Introduction
The Pursuit of Theory

KNOWLEDGE AND EXISTENCE

There would be no legal system if nobody could say what the law is. This is painfully trivial. The existence of law is mediated by knowledge that claims to know what the law is. Knowing the law is a business. Dispensations of legal expertise are services. They can be bought and sold. It should not come as a surprise that the deck is notoriously stacked in favor of those who can afford to mobilize more.

When service providers are widely immune to contestation (*e.g.*, judges, law professors, international arbitrators), they begin to develop their own idiosyncratic ideas. They have the power to do so.

Law is mediated by legal knowledge. Legal knowledge arrives in this world encumbered with both money and power. It is tainted by the very conditions that account for its existence. And so is law.

THE REVERSAL

Reflecting on what validates, rather than causes, its existence, legal knowledge claims to have a different constitution. Neither in legislatures nor on the pages of court opinions would the law, if it could speak, ever say that it follows the highest bidder or is ancillary to bosses. Law may *de facto* be borne out of money and power; *de jure* it presents itself as rising above them. The production of new law has to be based upon knowing the law, even if all that is known is an alleged "right to rule over others."

This coincides with what we expect the law to accomplish. It has to constitute authority in which is vested the task to control the treacherous voyages of money. This is how we ordinarily conceive of the integration of

society.[1] The hierarchy of control ought to run from law via power to money. Money is constrained by (political) power; power is constrained by law.

De facto, however, legal knowledge exists by virtue of a reversal of this hierarchy. This creates a predicament. Law that is merely known by virtue of money and power is just money and power wearing the vestiges of law. Saying what is legal cannot *simply* be a matter of auctions or voting. Legal expertise needs to be validated with recourse to what the law *really* is.

OBJECTIVITY

Hence, the solution appears to be simple. Since legal knowledge has to say what the law is, it needs to be objective. This means, quite simply, that legal propositions, in order to be valid, need to give a true account of the legal situation. Only by virtue of truth can legal knowledge emancipate itself from the undue influence of money and power. And so can law.

LEGAL POSITIVISM AND NATURAL LAW THEORY

The problem is straightforward. Legal knowledge, in order to make the law possible, necessarily has to lay claim to objectivity. At the same time, as a social fact, it is likely to be caused by less auspicious forces than the quest for truth.

Consequently, in any of its more advanced forms, legal knowledge needs to embrace at least a modicum of suspicion.[2] One has to reckon with arguments that wish to pass as objective while they actually just serve some special interests. The pursuit of a political agenda may be wearing the mask of a theory of legal interpretation (*e.g.*, the mask of "originalism"). Its proponents may be legitimately censured for hiding the ball.

Unsurprisingly, therefore, in any of its more advanced forms, legal knowledge aims at exposing the idealizations with which money and power purport to pass as sound legal doctrine. The respective challenges would be futile, however, if the promise of objectivity could not be kept. Objectivity is possible only by developing an idea of what the law really is – as opposed to, say, kicking people around; buying oneself influence; or the persistence of mere habits, religion, morality, or best practice.

[1] See Talcott Parsons, *Sociological Theory and Modern Society* (New York and London: Free Press, 1967) at 297–328.

[2] On the hermeneutics of suspicion, see Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation* (New Haven: Yale University Press, 1970).

Answering the question of objectivity correctly has been subject to the seemingly perennial controversy between legal positivists and advocates of natural law. They were not the only contestants in this debate, but for the purpose of introducing the problem it is quite accurate to focus on them.

Legal positivists would have us believe that someone lays down law.[3] Law is a social fact that can be read off, in a value-neutral way, the face of law's sources, such as legislation, regulations, or precedents. Describing accurately what has been laid down, as law, by either insurmountable or merely presupposed authority is what it takes to arrive at a legal knowledge that is true.[4]

As is well known, modern natural law theory embraces an alternative version of objectivity.[5] It claims, basically, that finding the right answer to a legal question is fully continuous with finding the morally right answer. The objectivity of legal knowledge is, thus, of a piece with having a correct moral justification.[6] Actually,

[3] This view is at least officially sustained by John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012) at 20.

[4] The most famous exposition of this view is Hans Kelsen, *Pure Theory of Law* (2d ed., trans. M. Knight, Berkeley: University of California Press, 1967) at 1.

[5] In a highly perceptive essay, Brian Bix distinguished between traditional and modern approaches to natural law. While the traditional approaches tried to identify, and to appeal to, some law that is "higher" than humanmade law and amenable to rational insight, modern natural law theory is a reply to legal positivism and insists on the relevance of morality to legal reasoning. See Brian Bix, "Natural Law Theory." In *A Companion to Philosophy of Law and Legal Theory* (ed. D. Patterson, Oxford: Blackwell, 1996) 223–240 at 231, 237.

[6] Admittedly, the contours of "natural law theory" as a position in legal philosophy are far from clear. This book is following Kant's lead. He characterized natural law as law that is, without being supported by external law giving, recognized on the ground of practical reason alone. It is the law that ought to be positive law. See Immanuel Kant, Die Metaphysik der Sitten, *Werkausgabe* (ed. W. Weischedel, Frankfurt aM: Insel, 1968) vol. 8 at 345–346. On Kant's views of natural law, see most recently, Christoph Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie* (Berlin: Suhrkamp, 2014) at 131–135. See also Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 12. According to John Finnis, *Reason in Action: Collected Essays: Volume 1* (Oxford: Oxford University Press, 2011b) at 200–201, the phrase "natural law" refers to "standards of right choosing." They are normative because of their truth, "and choosing otherwise than in accordance with them is unreasonable." In a manner similar to Kant, Finnis explains that the principles and standards of natural law are relevant prior to any "positing" by individuals or groups and provide the backbone for any critical evaluation of posited norms. The standards are also objective in that a person who fails to observe them commits an error of judgment. For the most part of the history of natural law theory, this elemental idea has been used to address the demands of "higher law" to the legislature. See Brian Bix, *Jurisprudence: Theory and Context* (7th ed., Durham: Carolina Academic Press, 2015) at 69–72. Arguably, this has been the case not only for natural law theories speculating about the *nomos* (Stoa) or a *lex aeterna* (Augustin and Aquinas), which were supposed to be manifest in the ordering of the world but also for the modern strand of natural law theory that focuses on rights (from Grotius to Locke). See Ernst-Wolfgang Böckenförde, *Geschichte der Rechts- und Staatsphilosophie: Antike und Mittelalter* (2d ed., Tübingen: Mohr

natural law is about having the morally right answer to the core legal question: under which condition may we coerce you into doing what we want you to do? We make arguments to this effect as participants in moral controversies. We, the good people, coerce you because we believe, firmly, that doing so is morally right. Natural law is an extension of moral claims to the domain where we have to decide over questions of coercion.[7]

THE POST-POSITIVIST SITUATION

At the beginning of the twenty-first century, however, things no longer look terribly good for these different claims to objectivity. The *descriptive* rendition of objectivity, which is epitomized by legal positivism, is no longer convincing. Law is not an array of semantically stable abstract entities. It is, as it were, permanently under construction.[8] There is nothing outlandish, let alone radical, about this view. Every student of hermeneutics knows that understanding is a process in the course of which the horizons of the author and the reader engage with each other productively.[9] Puzzlingly, therefore, as a position in legal theory, legal positivism can survive only at the price of its irrelevance for legal knowledge and, *a fortiori*, for the legal system. The late legal positivism of our age subsists in splendid isolation from its object – at any rate, in Anglo-American circles.[10]

By contrast, the rendering of objectivity in terms of moral justifiability is definitely on the right track. But it is also flawed when pushed up to the hilt. It is claimed, then, that there is one and only one substantive right answer to any legal question even in the face of initial moral disagreement among people who regard one another as reasonable persons.[11] Disturbingly, at the

Siebeck, 2006) at 138–139, 204, 234. See Sean Coyle, *Modern Jurisprudence: A Philosophical Guide* (Oxford: Hart Publishing, 2014) at 59–62. Once natural law theory becomes directed at the judiciary, however, its orientation changes. The institution to which the precepts of reason are addressed is not in charge in laying down good general laws but tasked with adjudicating specific legal questions. Consequently, the emphasis shifts from what constitutes "good laws" to what constitutes "right answers."

7 See Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 93.

8 See, for example, Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford: Clarendon Press, 1989) at 511–513.

9 See, for example, Roland Dworkin, "Law as Interpretation." In *The Politics of Interpretation* (ed. W.J.T. Mitchell, Chicago: Chicago University Press, 1982) at 249–270.

10 This observation has been aptly made by Ronald Dworkin, *Justice in Robes* (Cambridge, Mass: Harvard University Press, 2006) at 213.

11 See Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) 144–145. On different versions of the right-answer thesis, see Brian Bix, *Jurisprudence: Theory and Context* (6th ed., Durham: Carolina Academic Press, 2012) at 98–99.

same time, claims to moral objectivity in law are trailed with concessions regarding "burdens of judgment"[12] or "reasonable disagreements."[13] Insisting on one morally right answer for legal disputes in the face of concededly imperfect moral insight must appear strangely fanatical and perhaps even morally wrong.

SALOME

The first chapter of this book will address the problems of late legal positivism. At this point, it pays to examine briefly why we sense that the one-right-answer thesis is misguided.

The one-right-answer-thesis is cast into doubt, for it cannot accommodate aesthetic experience. Art and fiction invite us to see stories and situations in colorations that we necessarily ignore when we are engaged in action. This is true not only of the dreary genre of jury dramas but also of any piece of literature that suspends morality and is, therefore, capable of capturing life's perplexity. Good fiction does not preach. It reveals the elusiveness of our dealings and abstains from passing judgment. Art gives us the goodness of wicked schemes and the sinister side of righteousness without attempting to clarify which is which. It reminds us of a state of innocence to which we have no access in practice because of the existence of morality.

Aesthetic experience enables us to suspend responsibility. When we follow a story, there is no pain of having to pull ourselves together and to arrive at a moral perspective on it. We know that Salome is a horrible kid; but when she exclaims joyfully that she has finally kissed the lips of beheaded Johanaan, we cannot but join her in her triumph.[14] If one were to sum up Oscar Wilde's drama and Richard Strauss's music by saying that they confront us with the question whether there can be circumstances under which sexual desire can outweigh a man's right to life, one would have demonstrated, conclusively, that one is not amenable to the appreciation of art.

SUSPENDING JUDGMENT

Art reconciles us with life because it reconciles us with moral complexity. We are affected by it without being smushed by its grip. We do not need to pass

[12] See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1991) at 56–57.
[13] See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 105–106.
[14] On aesthetic freedom as freedom from practical freedom, see Christoph Menke, *Die Kraft der Kunst* (Berlin: Suhrkamp, 2013) at 150.

judgment on whether Hannah Schmitz, the fictional character in Schlink's *Reader* who became a prison guard in a desperate effort to hide her illiteracy, was an evil person.[15] On the contrary, we realize how stultifying morality is compared with life in narrated form. The pros and cons are part of the picture. But the scale of justice does not incline into one or the other direction. The reconciliation is *in* the narration. It defies being summed up into a moral lesson. The perceived reconciliation mitigates the impossibility of its conceptualization. Hannah Schmitz is convicted and commits suicide while serving her prison term. Undeniably, she gets what she deserves. But it does not strike us as right.

A steadfast belief in a right answer would deny this type of experience a place. The perception of innocence within guilt and guilt within innocence would disappear. The legally right answer is that in her capacity as a prison guard, Hannah Schmitz is guilty of a terrible crime. But how narrow-minded must that determination appear against the broader background in which being ashamed of her illiteracy figures along with her obliviousness to the politics of her time?

There can be no life without action. Why would what suspends guidance from morality and rationality be closer to life than socially useful experience? The explanation lies in a promise of transcendence. The perception of life transcends the vagaries of its evaluation from within. It reveals life in the state in which it does not have to be stamped with approval or disapproval to go on. Art does not give us heaven. It gives us earth beyond explanation and justification. It gives us truth, not in the sense of a better description, but as revealing the truer life that is eclipsed by our ordinary practice of judgment.

If the quest for the one-right-answer made sense, the suspension of judgment would not. If a moral controversy concerning the blameworthiness of Hannah Schmitz had to arrive at a right answer, art would not redeem us from judging. This explains why the idea that there has to be a one-right-answer is obnoxious owing to its moralistic embrace of banality.

THE QUESTION OF LEGAL THEORY

Legal knowledge cannot leave its labor to art, let alone grow into it. Storytelling is not a manner of giving each his or her due. The question before us is how one is to conceive of legal knowledge given that both legal positivism and modern natural law theory have run their course.

[15] See Bernhard Schlink, *The Reader* (trans. C. Brown Janeway, New York: Vintage Books, 1999).

The latter is embarrassing, at any rate in hard cases from the perspective of aesthetic experience. The attempt to come up with the one-right-answer is boorish. All the same, legal positivism can survive only at the cost of its irrelevance for legal knowledge.[16] Against this background, the core question of legal theory must be how one can conceive of legal knowledge once legal positivism no longer appears to be an option. More precisely, the question is how legal knowledge can still legitimately claim to rise above money and power and say what the law truly is without suggesting, as legal positivism did, that the law is out there, amenable to a value-neutral description.

SOURCES AND THE LEGAL RELATION

The answer to this question given in this book is threefold. First, sources of law lend expression to a particular relation between and among people. They are manifestations of the legal relation. We construct and sustain it to pass as socially recognizable agents. The law mediates our presence in this world. It does so in a manner that replies to a predicament of morality. The reply is the legal relation and the sources to which it gives rise.

Second, sources of law are not just rules used to constitute legally significant facts. What is constituted, in the form of sources, is something subjective, namely knowledge of the law. Customary law is a way of knowing the law, and so is legislation (which is at least a way of making up our mind). Both are based upon subjectivity, even if in different forms. Since sources ordinarily give rise to law while drawing on other sources, it is fair to say that all legal knowledge is self-knowledge, that is, knowledge *of* the law *by* the law. Its point is to attain clarity in singular cases.

Third, law is a background relation among people that can be pushed to the foreground when things turn sour or when people want to be guarded against harm. We invoke the law, for example, in order to end some more personal or amiable interaction. With an appeal to law, we become all of a sudden faceless. From then on, we interact as instantiations of "spouses," "employers," "employees," "parents." Relationships become cold and distant when they are perceived as exemplars of the legal relation.

The remaining sections of this introduction offer a sketch of the book's fundamental ideas. This sketch is followed by brief summaries of each chapter of the book.

[16] See note 10.

EXPLICABILITY

The point that the law mediates our presence in this world merits some elaboration. Essential to constituting our presence *as agents* in this world is, first and foremost, the explicability of our actions.[17] *Explicability* means demonstrating responsiveness to reasons, that is, being amenable to what a person can conceivably be persuaded by. The relevant contrast is madness or loss of rational control. I would not succeed at coming across as a responsible agent and, hence, as the author of my acts if I merely said that I did what I did because I am I. If I said that what triggers my actions is the fact about me that I am I, I would fail to make myself explicable as an agent. Used in this manner, the "I" that is supposedly authoring actions – in spite of serving as an indexical that identifies me as the speaker – would not designate agency. I am present as an agent in the social world only if I can pass as being responsive to reasons. Otherwise, I would be perceived as thrown around by some strange force, which I would merely, and falsely, call my own because I happen to be driven by it.

"Why did you kill your baby?"
"'Cause that's who I am."

Only a crazy person would say that. In order to be an outgrowth of agency, our acts have to pass the threshold of explicability.[18]

"Here is why."
"I did it because . . . "

Hence, we encounter reason-responsiveness even where we find people acting on the wrong balance of reasons or for a defeasible reason.

"Why did you kill your baby?"
"He was screaming all night."

In the case of responsiveness to moral reasons, I claim that anyone would have done what I did had he or she been in a similar situation and burdened with similar commitments. If I am right about what I claim, I am present in my acts as an agent who is responsive to the *right* reasons. I am thus not only explicable but also universally justified in doing what I do. Under this condition, I am

[17] Explicability is not the whole story. As we shall see, what matters eventually is the realization as self-determining (autonomous) beings. Explicability, however, is an elementary condition thereto.

[18] On explicability, see J. David Velleman, *How We Get Along* (Cambridge: Cambridge University Press, 2009) at 16.

definitely elevated above a state in which I am merely a pinball thrown around by natural causation.[19]

As will be explained in Chapter 4, the social practice of moral justification reveals that the fixation of moral beliefs depends on diverse and particular evaluative outlooks. Some people, for example, attribute greater weight to protecting human health than others. This explains why they support more risk-averse policies and arrive, when it comes to the control of substances, at moral beliefs that betray their evaluative outlook. Others see things differently.

Universalization – the claim that one adopts as a binding rule what everyone would have reason to do – is of no avail when it comes to determining the right attitude toward risks at least as long as people are willing to put themselves into the shoes of others and claim readiness to face the consequences. When hypothetically taking the positions of others, the risk-averse and the risk-takers universalize differently. Moral universalization, therefore, confronts us with our particularity. What we may have intended to amount to a justification turns out to be mere explication. Instead of experiencing the sweet harmony of universal agreement, people end up attributing to others views bearing the imprint of evaluative outlooks ("I can see that a Puritan would want that"). It is the prevalence of outlooks that renders explicable why justifications may fail for a good reason.

In the face of particularity, only readjusting the focus of justification can restore universality. It has to be determined under which conditions it is right – justified – to accept mere explicability.

> "I did it because I am a guy."
> "I know that you are."

The *legal relation* holds out the promise that various manifestations of particularity can be universalized by virtue of conditional yielding to what might be the explications of others. In the first place, the legal relation is the attempt to universalize the failure of straightforward moral universalizabililty. In the second place, by mutually conceding to one another our particularity we construe a relation in which we are rendered as *choosers*, more precisely, as persons having various rights to make choices. The focus of justification shifts from the assessment of the overall appropriateness of action to the observance of the conditions under which we legitimately exercise a right. The authorship of action is thereby rendered as an exercise of free choice. Rightful choosings represent justified explicability.

[19] Concededly, this is a very Kantian perspective.

With that one enters the realm of legality.[20] It is the world where we relate to demands, choices, and norms only "externally." Without endorsing them, we merely adapt to their existence.

FROM BELIEF TO THE FACT OF BELIEF

The core of the typically legal distance toward normative demands resides in how we relate to reasons for action. Within a legal relation, I yield to demands made by others and enjoy the power to make others yield to mine. More precisely, I yield to what others want, but I do so not for the reason that I accept or share their reasons for choosing the chosen course of action. In contrast to communications with a friend, a colleague, or a spouse, I allow others to go forward without further discussion and without giving them approbation or rebuke.[21] I simply respect what they take to be their practical knowledge, that is, knowledge guiding their action.

Leaving the practical knowledge that gives rise to choices unexamined and unchallenged involves a simple but remarkable transformation of its ontological state. Instead of involving a claim to validity, this knowledge is rendered as a social fact eventuating in a "choice," which is yet another social fact. Yielding to the practical knowledge of others involves waiving or bracketing its claim to validity. Viewed from the perspective of the believer, any belief that concedes that it suspends its claim to validity represents the mere fact of believing. Students not infrequently preface their remarks by saying "in my view." Unsure about their ability to take responsibility for their claims, they prefer to report their beliefs as facts about them. Reporting the existence of a belief is, of course, different from making a claim.

If the change of the ontological state from a deontological claim to validity to the social fact of believing takes place in an interaction, the practical knowledge underpinning choices is put into brackets. In this form, it is incapable of grounding these choices, for it does not even claim anything. You have reason to eat if you need food. You have no reason to eat if it is a fact about you that you happen to believe you do not need food (while you constantly overindulge because of this misguided belief). The choices that are made by people whose choices are based upon bracketed practical knowledge are "mere choices."

[20] Throughout this work, "legality" is understood in the Kantian sense to mean morally uninvolved conformity with law. This is not consistent with the usage prevalent in Anglo-American circles where "legality" designates the quality of being law. See Chapter 1.

[21] The legal relation is what Darwall would call "second-personal." See, for example, Stephen Darwall, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford: Oxford University Press, 2013) at 151–153.