiae*. Cambridge: Cambridge University Press.
- Austin, L. 1962. *How to Do Things with Words*. Oxford: Clarendon.
- Blackburn, S. 1988. *Ruling Passions: A Theory of Practical Reasoning*. Oxford: Clarendon.
- Chisholm, R. 1976. Freedom and Action. In *Freedom and Determinism*. Ed. K. Lehrer, 11–44. New York: Random House.
- Dancy, J. 2000. *Practical Reality*. Oxford: Oxford University Press.
- Davidson, D. 1963. Actions, Reasons, and Causes. *Journal of Philosophy* 60(23): 685–700.
- Ehrenberg, K. 2016. *The Functions of Law*. Oxford: Oxford University Press.
- Finnis, J. 1980. *Natural Law and Natural Rights*. Oxford: Clarendon.
- Finnis, J., 1988. *Moral Absolutes: Tradition, Revision, and Truth*. Washington, D.C.: The Catholic University of America Press.
- Finnis, J. 2013. Reflections and Responses. Chap. 28 in *Reason, Morality, and Law: The Philosophy of John Finnis*. Ed. J. Keown and R. P. George. Oxford: Oxford University Press.
- Hume, D. 1993. *An Enquiry Concerning Human Understanding*. Indianapolis, IN: Hackett.
- Gardner, J. 2001. Legal Positivism: 5½ Myths. *American Journal of Jurisprudence* 46(1): 199–27.
- Grisez, G. S. 1967. The First Principles of Practical Reason: A Commentary on the *Summa Theologiae*, 1–2, Question 94, Article 2. *Natural Law Forum* 107: 168–201.
- Harman, G. 1986a. *Change in View*. Cambridge, MA: The MIT Press.
- Harman, G. 1986b. Willing and Intending. Chap. 14 in *Philosophical Grounds of Rationality: Intentions, Categories, Ends*. Ed. R. E. Grandy and R. Warner. Oxford and New York: Oxford University Press.
- Kelsen, H. 1969. *Pure Theory of Law*. Trans. M. Knight. Berkeley: University of California Press.
- Kenny, A. 1979. *Aristotle’s Theory of the Will*. New Haven, CT: Yale University Press.
- Moran, R., and M. Stone, M. 2009. Anscombe on Expression of Intention. Chap. 8 in *New Essays on the Explanation of Action*. Ed. C. Sandis, 132–68. Houndmills, Basingstoke, UK, and New York: Palgrave Macmillan.
- Raz, J. 1999. *Practical Reason and Norms*. Oxford: Oxford University Press. (1st ed. 1975.)
- Rodriguez-Blanco, V. 2014. *Law and Authority under the Guise of the Good*. Oxford, UK, and Portland, OR: Hart.
- Rhonheimer, M. 2008. *The Perspective of the Acting Person: Essays in the Renewal of Thomistic Moral Philosophy*. Washington, D.C.: Catholic University of America Press.
- Schauer, F. 2015. *The Force of Law*. Cambridge, MA and London: Harvard University Press.
- Smith, M. 1994. *The Moral Problem*. Oxford: Blackwell.

- Spaemann, R. 2001. *Grenzen: Zur ethischen Dimension des Handelns*. Stuttgart: Klett-Cotta.
- Viola, F. 2016. Natural Law Theories in the 20th Century. In *A Treatise of Legal Philosophy and General Jurisprudence. Vol. 12, Legal Philosophy in the Twentieth Century: The Civil Law World*. Ed. E. Pattaro and C. Rovarsi, tome 2, chap. 1, pp. 3–90. Dordrecht: Springer Netherlands.
- Vogler, C. 2001. Anscombe on Practical Inference. Chap. 19 in *Varieties of Practical Reasoning*. Ed. E. Millgram. Cambridge, MA: The MIT Press.
- Wallace, R. J. 2014. Practical Reason. In *The Stanford Encyclopedia of Philosophy*. Ed. E. N. Zalta. <https://plato.stanford.edu/archives/sum2014/entries/practical-reason/>.
- Zambrano, P. 2009. *La inevitable creatividad en la interpretación jurídica. Una aproximación iusfilosófica a la tesis de la discrecionalidad*. México DF: Universidad Nacional Autónoma de México (UNAM).
- Zambrano, P. 2015. Fundamental Principles, Realist Semantics, and Human Action. *Rechtstheorie* 46(3): 323–45.