

LAW AS THEORY: CONSTITUTIVE THOUGHT IN THE FORMATION OF (LEGAL) PRACTICE

Peter Fitzpatrick*

Typical but puzzling engagements with law in Jurisprudence and in civil religion are drawn upon to evoke a dimension of law essential to its practice, a dimension relegated in usual conceptions of law. That dimension entails a responsive regard for whatever is beyond law's determinate existence. The same responsive regard is found also to be the generative force of theory, whether legal or social theory. Law in its practical guise is thence found to have a constituent correspondence to theory. Legal practice can no more escape theory than theory can escape practice.

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Law in its practical guise is found to have a constituent correspondence with theory.

'It's all very well in practice, but what about the theory?'

Anon¹

* Anniversary Professor of Law, Birkbeck, University of London

¹ Yet more thanks this time to Sundhya Pahuja for tracking down a number of sources for this reversal of the standard apothegm – a number so huge that the attribution can only be anon.

Introduction

Marcel Proust, once a student of law and always a social analyst, wrote to his friend George de Lauris in 1903 complaining that ‘your blasted laws’, the anti-clerical laws of the later nineteenth century, produced a certain closing of the mind, an ‘intellectual protectionism,’ and more specifically he complained that the intolerance that these laws had produced in school education ‘is a sign of the dangerous state of mind to which the [Dreyfus] Affair, etc. gave rise.’² Immediately and poignantly, he goes on to instance this:

...I must tell you that at Illiers, a village at whose school prize-giving ceremony my father presided the day before yesterday, the priest has not been invited to the prize-giving since Ferry’s laws. The pupils are taught to look upon all who associate with that priest as persons to be avoided...And I, who remember this little Beauce village, where all eyes are turned towards the niggardly earth, mother of avarice, where the sole striving towards the sky, sometimes mottled with clouds but often divinely blue and every evening at sunset transfigured, where the only striving towards the sky remains that of the church’s pretty steeple – I, who remember the village priest, who taught me Latin and the names of the flowers in his garden – ...I don’t think it is right to have stropped inviting the old priest to the prize-giving, since in the village he stands for something more difficult to define than the social function symbolized by the pharmacist, the retired tobacco-monopoly engineer and the optician, but which is every bit as worthy of respect.³

That this was no transient piece of sentimentality is painfully revealed by the passionate intensity which fires Proust’s letter and by his more general insistence ‘that anti-clericals...draw a few distinctions and look closely at the great social edifices that they want to demolish before setting to work on them.’⁴

² MARCEL PROUST, *SELECTED LETTERS, 1880-1903*, 342-4 (R Manheim trans., 1985).

³ *Ibid.*, at 343.

⁴ *Ibid.*, at 345.

If Proust had been more uncharitably inclined, he could have added that the same Jules Ferry responsible for anti-clerical laws in education, minister for public instruction and later prime minister, that same Ferry saw secular public education ‘as a means of creating national unity through a “religion of the fatherland”’, a ‘Comtean religion of Progress and Humanity’ imbued by, in Ferry’s words, ‘the great Being which cannot perish.’⁵

Although my presiding concern will be that ‘something more difficult to define’ intimated by Proust, for immediate purposes his constrained view of the professional practice typified ‘by the pharmacist, the retired tobacco-monopoly engineer and the optician’ is hardly propitious.⁶ If, dwelling on the theme, ‘is legal thinking a practice?’, we were to follow Proust’s constrained view, then we would only reproduce standard and dismissive notions of how limited and limiting legal thinking is. That drab conclusion would in a way be confirmed by the marginalizing, the disregard of theory as opposed to practice: ‘legal theory,’ writes Laurent de Sutter, ‘is no longer respected among the legal field,’ and he would add that legal theorists, perhaps in self-defence, ‘are more and more claiming the necessity to stay close to the reality of law,’ before concluding that ‘the *malentendu* between legal theory and legal practice has never been so strong.’⁷

Now, ‘mal-entendu’ has been appropriated as an English word. The helpful hyphen accentuates a literal meaning. This is a meaning that does not conform to the standard definition or translation as ‘misapprehension’ or ‘misunderstanding’. Rather, as between legal theory and legal practice there is some evident, if narrow, apprehension or understanding. But what I will show is that there is an illness, something wrong or blocked, in the apprehension or understanding between them. That pathology will be identified as something of a *méconnaissance*, as a disregard, or an inadequate regard, for that dimension of life which Proust saw being denied, even eliminated in a profane practicality – not necessarily an institutionally religious dimension, I hasten to add. More

⁵ MICHAEL BURLEIGH, *EARTHLY POWERS: RELIGION AND POLITICS IN EUROPE FROM THE ENLIGHTENMENT TO THE GREAT WAR* 342-3 (2005).

⁶ PROUST, *supra* note 3, at 343.

positively, that dimension of life will here be related to practice, and legal practice, by way of its affinity to theory. This, I will argue, is theory as necessary for the constitution of practice, and theory to which constituent dimensions of law correspond. For now, I will orient that overall argument by adapting the earlier theme with legal thinking to a consideration of the failed attempts to constitute a thought of modern law.

Constitutive Thoughts of Law

Although it is to claim too much too soon, there are modernist indications of an affinity between law and that dimension of being discerned by Proust in the religious. Confining ourselves to that revolutionary tradition – an alluring oxymoron – drawn on by Ferry, Mirabeau wrote in 1792 that ‘the Declaration of the Rights of Man has become a political Gospel and the French Constitution a religion for which people are prepared to die.’⁸ In another representative view, the people are portrayed simultaneously as recognizing the revolutionary ‘Supreme Being’ and as ready ‘to sacrifice itself wholly for law.’⁹ And in more of an operative vein, Chénier heralded the revolutionary national ‘religion...of which our law-makers are the preachers, the magistrates the pontiffs.’¹⁰ Law, law in operation, was taken to match such deific attributes with its fusing of a near invariant content with a near-comprehensive power of determination.¹¹

Standard modernist claims for law are no more modest.¹² I will take the rule of law as exemplary here, although later I will be attributing its qualities

⁷ Laurent de Sutter, personal communication, 28 May 2005, setting out the generative terms for the seminar series: see *supra* note 1.

⁸ BURLEIGH, *supra* note 5, at 81.

⁹ *Ibid.*, at 94-5.

¹⁰ *Ibid.*, at 81.

¹¹ See eg: JULIUS STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 213 (1964) and, extending the revolutionary tradition to the Napoleonic codes, see DONALD R KELLEY, *HISTORY, LAW AND THE HUMAN SCIENCES: MEDIEVAL AND RENAISSANCE PERSPECTIVES* 42-3 (1984).

¹² Although the distinction in terms of ‘modern’ law fits in with the narrative here, my overall argument will indicate that ‘modern’ law should not be seen as entirely distinct from other epochal types of law.

more expansively to law itself. For the rule of law, for law to rule, there are some practical requirements that would appear to be decidedly impractical. For law to rule it must assume a sameness of content by which to rule, its legendary stability and predictability. Yet it must also be capable of vacating its existing content if it is not to become incapable of ruling a situation changing, changing infinitely, around it. That extensiveness of law requires of it both a self-asserting force of incipient determination and a self-denying openness of response. These contrary dimensions of law's rule – sameness and changefulness, stability and variability – have been matched by a swirling jurisprudential debate. With one side of the debate, we find that for law, and 'not men', to rule, it must be autonomous, enclosed in itself, coherent in itself, and, in a sense above all, self-generating. In stark contrast, on the other side of the debate we find that law is dependent – dependent on 'social change' and such that it is thence necessarily open and intrinsically oriented in a protean attunement to what is ever outside of or beyond it.

Allow me first to prepare the ground, as it were, by looking at the connection between what have been the different failures of this jurisprudential debate to constitute law in either of these two dimensions.¹³ One way of evoking the failure to capture the ipseity of law in the first dimension would be to focus on perhaps the most rigorously sustained effort to do so, that of Kelsen. It is so well-rehearsed that the details would be tedious, but the point I want to stress here, unfairly, is Kelsen's most egregious problem, the problem of what is ultimately constitutive of law. His clearly coherent scheme, his 'pure theory of law,' falters when his structured constitution of the law comes to its ultimate point of coherence, comes to the famed *grundnorm*, a norm which stands outside of the law that it ultimately constitutes. The identity of this *grundnorm*, this basic norm, alternates vertiginously between legal norm, legal transcendent, vacuous pre-supposition, and hypothesis.¹⁴

¹³ The account that follows could be read as so many instances of theory as practice, of theory reduced to ossified practice, with the putative theory setting the mantric terms for what become various jurisprudential orthodoxies. My analysis focuses on a dynamic opposed to this but such stultifying of theory also needs attention.

¹⁴ See the range of more or less plausible attributions surveyed in STONE, *supra* note 11, at 124-5.

Although this opening to an uncertainty, even to an emptiness, in law's 'original' relation is considered a failure in Kelsen's theory, I will later adopt it obliquely as a success, but in the meantime, and to indicate that an imperative quality of law may be involved here, I will show how perhaps the most notable attempt to rectify Kelsen's *grundnorm*, at least in an English tradition, ends up repeating its supposed failure. Again, brevity is appropriate. In *The Concept of Law* Hart follows a trail that is both Kelsen's and 'very familiar': 'if the question is raised whether some suggested rule is legally valid, we must in order to answer the question use a criterion of validity provided by some other rule.'¹⁵ Rule is thus hierarchically connected to rule, culminating at a point where no further connection is possible. Here we find an ultimate rule of recognition which imparts an integral existence to law. Without going into the detail of how this rule of recognition may differ from Kelsen's *grundnorm*, let us proceed to the similarity of ostensible failure. The obvious problem which now supervenes, as Hart sees it, is that 'the rule which, in the last resort, is used to identify the law escapes the conventional categories for describing the legal system'.¹⁶ At which point Hart finds he has to resort to something beyond law to establish the existence of the rule of recognition, something which is 'an empirical, though complex, question of fact'.¹⁷ Hart wants also to say, if not very loudly, that the rule of recognition somehow combines law and fact, somehow combines what is within and what is beyond law; yet Hart had already founded his search for 'the concept of law' on the inability of factual observation from beyond the constituted law to account for it.¹⁸

We could perhaps begin to move beyond the jurisprudential failure to provide an integral thought of law's self-constitution by connecting this failure to the more general modernist failure to constitute the thing-in-itself. At this stage I will confine the connection to another tantalizing failure as observed by

¹⁵ HLA HART, *THE CONCEPT OF LAW* 103 (1961).

¹⁶ *Ibid.*, at 107.

¹⁷ *Ibid.*, at 107, 245.

¹⁸ *Ibid.*, at 108 and, for this inability of factual observation, see chs 2-4. Strictly, what factual observation is unable to account for is the legal rule but for Hart law is a system of rules.

Nietzsche: “‘Things that have a constitution in themselves” – a dogmatic idea with which one must break absolutely’; to which he would add, no more amenably, ‘there is no thing without other things, i.e., there is no “thing-in-itself”’.¹⁹ Later I will more agreeably attribute a certain necessary, if precarious, success to the effort to constitute law as the thing-in-itself, but for now I will only draw on a parallel in the failures to constitute law and to constitute the thing-in-itself, a parallel which reveals each as constituted by the relation to ‘other things’, to what is beyond it.

Which takes us to the other side of the jurisprudential debate, to the mode of constituting law in a dependent relation to what is apart from or other to it. The scholarship on law and society is perhaps the most conspicuous instance. The type of constitutive force claimed here could be called ‘strong’. This strong force is, in terms of Kant’s idea of the constitutive, ‘practically determining.’²⁰ It would be at least courteous to engage initially with this constituting of law by way of a specifically ‘constitutive theory’ in Jurisprudence and in the social theory of law. In one of its dynamics, this constitutive theory is a reaction against the ‘domain assumption’ of most scholarship on law and society, the assumption that law is constituted in a comprehensively dependent relation on society, usually a relation in which law is rendered as an instrument of society.²¹ Proponents of this constitutive theory are prompted at least in part by the observation of situations where law appears to be constituting or, in the accepted terminology, shaping social relations or social identities. So, such theorists would have it that not only is law constitutively dependent on society, but society is also constitutively dependent on law – a matter, in all, of ‘complex, mutually constitutive relationships’.²² This perceived mutuality is not confined to that

¹⁹ FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 302 (ss 557 and 559) (Walter Kaufmann and RJ Hollingdale trans., 1968).

²⁰ IMMANUEL KANT, *CRITIQUE OF JUDGEMENT* 286 (5:457) (James Creed Meredith trans., 2007).

²¹ The term ‘domain assumption’ is taken from ALVIN W GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 31 (1971).

²² Elizabeth Mertz, *Legal Loci and Places in the Heart: Community and Identity in Sociological Studies*, 28 *LAW & SOC REV* 971, 972 (1994).

between law and society. Other theorists would object to the instrumental constitution of law in terms of its dependent relation to, for example, economy or some overall 'structure in dominance', and they would grant law its own constitutive force in any such relation.²³ I will, however, continue with the instance of society here.

Without wishing to dissent at all from this constitutive theory, not least because I will end up adopting something like it, there are some rather immediate problems with it. Bluntly, we would plunge into circularity and a certain inconsequence if we purport to constitute something in a relation to that which it constitutes. With the strong or practically determining mode of constitution, the situation involved here cannot be one where law and society relate simply as a matter of marginal or vague influence. If this were all they did, then the distinct integrity of each would be simply affirmed and they would not be constituted relationally. They must, then, be related in a necessary way to the effect that one would be 'constitutively' different or non-existent without its relation to the other. Yet if law and society are produced in 'their' relation, what is there to keep them distinct, to keep them as distinct 'things'? Why should they not simply dissipate in the relational soup? To counter this dissipation, we would seem to need a *tertium quid* or need each thing to be constituted in itself as well as being constituted relationally. More on that delicate combination and the commonality later. All I wish to extract at this stage by way of the specific constitutive theory of law is that law and society seem to be constituted in a relation to each other, a relation that is necessary but indefinite.

That outcome would seem to be replicated with a venerable variety of jurisprudential positivism. This is not just positivism now in the sense of a self-positing by law but, rather, a positing of law as the resultant of something else, the sovereign or sovereignty being the main contenders. This monocausal scenario can be readily disrupted, however, if we move beyond the reduced renditions

²³ A once-famous statement of the case was E. P. Thompson's objection that the confinement of law in terms such as 'structure in dominance' confines it to a thoroughly subordinate 'level' whereas the glorious sweep of his intemperate observation found a constituent law that 'did not keep politely to a "level" but was at every bloody level': E.P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* 130 (1978).

of the ancestor-figures forced to support it. So, Bodin is invoked frequently for the nostrum that '[t]he first attribute of the sovereign prince... is the power to make law binding on all his subjects'; to which nostrum he would resoundingly add that 'the principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent'; and for good measure, 'it is expedient that if he is to govern his state well, a sovereign prince must be above the law'.²⁴ Yet, and this is much less frequently remarked, Bodin would in many ways scale down such sovereign conceit. I will take only two of them here. With one, Bodin would bind the sovereign in the 'covenants' made with the subject, covenants not to be 'confused' with law since law is the creation of the sovereign and does not bind him, whereas covenants with the subject do so bind him.²⁵ But the abjection of law itself is sharply qualified in the second way of constraining sovereignty where, towards the end of *The Six Books of the Commonwealth*, law is accorded a practical primacy, for if the commonwealth, no matter by what kind of 'sovereign power' it is ruled, 'is governed without law and all is left to the discretion of the magistrates to distribute pains and penalties according to the importance and status of each individual, such estate could be neither stable nor durable... There would be no bond of union between the great and the humble, and therefore no harmony between them'.²⁶

The other primal upholder of the sovereign as law's epigenesis, and perhaps the most influential, is of course Hobbes. And, as is excessively well know, for Hobbes a law is an emanation of the sovereign, and the sovereign Leviathan is nothing less than a 'Mortal God', one with a complete and terrifying power.²⁷

²⁴ JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 32, 43 (Book I, chs 8 and 10) (MJ Tooley trans., nd).

²⁵ *Ibid.*, at 29-30, 34 (Book I, ch 8).

²⁶ *Ibid.*, at 206 (Book VI, ch 6).

²⁷ For these revisionist points and the line of argument that follows now, see PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 93-5, 105-7(2001); and looking further afield into the works of Hobbes see especially *ibid.*, at chs 14-15, and THOMAS HOBBS, *THE ELEMENTS OF LAW NATURAL AND POLITIC* 58, 61 (ch 16, para 4 and ch 17, para 2) (nd), and generally ch 18; also THOMAS HOBBS, *DE CIVI* 18, 41 (ch 1, para XV and ch 4, para I) (nd), and THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER & A STUDENT OF THE COMMON LAWS OF ENGLAND* 68, 166 (paras 27-8 and para 204) (1971).

Yet closer acquaintance with Leviathan reveals an unexpectedly tender side. Leviathan remains bound by the covenants that brought it, and political society, into existence. These were covenants between a people whose life was not so unrelievedly dire as Hobbes at times takes it to be, and from that life the people retain a primal efficacy which Leviathan must accommodate if it is not to lose the right of sovereign rule.²⁸

From that restriction on Leviathan, then, Hobbes derives an extensive list of 'liberties', and from Leviathan's constituent duty to secure '*the safety of the people*' Hobbes derives even more, since: 'by safety here is not meant a bare Preservation, but also all other Contentments of life, which every man by lawfull Industry, without danger, or hurt to the Common-wealth, shall acquire to himselfe'.²⁹ In a like vein of empathic engagement with its subjects, the very commands of Leviathan, the laws, must be 'good', equal in their application, impartially administered, knowable, and few.³⁰ Even more startling, just as 'men' have been able to create a sovereign Leviathan, 'so also have they made Artificiall Chains, called *Civile Lawes*, which they themselves, by mutual covenants, have fastened at one end to the lips of that Man, or Assembly, to whom they have given the Sovereigne Power, and at the other end to their own Ears'.³¹

Very much in the shadow of Hobbes, but of historically unsurpassed significance in English jurisprudence, there is John Austin. He will provide our final example of the dubious sovereign source of law. With little strain on originality, Austin initially announces that law is a command of a political superior to a political inferior, and that this 'superiority... is styled sovereignty'; and, indeed, an exclusive and independent sovereignty accorded general and habitual

²⁸ THOMAS HOBBS, *LEVIATHAN* 231 (175) (nd) – his emphasis.

²⁹ *Ibid.*, at 203 (152), 237-40 (180-2) (nd).

³⁰ *Ibid.*, at 147 (108-9) (nd) – his emphasis. The imagery is especially telling in that the all-powerful Leviathan evokes *Job* where we find that this creature of the sea cannot be 'draw[n] out...with a hook...or his tongue with a cord which thou lettest down' (41:1).

³¹ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED (SECOND ED.) AND LECTURES ON JURISPRUDENCE* at Vol 1: 1, 5, 170-3, 179 (1861-3).

obedience is necessary for 'political society' and law to exist.³² There is, however, at least an ambivalence to the criterion of habitual obedience on the part of the populace. It is such habitual obedience to law which Austin relies on to distinguish an operative sovereignty when it is subordinated to a superior power; so, it was such habitual obedience which ensured that 'the French government was sovereign or independent' even whilst that same government 'obeyed' the allied armies occupying France in 1815.³³ All that marks, all that constitutes this beleaguered sovereign is law in the obedience to it. And, furthermore, the populace does not exhibit a numbed or simply sovereign-led obedience; rather, for Austin the legal rule entails a felt obligation to follow it.³⁴

Of course, within a milieu of legal theory some account must be taken of the famed corrective Hart administered to Austin on precisely this matter of obligation, a corrective facilitated by Hart's ignoring what Austin wrote on this score.³⁵ Briefly, for Hart it was inadequate to see law as the command of the sovereign habitually obeyed because seeing law in this way ignored the element of obligation in law. For Hart law is given affect by legal rules being carriers of obligation, and hence being things formed and used by people in active and reflective ways, and not by people as mere creatures of habit. He would also depart from venerable attempts in Jurisprudence to identify law in terms of some 'external' factuality, and he would do so by bringing to bear an integral 'internal' aspect of rules in which people use rules 'in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism or punishment, viz., in all the familiar transactions of life according to rules.'³⁶ In this way Hart opens up law demotically in a relation between it and the social, but having done so he resorts to various expedients to close it down again, for example by asserting a stable and containing 'core' to all rules, the impossible core-in-itself, or by finding that for a legal system to exist

³² *Ibid.*, at Vol 1: 172-3.

³³ *Ibid.*, at Vol 2: 3, 15, 158-9.

³⁴ *Ibid.*

³⁵ HART, *supra* note 15, at 88.

³⁶ See PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 197-201, 207 (1992).

it is only officials who need exercise the internal aspect of rules, leaving law with no constituent relation to an impossibly inert society, a society of automats subject to the absolute rule of these officials.³⁷

The jurisprudential impasse in the many manifestations of it just considered is that the constitutive thought of law impels us to see law as dependent on its relation to other things such as sovereign or society, yet when we regard those other things in relation to law, they appear to be dependent on it or to assume an impossible existence if separated from it. I will now explore that seeming impasse by way of some characteristic concerns with practice and with theory and in this way move towards a more integrated constitutive thought of law. The outcome, in terms of the story so far, is that one cannot theorise law as if theory in some way preceded law because their constituent dimensions are the same and unsurpassable.

Theorising practice and Practicing Theory

Legal 'practice' of the kind posed by Laurent de Sutter³⁸ – the practice of the legal profession, of legal practitioners, the practice of the courts – this practice is meant to have a situated solidity to it. It is what is commonly, actively, palpably done. To put something into practice is to commit it to an operatively immediate and secure domain. 'Practice' contrasts in all of this with an ethereal, attenuated, conjectural, impractical 'theory'. The heretical thought that 'practice' may not be so practically amenable is indicated by the Oxford English Dictionary where 'practice' is accorded no less than fifteen senses.³⁹ And our uncertainty about practice may be compounded if we recall that its philosophical siblings have failed to account for its formation.

³⁷ See *supra* note 1 as well as *supra* note 5 above and the accompanying text.

³⁸ Oxford English Dictionary, Second Ed., CD-ROM v 3.1 (Oxford University Press, 2004), 'practice'.

³⁹ DAVID HUME, A TREATISE OF HUMAN NATURE 44–6 (1969). This is one, if famed, strand of Humean thought and does not take account of his claim that it is our human nature that connects us, with some efficacy, to reality. Since Hume would also deny rational thought the ability to make that connection, it remains ultimately impossible to establish it in such rational terms.

Some time ago, but not without more ‘ancient’ precedents, Hume revealed that empiricism, as a reliance on practical experience, does not give us any confident grasp on a reality external to us.⁴⁰ Just as discouraging, if more productive, is the outcome reached by pragmatism, that most ‘practical’ of philosophies. The argument here, made by way of a brief focus on the two ‘classical’ pragmatists, will be that pragmatism’s abiding utility – what it might do for, say, law or politics – reproduces the very dimensions of more ‘theoretical’ philosophy that it would seek to subordinate or surpass. For Charles Sanders Peirce, pragmatism was to give us ‘practical bearings’, yet this could still lead us to an ultimate truth commanding universal assent – an achievement more akin to absolutist metaphysics.⁴¹ More typical of pragmatism, truthful perception for William James produces, or there is nothing to stop it producing, as many practical truths as there are perceivers.⁴² We could, however, pragmatically use these failures to give us a ground for the formation of practice, use them to begin to indicate what is involved in such a formation.

Hume’s difficulty is, of course, usually taken to be characteristic of modernity, a modernity in which there is no transcendent and resolving reference endowing our experience or our practice with assured content. Nor, coming from within that experience or practice, can we extend to or encompass its constituent relations. The determination of its relational ‘context can never be entirely certain or saturated.’⁴³ In a sense aptly then, James would bequeath a collection of stark singularities from which, in their incommensurable diversity, no commonality of experience or of practice could be distilled. Or, in the alternative, if the only allowable possibility remains that experiences or practices are incommensurable yet somehow in common, then the only available commonality would require them to be the same as each other and

⁴⁰ CHARLES SANDERS PEIRCE, *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, VOLUME VI: PRAGMATISM AND PRAGMATICISM* 2, 37 (1960).

⁴¹ Eg: WILLIAM JAMES, *ESSAYS IN RADICAL EMPIRICISM* ch. 2 (1996).

⁴² Jacques Derrida, *Signature Event Context* in *JACQUES DERRIDA LIMITED INC.* 3 (Samuel Weber and Jeffrey Mehlman trans., 1988). As this line of argument at least indicates, no ultimacy is being accorded here to the claims of immanentism or innatism.

⁴³ Even if only in part, any enduring settledness would require a total hold on all that could ever be of the commonality.

hence entirely commensurable. The equivalent in Peirce's terms would have to be at least the prospect of surpassing truth in which the singularities would be quite subsumed.

More positively, we could extract from this refined failure of practical formation the opening to another approach. Practice entails the distinctiveness, the singularity of lived experience as opposed to some 'theoretical', some general or rationalized accounting for experience. Putting aside the rendering of practice as the solitary activity or habit of an individual person, if persons are in a practice, or carrying on a practice, the singularity of the lived experience of each in that practice cannot, as we just saw, subsist simply as singular, as incommensurable. This is not simply because any practice involves an element of commonality to which singularity must give way, at least to some extent. Rather, and paradoxical as it may seem, the existence and maintaining of singularity depends, as we saw, on the element of commonality. The alternatives, as we also saw, would entail the loss of singularity either, with James, in sameness or, with Peirce, in a subsumption to some terminal truth.

If, however, the singular carrying on of a practice has to be attuned to the commonality of that practice, the commonality itself has to be receptive to the singularity. Singularity would be lost if the commonality on which it depends were enduringly set.⁴⁴ Furthermore, the determinative affirmation of a set content would be inimical to the infinite variety of possible relation between singularities. It would also be inimical to the infinite variety of possible relation between the practice and the world. These relational imperatives have, as it were, to be built into the living commonality. Yet this commonality cannot be an utterly receptive vacuity since that would leave the only available commonality as an entirely commensurable sameness, and that would be to deny singularity. So, there has to be some set content to the commonality.

Such seemingly opposed dimensions of the commonality, its set and its receptive dimensions, can be illustrated in the correspondence often drawn

⁴⁴ See Oxford English Dictionary, *supra* note 38, 'practice' simple sense 2a; and RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 317 (1976).

between practice and custom or customary action.⁴⁵ Custom is usually taken as typifying the set dimension. It is fixed and unchanging. To comply with one English criterion, it must be immemorial.⁴⁶ Yet custom would no longer be custom if it were not receptively transformative. Should it cease to be receptive, cease to change with changing conditions, cease adequately to correspond to what is actually done, it can no longer be the custom of the grouping in which it once pertained. I will now develop the seeming opposition between these dimensions of practice by way of a companionable account of theory and then of law.

Bluntly, theory is that which unifies these dimensions of practice. If this may be modestly assumed for the moment, then we would expect theory to be intimately tied to practice since it must take into itself the constituent dimensions of practice. Yet if it is to unify these dimensions, it cannot simply be identified with practice and with these disparate dimensions of practice. It must stand markedly apart from practice.

Conveniently for this assumption about theory, for this theory of theory, the many meanings ascribed to 'theory' can be divided between those which would see theory and practice as congruent, even as the same, and those which would see theory as radically different from and opposed to practice.⁴⁷ This latter oppositional variety of meaning usually comes from settings empathic to practice, settings in which theory is diminished or merely suppositional, and out of touch with the experience of situations 'on the ground'. There can, however, be some convergence between such oppositional meaning and meanings that

⁴⁵ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, 16th ed, Vol I 67, 76 (1825).

⁴⁶ For what follows in this paragraph on meanings of theory and their relation to practice see eg: WILLIAM, *supra* note 45, at 316-18.

⁴⁷ See Michael Gardiner, 'Of Woodsheds, Politics and Cultural Theory', a review of MM BAKHTIN, TOWARD A PHILOSOPHY OF THE ACT, at <http://www.ualberta.ca/~di/csh/csh10/Bakhtin.html> (last accessed 13 April 2009). See also JACQUES DERRIDA, NEGOTIATIONS: INTERVENTIONS AND INTERVIEWS 1971-2001, 13 (Elizabeth Rottenberg trans., 2002); and JACQUES DERRIDA, ROGUES: TWO ESSAYS ON REASON 128 (Pascale-Anne Brault and Michael Nass trans., 2005).

would import an identity between theory and practice. We see this in varieties of praxis where the opposition must be overcome by thoroughly aligning theory with material practice. Other ideas of praxis would not so much subordinate theory to practice as merge the two in some sublation or apotheosis. Theory thence becomes contained and deposed by 'theoretism'. Guided by Bakhtin, 'theoretism' can be described as 'the rationalistic desire to subsume the open-ended and "messy" qualities of real-life communicative and social acts under the aegis of an "all-encompassing explanatory system—"' a suppression of 'the "eventness" of the everyday social world'.⁴⁸ Inversely, the connection to practice remains essential for theory.

If we may now gloss slightly Greek etymologies for 'theory' we would find it is most commonly described in terms of a viewing or a seeing.⁴⁹ Simply viewing or seeing would fit the absorptive passivity which theory must have to accommodate the receptive dimension of the commonality of practice. But to combine the receptive and the set dimensions of the commonality of practice, theory has to be more than passive, and an obliging etymology would also offer a more active sense of 'looking'⁵⁰: the opening receptiveness of theory integrates with a prehensive orientation that takes impetus from the commonality of practice but which is always extending illimitably beyond it.

The receptive passivity and the active orientation join together in a responsiveness of theory, in what could be called the responsibility of theory, in its being responsible, to resurrect an antique spelling.⁵¹ The combining of the set and receptive dimensions of practice, this responsibility of theory, into some accounting for or explaining of practice can never itself be set. The seeming

⁴⁸ Oxford English Dictionary, *supra* note 38, 'theory' etymology and meanings 1 and 2; and WALTER W. SKEAT, A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 551 (1963).

⁴⁹ Oxford English Dictionary, *supra* note 38, 'theory' etymology; and John Frow, *Theory*, in NEW KEYWORDS: A REVISED VOCABULARY OF CULTURE AND SOCIETY 347 (Tony Bennett *et al* eds., 2005).

⁵⁰ Oxford English Dictionary, *supra* note 38, 'responsible'.

⁵¹ Jacques Derrida, *The Law of Genre*, in JACQUES DERRIDA, ACTS OF LITERATURE 231 (Avital Ronell trans., 1992).

resolution of the dimensions 'in theory' is only ever for the time being. Borrowing from Derrida in a somewhat different context, theoretical designation 'gathers together the corpus and, at the same time, in the same blinking of an eye, keeps it from closing, from identifying itself with itself.'⁵²

Whilst this non-closure or non-fulfilment intrinsic to theory would deny invariance to practice and would eternally counter the pretence of its being a thing-in-itself, theory's responsibility in its uniting of the set and receptive dimensions of practice is to endow practice with some stability.⁵³ But this is a stability that cannot be reduced to the set dimension of practice. Stability, says Derrida, 'is not natural, it is because there is instability that stabilization becomes necessary'.⁵⁴ 'All stability in a place', adds Derrida, is 'but a stabilization or sedentarization'; 'displacement', or 'the process of dislocation is no less arch-originary, that is, just as 'archaic' as the archaism that is always dislodged'.⁵⁵ The outcome generated by theory is that this 'stability' of practice has to be held to. What endurance it has cannot only be in-itself but has to be in its labile engagement with and accommodation of its constant 'displacement' or 'dislocation', of its being ejected or drawn out from its set or determinate place into the insistent possibility of its being otherwise.

And so, to law. Resuming now the earlier constitutive thoughts about law, the difficulty in claiming law for an encapsulated practice, for legal practice, is heightened by that persistent effort and that persistent failure, which we have already observed, to constitute law as an encapsulated thing-in-itself. In practical terms we know that, 'in law', 'no existing, coded rule can or ought to guarantee absolutely' in advance the outcome of any decision.⁵⁶ Indeed, if there were no challenge to, no disruption of, an encapsulated practice, there would be no call

⁵² *Ibid.*, for the quoted phrase.

⁵³ Jacques Derrida, *Remarks on Deconstruction and Pragmatism*, in DECONSTRUCTION AND PRAGMATISM 83-4 (Chantal Mouffe ed., Simon Critchley trans., 1996).

⁵⁴ JACQUES DERRIDA, SPECTERS OF MARK: THE STATE OF THE DEBT, THE WORK OF MOURNING & THE NEW INTERNATIONAL 82-3 (Peggy Kamuf trans., 1994).

⁵⁵ Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, in JACQUES DERRIDA, ACTS OF RELIGION 251 (Mary Quaintance trans., 2002).

⁵⁶ See the text accompanying notes 23-28 above.

for law, for the legal decision. In responding to that call, law goes ever beyond its determinate existence, and in so doing it takes on the receptive dimension of the commonality of practice. Yet in extending itself this way, law is not purely, passively receptive. Law extends in an active responsiveness, an engaged responsibility. That responsiveness and responsibility are oriented in part by the configured contents of law, contents formed 'in practice' and which have to be already 'there' so as to be able to base a claim or argument and to feed judgement.

There is, I hope, by now no need to underline the similarity between the constitution of theory and of law just outlined, but there remains still a need to extend the similarity to the earlier and resonant account of law and the jurisprudential impasses that got us to this stage. Like theory, law's responsiveness and responsibility are oriented illimitably. That imperative was at least intimated by the jurisprudential attempts to trace an instituted, a posited law to its constituent sources – attempts such as those by Kelsen and Hart which end in a failure of delimitation, a productive failure that came from the pursuit of law's self-constitution, and a failure that intimated something ever beyond any constitution posited in-itself. The alternative jurisprudential tradition would erect a constitutive source apart from law and thoroughly account for law in its terms, society and the sovereign being the two instances we considered earlier. Such efforts were, however, met with counter-indications that society and the sovereign constitutively depended on law.

It was Hobbes, as we saw, who tied the mighty sovereign both to law and to primal covenants that were socially constitutive.⁵⁷ We could now return to Derrida so as to bring law and the social closer together:

[W]e are caught up, one and another, in a sort of heteronomic and dissymmetrical curving of social space – more precisely, a curving of the relation to the other: prior to all organized *socius*, all *politeia*, all determined 'government', *before* all 'law'. Prior to and before all law, in Kafka's sense of being 'before the law'.

⁵⁷ JACQUES DERRIDA, *POLITICS OF FRIENDSHIP*, 231 (George Collins trans., 1997), – his emphasis.

Let's get this right: prior to all *determined* law, *qua* natural law or positive law, but not prior to law *in general*. For the heteronomic and dissymmetrical curving of a law of originary sociability is also a law, perhaps the very essence of law.⁵⁸

So, this law before the law, this law of the law, is in 'essence' indistinguishable from law itself. It could thence be said, rather more compactly, with Rousseau: 'Laws are really nothing other than the conditions on which civil society exists'.⁵⁹

In so essentially generating the social, in so orienting us in our being together, law takes into itself those same combined dimensions which emerged from the relation of theory and of law to practice, the combining of the set and the receptive dimensions into a constituent responsiveness and responsibility. Much as that may have a ring of the conclusory to it, we are still left with the formidable challenge posed by one of the preliminary constitutive thoughts raised earlier about law. That thought collected qualities marking the rule of law as something of a paradigm of the thing-in-itself. For the rule of law, or we could now say for law in its essence to rule as law and not as the instrument of something else, law would have to be autonomous, enclosed in itself, coherent in itself, and self-generating.

If, or to the extent that, it failed to match any of these qualities, something else could rule instead of or in conjunction with law. Yet if law were not open, diverse, and constitutively related to what was ever beyond it, it could not extend to and incipiently rule any effect or affect of our infinitely changeful being together. So, if law is to so extend and assume the capability of being ever otherwise to what it may be 'at any one time', it has to take on an ultimate vacuity, and that vacuity allows of its occupation by such as sovereign and society.

The resolution, such as it is, is that law brings to bear on the alterity to which it constantly relates its qualities of autonomy, self-enclosing, self-cohering,

⁵⁸ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 83 (Book II, ch 6) (Maurice Cranston trans., 1968).

⁵⁹ Jacques Derrida, *Remarks on Deconstruction and Pragmatism*, in *DECONSTRUCTION AND PRAGMATISM* 81 (Simon Critchley trans., Chantal Mouffe ed. 1996).

and self-generation. In so doing, it draws, 'curves', borrowing Derrida's term, the alterity into a domain where these qualities are existent yet always potential and never fully realised or realisable. It is not possible to identify some density of realisation and take that as an indicator that law or the rule of law definitively exists. There is only ever as much law as there is.

Conclusion

In this domain of potentiality, law takes on an effective transcendence. It is only in transcendence that law's determinate content, its content for the time being, can be reconciled with law's infinite extensiveness and ultimate vacuity. Law partakes of that quasi-transcendentality' described by Derrida, as 'at once ironic and serious'.⁶⁰ It 'seriously' is a transcendence – 'quasi'- perhaps because it claims no continue determination, yet it is ironic in its assertion of a presence that is never enduringly present. It is a transcendence akin to that which Proust comes to give us in the steeple at Illiers solely 'striving towards the sky' and ever surpassing a profane practice.⁶¹ And so a generous Greek etymology would provide English with a further meaning of 'theory', theory as a theory, a legation that comes 'to perform some religious rite or duty'.

⁶⁰ PROUST, *supra* note 2, at 343.

⁶¹ Oxford English Dictionary, *supra* note 38, 'theory' meaning 2.