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# Preface

Argumentation, reasoning and justification have always been inherent parts of lawyers’ work. Lawyers themselves are obviously well aware of the fact and would almost unanimously acknowledge that enhancing one’s knowledge and skills in argumentation has a direct impact on the quality of their work.

The issue of argumentation has been generally approached from two directions. The pragmatic approach has appraised the argumentation as a field mostly concerned with the persuasion of others (e.g. an opposing party or a judge) in order to succeed in legal battles (e.g. negotiation or court trial). It includes training in legal writing, legal advocacy and negotiation. The approach aims at developing extremely valuable soft skills that can be directly applied in everyday legal practice.

The theoretical approach to argumentation is usually concerned with the study of the nature and structure of arguments, development of models and frameworks of argumentation and assessment of ways to strengthen or attack arguments. The possibilities of engaging AI techniques in the evaluation and development of arguments have been explored quite recently as well.

However, by many academicians the pragmatic approach is often disapproved as a kind of sophism allowing to effectively uphold any intended conclusion. Practicing lawyers on the other hand have certain strong reservations regarding the theoretical approach. They are usually aimed at its (supposedly) very low potential to be actually applied in everyday legal practice.

This publication is conference proceedings to the Argumentation 2011 International Conference on the Alternative Methods of Argumentation in Law the aim of which is to establish a permanent forum to bridge the aforementioned gap. The conference consists of four workshops/streams each specialized in a specific and unique method of studying legal argumentation — Formal Methods in Legal Reasoning, Law and Language and Law and Visualisation and Law and Literature.

### **Formal Methods in Legal Reasoning**

In practice as well as in academia legal arguments take form of a rather unstructured text — either written or spoken — formulated in natural language. It has been so ever since the first legal arguments appeared in the history and has been justifiable by the very fact that the text presented in natural language offers the most convenient way to express and preserve legal arguments for both — the creator of the argument (or the transmitter) and the consumer (or the recipient).

Expressed in such a form legal arguments are transmitted by those means of human communication that are the most natural and easily understandable. However, there are serious harmful consequences arising out of this situation, the most significant of them being the ambiguity of the information communicated in this way and its low comprehensibility for the current information and communication technologies. While it is possible to accept that law itself is a system with certain degree of fuzziness, this does not imply that arguments formulated within the system should be fuzzy as well. In fact, the opposite is true, since it is desirable to achieve such a framework for the argumentation in which no space for ambiguity would be left.

It is the goal of the “Formal Methods in Legal Reasoning” stream to provide a platform for discussing alternative means of structuring and presenting legal arguments and reasoning leading to the disambiguation of such a communication and increase the scope for its possible automatic processing while preserving its natural form and general intelligibility.

It should be stressed out that formal methods of structuring legal arguments should not alienate the field of legal argumentation and reasoning from the common producers and consumers, but to make the argumentation and reasoning more accessible, understandable and useful.

There are three papers included in this proceedings dedicated to the discussion of formal methods in legal reasoning. In ‘Dual-Process Cognition and Legal Reasoning’ Ronkainen expose us to the fundamental question of the context in which formalization of legal reasoning is to be perceived. Bodych provides a dense overview of the contemporary theories within the field in ‘Legal Reasoning and Argumentation.’ ‘Determining the Fallacy and Non-Fallacy of Argument’ is Kopec’s attempt to prove that in most of the cases the *ad hominem* argument is to be considered as non-fallacious.

## Law and Language

Modernity and post-modernity in legal theory and critique has brought the language and law into close consideration. Language-related criticism, imagination, narrativity or rhetorical devices have found their way into the analyses of legal argumentation and reasoning.

With the development of IT and their use in legal environment these issues acquire a new dimension (hence the use and development of translation devices and other automation).

The ‘Law and Language’ stream aims to provide a space for discussing these and related issues in reference to legal argumentation. Thus, it will bring together scholars not only of legal background but also from various fields of expertise: linguistics, translation, philosophy, media studies, cultural studies, literary criticism etc.

There are four papers dedicated to the issue to be found in the proceedings. In ‘Semantic Sting and Legal Argumentation’ Dyrda and Gizbert-Studnicki expose the Dworkin’s famous ‘semantic sting’ to a detailed analysis. Damele compares the argumentation strategies of Italian and Portugese constitutional courts in ‘Rhetoric and Persuasive Strategies in High Courts’ Decisions.’ Surmajová and Balog offers a brief comment on the importance

of ‘Vagueness in Legal Language.’ The cognitive aspects of legal language is assessed in Skoczzeń’s ‘Law, Language and Their Influence on Cognition.’

### **Law and Visualisation**

Commonly, the figure of Justice is depicted blindfolded and the Law is regarded as strictly textual. Simply put, only words (i.e. natural language), either spoken or written, are generally used to communicate the legal norms. However the contemporary society is becoming thanks to the rapid development of information and communication technology steadily more visual. Consequently, the traditional notion of Law and its communication is challenged by this “pictorial turn”.

The “Law and Visualisation” stream therefore focuses on both — the theoretical aspects as well as its practical implications of the law visualisation and visualification. The participants were encouraged to share their thoughts, opinions and experience with the use of visuals/images in legal communication. Especially, the impact on the speeding up of the legal communication, its comprehensiveness and its limits (i.e. the legal interpretation of images) may be discussed. Also, the real life examples of visual legal communication in teaching of law and trial practice were welcomed.

Two papers addressing the topic are included in this proceedings. In ‘Reflections on the Use of Visual Representations of Legal and Institutional Constructs as Assignments in Legal Education for Pre-Service Teachers in Canada’ Burgess provides detailed elaboration on the employment of visualisation techniques in teaching of law. Dudek addresses the topic of visualisation from the point of view of the so-called paternalistic regulations in ‘Paternalistic Regulations Expressed through Means of Visual Communication of Law? Contribution to Another Distinction of Paternalistic Legal Regulations.’

### **Law and Literature**

Studies in ‘Law and Literature’ offer more complex comprehension of the concept of law but also offer new vision of legal methodology. Throughout

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analysis in Law in Literature we ascertain what law is and what the role of law and jurisprudence in society is. Even today in not-ending development in belles-lettres (and other forms of art) we can find new conception of law or new findings in legal methodology.

This stream aims to provide a space for discussing the contemporary applicability of literature in law and jurisprudence. It enables to share findings amongst lawyers, legal academics and experts and academics from various humanities.

The stream has attracted one contribution — ‘Description of Contemporary Law in Dostoyevsky’s Work’ — in which Klusoňová provides her insights into the parallels between law and theatre plays.

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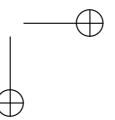
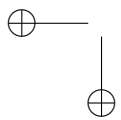
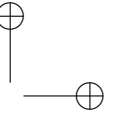
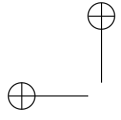
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# Dual-Process Cognition and Legal Reasoning

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**Abstract.** The dual-process framework is a set of theories on human cognition in which cognition is seen as consisting of (at least) two substantially different yet interdependent systems: the older, faster, partly unconscious and automatic System 1 and the newer, slower, fully conscious and considered System 2. When viewing legal reasoning through the dual-process model, we can easily see that System 1 is primarily responsible for deciding a case (or finding the best line of arguments in support of a party) with the help of aligning the particulars of the case with the preexisting framework of statute and case law, whereas System 2 is responsible for generating and evaluating arguments in support of the outcome determined by System 1, thereby opening up an individual’s reasoning process for external critique. System 2 may also override System 1 altogether, but this is only possible in easy cases. In part thanks to the dual-process framework we can take a scientific look into the often discussed but substantially neglected question of Right Answers in law through empirically testable hypotheses. This also has significant implications for artificial intelligence and law. By acknowledging the differences between the two, we can better use the most suitable computational models for each of them individually.

**Keywords:** legal reasoning, legal decision-making, justification, dual process theory.

## 1 Introduction

Consider this simple arithmetical exercise:

A bat and a ball cost \$1.10 in total. The bat costs a dollar more than the ball. How much does the ball cost?

Many respondents tend to answer ten cents rather than the correct five, and this finding has been replicated across numerous populations of test subjects.<sup>1</sup> The \$1.10 is easily split into two salient parts, and when one of them has been used, the only one remaining provides an answer so obvious that many respondents apparently stop right there rather than bothering to do the math. This error is the result of a cognitive bias known as anchoring, and it is but one of the many pieces of evidence for the idea that we as humans perform reasoning in two very different ways: intuitively, quickly and mostly unconsciously using *System 1*, and reflectively, slowly and consciously using *System 2*.<sup>2</sup> In the example, System 1 figures out an answer and is typically so confident about it that System 2 does not even get a chance to check whether it is correct.

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<sup>1</sup>Frederick 2005. In the *best* population, students at MIT (n=61), 48% answered this and two other similar questions all correctly, whereas 7% failed in all of them. In several of the worst populations, on the other hand, more than half failed in all three.

<sup>2</sup>In this paper, I follow the terminology used by the most comprehensive collection of state-of-the-art research within the dual-process framework, Evans & Frankish 2009. The prosaic labels System 1 and 2 are the ones most commonly used in the literature (but by no means the only ones, see Stanovich 2011, p. 18 for a convenient overview of the considerable variation in terminology). The apparent inconsistency between *Systems* 1 and 2 but dual-*process* cognition makes it possible to accommodate a wider range of theories, in which two distinct types of cognitive processing may or may not be handled by distinct systems of reasoning. Generally on dual-process cognition, see also eg. Evans & Over 1996, Stanovich 1999, Kahneman & Frederick 2002, and Kahneman 2003. For a general, dual-process-aware introduction to current theory of human reasoning, see eg. Johnson-Laird 2006.

In this paper I present an overview of the dual-process framework of human cognition and an application of it to the main tasks of legal reasoning. Furthermore, I consider its implications on the question of computational modelling of legal knowledge and legal reasoning which is central for my own field of research, artificial intelligence and law. I also examine a number of related models presented earlier in legal theory in a new light thanks to the dual-process framework.

## 2 The Dual-Process Framework

The idea that the human mind has several distinct modes of operation has a long and varied history from at least Plato through, among others, Descartes, Leibniz, Spinoza, and Schopenhauer to Freud.<sup>3</sup> Of these, the best known version is probably Freud’s, that of an unconscious and a conscious system of thought. The Freudian unconscious system and the System 1 of contemporary cognitive psychology do however differ in several crucial respects. The Freudian unconscious is formed by repressed impulses and it only manifests itself indirectly through dreams and harmful effects such as neuroses. As such, it is indeed no reasoning system at all. On the other hand, repression has no role in the formation of System 1, which is a comprehensive system of reasoning that is mainly beneficial for the individual. That is, whereas unquestionably erroneous forms of reasoning such as that commonly demonstrated in answers to the exercise at the beginning of the paper may be the form of System 1 processing that is easiest to demonstrate, it is however not representative. Many if not most of System 1 processes are absolutely vital to our proper functioning as human beings.

A comprehensive summary of the essential contrasts between the two systems is given in Table 1.<sup>4</sup> It should be noted that the dual-process hypothesis is still very much an evolving one and as such, is not supported

<sup>3</sup>See Frankish & Evans 2009 for a detailed historical look into the dual-process idea and its predecessors.

<sup>4</sup>From Lieberman, p. 294. However, Lieberman uses the terms *X-system* and *C-system* (for *refleXive* and *refleCtive*, respectively) rather than the more common Systems 1 and 2.

	<b>System 1</b>	<b>System 2</b>
<i>Phenomenological characteristics</i>	Non-reflective consciousness Feels spontaneous or intuitive Outputs experienced as reality	Reflective consciousness Feels intentional and deliberative Outputs experienced as self-generated
<i>Processing characteristics</i>	Parallel processing Fast operating Slow learning Implicit learning of associations Pattern matching and pattern completion	Serial processing Slow operating Fast learning Explicit learning of rules Symbolic logic and propositional
<i>Representational characteristics</i>	Typically sensory Representation of symmetric relations  Representation of common cases Representations are not tagged for time, place, ownership, identity	Typically linguistic Representation of asymmetric and conditional relations  Representation of special cases (e.g. exceptions) Representation of abstract features that distinguish (e.g. negation, time, ownership, identity)
<i>Evolutionary characteristics</i>	Phylogenetically older Similar across species	Phylogenetically newer Different in primates or humans
<i>Moderator effects</i>	Sensitive to subliminal presentations Relation to behaviour unaffected by cognitive load Facilitated by high arousal	Insensitive to subliminal presentations Relation to behaviour altered by cognitive load Impaired by high arousal
<i>Brain regions</i>	Amygdala, ventral striatum, ventromedial PFC, dorsal ACC, lateral temporal cortex	Lateral PFC, medial PFC, lateral PPC, medial PPC, rostral ACC, medial temporal lobe

**Table 1.** Characteristics of System 1 and System 2



by a complete consensus regarding many of its details. Or, indeed, even something as central as the actual number of processes involved, which may be two or greater. For instance, one proposal postulates a System 3 for handling conflicts between the first two<sup>5</sup>, another splits System 2 into separate algorithmic and reflective systems<sup>6</sup>. Among the most controversial of the open questions are the extent to which System 1 processes are innate rather than learned and the closely related question of modularity,<sup>7</sup> and whether differing results produced by System 1 and System 2 processes mean that System 1 is irrational in the cognitive biases or that System 1 is also rational but on its own, ecologically determined terms.<sup>8</sup> Whether the two systems have separate or overlapping neural correlates is another open question.<sup>9</sup>

All versions of the dual-process theory do however share a common core, and already that core by itself provides us with good starting point for introducing the notion into legal theory. Just analyzing traditional legal theory and commonsensical observations about legal reasoning in light of the dual-process framework allows us to restate the process of legal reasoning in new, radically different terms, which may help us in trying to find better answers to some of the questions that have troubled legal theorists for centuries. To achieve this, it is not necessary to include the specific details of any particular individual theory, nor is it necessary to postulate additional controversial hypotheses such as an ‘Universal Moral Grammar’<sup>10</sup>

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<sup>5</sup>Evans 2009

<sup>6</sup>Stanovich 2011

<sup>7</sup>The breadth of the current debate is represented well in articles such as Carruthers 2002 and Pinker & Bloom 1990, including the peer commentary published together with the articles.

<sup>8</sup>The different positions in this respect are labelled *meliorist*, *apologist* and *Panglossian* (see also Figure 1) in Stanovich 2009, a representative of the meliorist position, and incidentally also the origin of the *System 1/2* terminology. Gigerenzer 2008 is an example of the Panglossian position. See also Cohen 1981, Stanovich & West 2000, and Barbey & Sloman 2007 (including commentary).

<sup>9</sup>Lieberman 2009, Glimcher 2009

<sup>10</sup>Mikhail 2007, inspired by the equally controversial hypothesis of an Universal Grammar as an innate and quite intricate faculty that forms a common substrate to all natural languages of the world, see Chomsky 1965, and, regarding at least the first decades of

The common core of the dual-process framework can be summarized as follows: System 1 processing is fast, automatic, high-capacity and low-effort, whereas System 2 processing is slow, controlled, limited-capacity and high-effort. Most versions of the dual-process framework do however share a larger number of common characteristics. According to the consensus view, System 1 is also evolutionarily old and shared with animals, parallel, associative, pragmatic, implicit, and unconscious, whereas System 2 is evolutionarily recent and distinctively human, sequential, rule-based, abstract, logical, explicit, and conscious.<sup>11</sup>

### 3 Dual-Process Reasoning in Law

In legal theory, the traditional standard model of legal reasoning is the syllogism: the application of the facts of the case to one or several general legal rules yields the correct decision as an inevitable conclusion. Ronald Dworkin calls this the plain-fact view of law. But, on the other hand:

The plain-fact view is not, I must add, accepted by everyone. It is very popular among laymen and academic writers whose specialty is the philosophy of law. But it is rejected in accounts thoughtful working lawyers and judges give of their work. They may endorse the plain-fact picture as a piece of formal jurisprudence when asked in properly grave tones what law is. But in less guarded moments they tell a different and more romantic story. They say that law is instinct rather than explicit in doctrine, that it can be identified only by special techniques best described impressionistically, even mysteriously. They say that judging is an art not a science, that the good judge blends

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the controversy in linguistics, Harris 1993. I expect that the Universal Moral Grammar approach would fail when confronted with decision-making in real-world problems, just as Chomskyan transformation grammar by itself offers little help in understanding how people manage to parse both ‘Time flies like an arrow.’ and ‘Fruit flies like a banana.’ correctly.

<sup>11</sup>Evans 2009, pp. 33–34

analogy, craft, political wisdom, and a sense of his role into an intuitive decision, that he “sees” law better than he can explain it, so his written opinion, however carefully reasoned, never captures his full insight.<sup>12</sup>

Or, as put more succinctly by Oliver Wendell Holmes:

The life of the law has not been logic: it has been experience.<sup>13</sup>

Unfortunately, this aspect of legal thought has so far not been explained satisfactorily by legal theory. In part, this failure is caused by a general tendency to see System 2 as the only form of human reasoning and therefore to only try to explain its functioning in System 2 terms. This however is symptomatic of an even broader problem, namely a general refusal to see legal reasoning as something performed by actual flesh-and-blood humans rather than something preferably only taking place in the abstract realm of ideas. Dworkin himself with his superhuman Judge Hercules as the paragon of legal reasoning is not without blame in this respect, either.

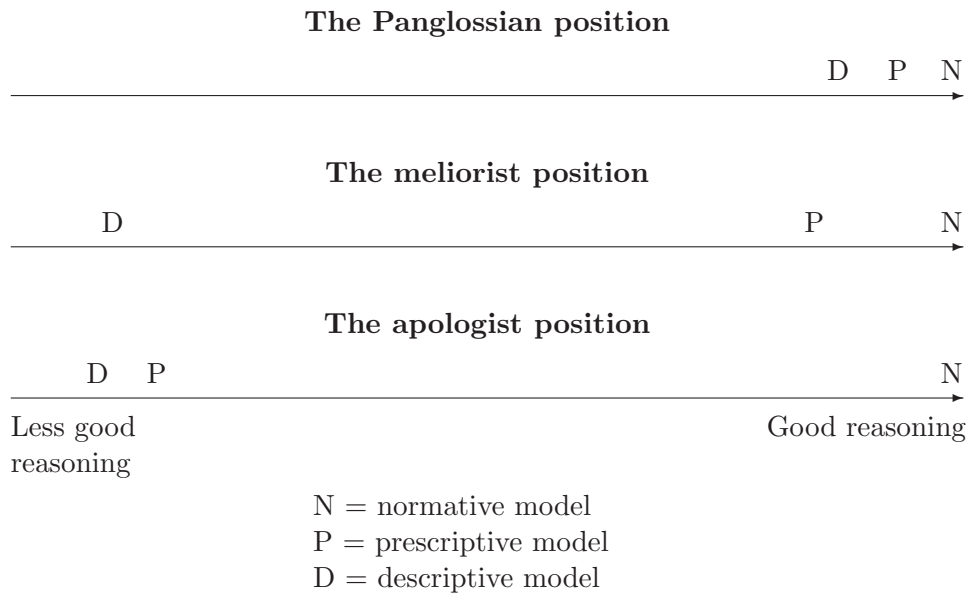
When considering the role of actual flesh-and-blood humans, legal reasoning is at an advantage over other complex domains of reasoning and decision-making. This can be shown by considering the relative positions of people actually do reason (descriptive), how they are told they should reason (prescriptive) and how they ideally should reason (normative). The three basic schools of thought regarding these positions are shown in figure 1.<sup>14</sup> According to the Panglossian, we already live in the best of all possible worlds, and the gap between current practice and the ideal is minimal. The meliorist and the apologist both see a considerable gap between practice and the ideal, but they differ in regard to the potential for improvement through prescriptive measures. The meliorist sees considerable room for improvement, whereas the apologist takes the prescriptive position to be almost as bad as current practice.

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<sup>12</sup>Dworkin 1986, p. 10. At this point, Dworkin further refers to Cardozo 1921, pp. 165–180.

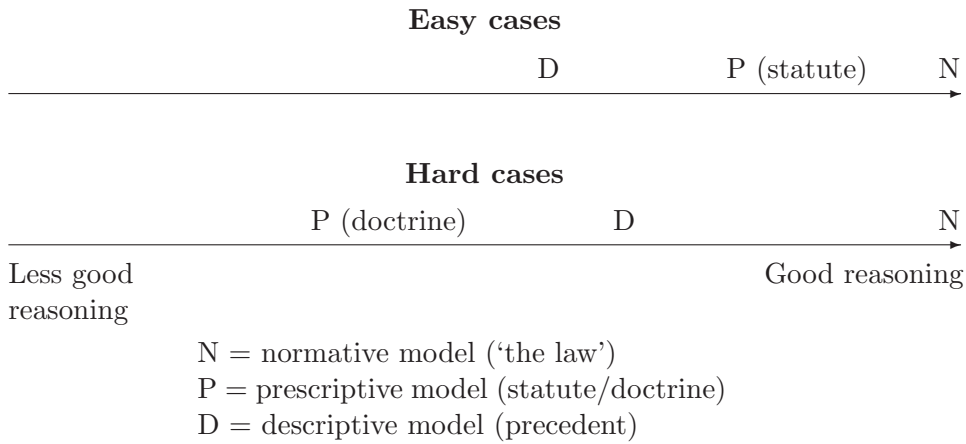
<sup>13</sup>Holmes 1881, p. 1

<sup>14</sup>From Stanovich 1999, p. 5, cf. note 7 above.



**Figure 1.** Three pretheoretical positions on human rationality.

In legal reasoning, the same three positions can be recognized as a starting point. Adopting any single one of them is however beside the point I wish to make, and I do not think that it is necessary or indeed even possible, but rather that they can be used together as a way to visualize the relationships between the different positions regarding particular tasks. In the exercise at the beginning of this paper, for example, the gap between the actual and the ideal is obvious, whereas in the legal domain it may be harder to tell. In legal reasoning, the normative position can be called quite simply ‘the law’. The prescriptive position is typically initially provided by statute law, whereas the descriptive position, that is, the practice of legal reasoning, covers case law. For easy cases, this is a quite adequate explanation and legal theory does not even have to come into the picture at all. In hard cases, however, something unexpected happens. Statute law



**Figure 2.** Pretheoretical positions in terms of sources of law.

is no longer sufficient by itself as a prescriptive model, but rather it must be supplemented by doctrinal and theoretical jurisprudence. According to basically any theory of legal sources whatsoever, the authority of doctrine, if indeed even applicable at all, is always subordinate to precedent. That is, in hard cases, the relative positions of the prescriptive and the descriptive are actually reversed, as shown in figure 2, and this is recognized by the prescriptive position itself. As such, the practical consequences of this may be quite surprising. When studying human reasoning within the legal domain, we are free to consider the actual practice of legal reasoning, even with all its flaws, as the gold standard. Legal theory by itself is not in a position to show conclusively that some particular precedent was decided incorrectly, as much as certain legal theorists might want it to be. Even in the case of the most unquestionably dysfunctional before/after-lunch-type variation, other actual cases must be invoked in order to argue that some particular decision is incorrect.

### 3.1 System 1: Finding the decision

The function of System 1 in the process of legal reasoning is straightforward: it is responsible for seeing the facts of the case specifically as legal facts and then translating those facts into a tentative decision regarding the outcome of the case. This outcome can be, in the mind of a judge, the actual verdict, or, in the mind of an advocate, the most favourable line of argument for advancing the case of one’s party. Once the big picture is clear, the meaning of the details become more apparent.

System 1 processing is massively parallel. As such, it is impossible to fully describe System 1 processing in terms of individual rules, whether for the purposes of identifying individual rules (on the System 1 side) used in arriving at some particular decision or to make a ‘dump’ of the entire rule base used by some individual reasoner. System 1 processing can be understood in terms of heuristics, but it is important not to confuse the two. Heuristics can be produced as explanations of System 1 processes in System 2 terms as more or less simplified representations of the underlying System 1 processes. On the other hand, heuristics can also be learned as conscious rules of thumb, in which case they work as rules in System 2. If a heuristic of this type is a complete description of the problem domain, it may also remain in System 2 only. If it is a simplification of a more complex problem, however, it will be assimilated to the previous System 1 model of the domain.

Naturally this does not mean that *all* aspects of System 1 processes are beneficial.<sup>15</sup> It is clear that cognitive biases arise from System 1 processes, indeed the whole dual-process idea arose from the study of errors of reasoning. In many situations System 1 processes lead to predictable errors of the type that due care by System 2 should be expected to detect and override<sup>16</sup>, on the other hand, in some situations, particularly those of

<sup>15</sup>As much as some advocates of ‘fast and frugal heuristics’ might want to claim this, cf. eg. Gigerenzer 2006, Todd & Gigerenzer.

<sup>16</sup>But far from always does so, see Danziger *et al.* 2011 for one experimental validation of the Realist ‘law is what the judge had for breakfast’ caricature, in which the judges of the studied population making decisions concerning parole were predictably the most

very high complexity, System 1 is the only game in town. It is absolutely imperative to investigate the function of System 1 in these two situations separately. Seeing System 1 merely as the source of cognitive biases or as ‘emotion’ may provide many useful observations on harmful side of System 1 processes in law<sup>17</sup> but it misses the big picture. System 1 is a *cognitive* system, not an emotional one, though in many ways System 1 may certainly bear more resemblance to the emotional system than to System 2.

Another major problem with System 1 is subjectivity. System 1 is subjective in the everyday sense: it varies from person to person at least to some extent. Depending on the amplitude of this variation it can be seen either as inevitable noise or as a harmful interfering signal which should be suppressed. In any case this kind of variation should be considered dysfunctional, the only question is whether eliminating it is necessary or indeed even possible in practice. Even though some particular form of variation might fall into the noise category as far as the system as a whole is concerned, at least for the parties involved it is always significant.

Another and perhaps a more important side of subjectivity is however that the massive parallelization makes it difficult to say why one chooses A rather than B. System 1 is intersubjectively opaque, in the worst case making it impossible to justify one’s line of reasoning in any kind of generally understandable terms, as aptly evidenced by Justice Stewart’s famous dictum regarding obscenity: ‘I know it when I see it.’<sup>18</sup> In order to deal with these problems, we must turn to System 2.

### 3.2 System 2: Justification

If the outcome of a case is decided by this opaque System 1, does it mean that judicial decisions are arbitrary and individual judges may decide cases however they please? No. In this regard, there are two important safe-

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lenient first thing in the morning, then becoming progressively stricter towards lunch, with a similar pattern repeating again both after lunch and after the afternoon coffee break.

<sup>17</sup>Such as Feigenson 2010

<sup>18</sup>Jacobellis v. Ohio, 378 U.S. 184 (1964)

guards. First of all, we do not let just any System 1 make the decisions, but rather almost always there are requirements as to the professional qualifications of judges to ensure at least some degree of consistency. By itself this is however not sufficient, as the well-known (but far from well-understood) phenomenon of judicial temperament illustrates. And this is where System 2 takes over.

When System 1 has come up with a tentative outcome for the case at hand and at the same time has aligned it with the legal system as a whole, it becomes the task of System 2 to explain the details of that alignment. That is, the role of System 2 is to generate legal arguments in familiar terms of statute and precedent after the fact in support for a conclusion that has already been reached. This process of justification has two important functions.

Firstly, this makes it possible to ensure that one’s decision is correct. After all, there might be some statutory provision one’s System 1 has overlooked, or a precedent in favour of a different outcome that is closer to the present case than the one suggesting the tentative outcome one had in mind. In these situations, the tentative outcome must be modified accordingly. After eliminating the first tentative outcome, it is possible that only one other alternative outcome remains, or the correct revised outcome has otherwise become apparent in the justification process, or possibly System 1 must be consulted for a second (third...) time.

Secondly, justification opens up one’s line of thought for external critique. Explaining one’s line of reasoning to others forces one to consider aspects which might otherwise remain unconscious. There is always at least some degree of blindness towards one’s own cognitive biases, so adding more people to the equation helps, especially if there is the kind of diversity that results in substantially differences in individual biases. In law, however, this by itself is not enough. Legal decisions must have a basis in law, that is, decisions must be made based on some specifically acknowledged legal criteria whereas some other potentially influential criteria must explicitly be ignored. In this respect, we can view the task of System 2 in the light



of the theory of legal argumentation as proposed by Alexy and Aarnio.<sup>19</sup> The arguments used to justify a particular outcome in a case must live up to the standards of rationality acknowledged by the narrow legal community of expert professionals. As to specific points of law, these standards must include some theory of sources of law, but that alone is not sufficient, a substantial element of common-sense knowledge is always present as well. System 1 may also respond predictably to many unorthodox forms of argumentation, such as PROOF BY LOUDNESS<sup>20</sup>, which in some circumstances may by themselves be sufficiently persuasive, but which do not live up to agreed standards of rationality in argumentation and as such cannot be used as justification.

### 3.3 Synthesis: Systems 1 and 2 in Interaction

As described above, Systems 1 and 2 work together in the legal reasoning process: System 1 produces the decision and System 2 produces the arguments in support of the decision while also verifying its correctness. This implies a particular temporal order in which System 1 has to act before System 2. This claim should however be taken with two important reservations.

Firstly, even though *the* decision is what we are most interested in in law, System 1 only has to make *a* decision, or perhaps more properly a decision candidate, for System 2 to start doing its part, and multiple decision candidates can and should be considered in parallel before committing oneself to a particular one as *the* decision. In a typical case, from the perspective of a judge, these decision candidates are provided (and thus a considerable part of the decision-making process has already been dealt with) by the parties of the case, and they, together with any other plausible decision candidates should be given equal consideration from the beginning. At some point, which can, depending on the case, happen very early or quite late in the process, one does however have to pick one of them.

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<sup>19</sup>Alexy 1978, Aarnio 1987

<sup>20</sup>Seely 1993

Secondly, some of the characteristics of System 1 processing make it extremely difficult to pinpoint the moment at which this happens. This is because System 1 processing is mostly unconscious and massively parallel. That is, one may consider different alternatives equally at the same time and not be aware of it. This is of course not a problem. What can be a problem is making up one’s mind far too early in the process and then interpreting all the remaining incoming information with a confirmation bias, that is, in a way that is most favourable for the decision one has already made.

This process of finding decision candidates and then verifying and justifying them may take several iterations for each one of them, if some initial decision candidate from System 1 turns out to be untenable as such. Resuscitating such a decision candidate can take anything from a small adjustment to a 180-degree turn. Perhaps somewhat counterintuitively, several rounds of iteration are most likely to be needed in easy cases. In easy cases, the subject matter is located in a crowded place in the legal realm, surrounded by dense structures of statute and/or case law. Because of this, in easy cases it is also easier to show that the System 1 decision candidate is (at least partly) incorrect, thanks to either a clear statutory provision or a precedent on point to the contrary.

Hard cases, on the other hand, are different. A hard case may also land in a crowded place in the legal realm, but in such a situation it will be located at a place of significant discontinuity. In this situation, there are two (or more) mutually incompatible possible outcomes with equally strong arguments for each, which at the same time invalidate or weaken each other. A hard case may also land in more barren territory with no statute or precedent in sight. In this situation it will become necessary to take a look at the situation from further away, that is, in more abstract terms, until one can spot some familiar landmarks and reorient oneself with their help. The greater distance to authoritative rules means that their argumentative strength is weaker, which makes them easier to rebut. On

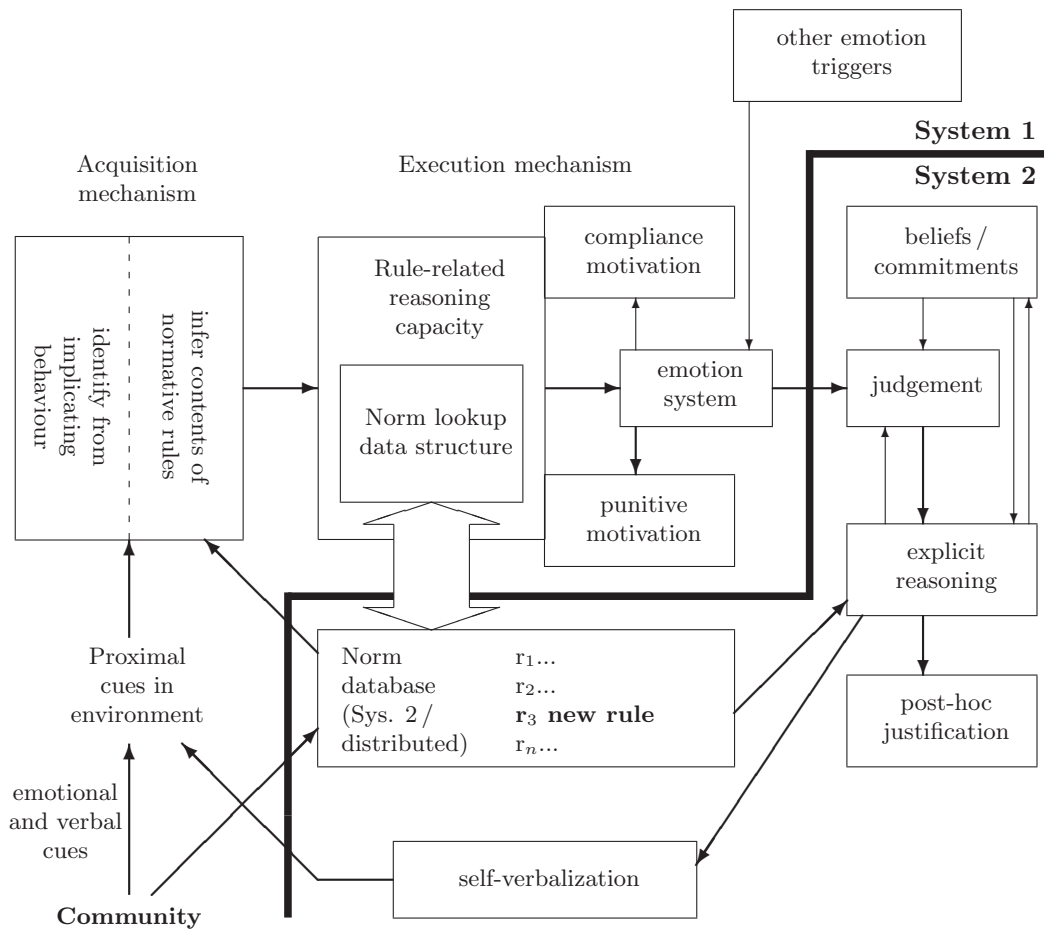
the other hand, the starting point in this situation is that there is nothing better around, either, and, once successful, even an individual precedent may stake a claim to a significant plot of land in the legal landscape.<sup>21</sup>

Either of these situations in hard cases means that we have to accept the occasional possibility of multiple Right Answers in a given individual case (typically two possible extremes with or without a continuum of possible compromises between them). This is by no means enough to make law indeterminate, even if the potential unpredictability of the outcome might lead one to believe that. Most of the decision-making process will be carried out the same way regardless of who the judges are, and only a minute (but potentially highly significant) individual variation in the System 1 processes of the judges actually deciding the cases is responsible for the uncertainty. Just because individual differences show up where they matter the most (and indeed they should, to counteract each other’s cognitive biases, for example), it does not make the decision-making process arbitrary as a whole. Even if there may be two competing Right Answers, there will in any given case always be an infinite number of Wrong Answers which will never be reached no matter what the circumstances or who the presiding judges are. In any court within the European Union, for example, sentencing someone to the death penalty is always a Wrong Answer. Or, whereas a parent might consider teaching a child caught smoking a lesson by making them smoke an entire packet of cigarettes as a form of extralegal (and certainly in many jurisdictions also illegal) punishment, no (normal) judge would take the same approach with the prosecution of someone caught smoking in a place where it is prohibited.

A block diagram of how different aspects of the two systems interact is given in Figure 3. It is adapted from a model of general norm-based reasoning<sup>22</sup> with one important change. In the legal domain, it does not make

<sup>21</sup>Following Rissland & Xu 2011, such a case may be termed a *black swan* and the subsequent cases in or near its field of application *gray cygnets*. The considerable uncertainty regarding the argumentative force of a black swan makes it initially difficult to predict whether the gray cygnets will turn black or white as they grow up, whereas in the long run the situation will become clearer.

<sup>22</sup>Saunders 2009, which in turn is based on Sripada & Stich 2006.



**Figure 3.** A dual-process model for the psychology of legal reasoning.

any sense to treat the norm database as a module wholly inside System 1. Considering the amount and type of data to be stored, it is unrealistic to expect that all of it could be stored neatly in a data structure within System 1 in a way that also allows for the retrieval of individual norms. Indeed, in practice, as any lawyer should recognize, it is even unrealistic to expect this data structure to be confined to the body of any human individual, but rather, in the best spirit of distributed cognition<sup>23</sup>, the capabilities of the mind are almost seamlessly augmented by statute books and court reports, which of course for the past few decades have been increasingly accessed through more and more advanced legal information technology.

Rather than placing the whole database inside System 1, the arrangement could be compared to an  $n$ -dimensional associative array (hash table), whose keys form an extremely complex structure in a highly compressed and efficient form not unlike a self-organizing map<sup>24</sup> and whose values (norms) are accessed through System 2 or external sources. Quite typically, the value part of the entry for a norm stored in long-term memory could be completely empty, meaning ‘there is (or ought to be) a law or a precedent on this, look it up’. Once this has been done, thus refreshing one’s memory by entering the correct, current version of the rule into System 2 working memory, the reasoning process may proceed. It is also possible that the System 1 part is quite extensive and System 2 recollection comprehensive but possibly still incomplete. For example, for the core of criminal law, it is likely that the elements of the crime are readily available, whereas on the decision-making side only a relative measure of guilt and severity might be produced. This must then be aligned with the actual scale of penalties after consulting the statute to yield the correct punishment in absolute terms.

There is already also some support for the dual-process model in legal reasoning from neuroimaging studies.<sup>25</sup> There is always an element of ‘emotional’ (System 1) processing, but with lawyers, ‘rational’ (System 2) processing takes over faster and to a greater extent than with non-lawyers.

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<sup>23</sup>Hutchins 1995

<sup>24</sup>Kohonen 2011

<sup>25</sup>See eg. Schleim *et al.* 2011

At this point it is however far too early to make any substantial claims based on imaging studies, in part because the studies so far have been designed in terms of the ‘moral brain’ hypothesis rather than the dual-process hypothesis, in part because of the general limitations of using imaging studies to study cognitive processes combined with a problematic tendency to make bold and unwarranted claims despite these limitations, often quite successfully.<sup>26</sup>

### 3.4 Traditional Legal Theory in a Dual-Process Perspective

As the Dworkin quotation claims, the classic mistake in most of legal theory is to approach legal reasoning in nothing but System 2 terms. Dworkin’s own *law as integrity* approach, on the other hand, seems to take the same mistake to the other extreme: it focuses on the System 1 part to such an extent that it all but completely neglects the part that is necessarily System 2. That is, it works well enough for one’s personal use, and even produces the same outcomes as Dworkin as long as one has approximately the same general social values as he does, but it is useless in generating persuasive arguments to convince someone whose value system is different. Taken to the extreme, it could be even claimed that the whole Dworkinian concept of integrity is nothing more than a by-product of the manner in which the System 1 data structure is optimized, that it quite simply takes substantial additional cognitive effort to deviate from the *law as integrity* model and as such, any of the other alternatives are unlikely if not downright impossible. Or, to put it in other terms, coherence is created by a desire to avoid cognitive dissonance.

Considering in turn the other notion popularized by Dworkin, the dichotomy of rules and principles<sup>27</sup>, it is apparent that it not the same as the System 1/2 distinction. On the other hand, it is not completely orthogonal to it, either. Rules and principles both have their System 1 and 2 components, but they serve different functions. The System 1/2 structure of rules is described above. The System 1/2 structure of principles, on the

<sup>26</sup>Uttal 2001, Weisberg *et al.* 2008

<sup>27</sup>Dworkin 1978

other hand, is quite different. On the System 1 side, principles act upon the rules data structure: they work by organizing and consolidating the rules, thereby maintaining Dworkinian integrity. On the System 2 side, on the other hand, principles are readily available only as a name or possibly a very abstract description derivable from the name of each principle and its ordinary-language meaning. A further elaboration of a principle can only be achieved by retrieving specific rules or cases to which the principle applies.

Apart from legal principles, another likely candidate for a structuring principle on the System 1 side is the use of legal concepts. As an extreme in conceptual eliminativism in legal theory, Alf Ross writes:

The word ‘right’ has no semantic reference whatever.<sup>28</sup>

In Ross’s exposition, it is difficult to see why ‘right’ (or, for that matter, ‘t-t’) would be somehow inferior to the privileged concepts ‘conditioning fact’ and ‘legal consequence’ before and after it. The latter for example seems to also presuppose the existence of non-legal consequences by some criteria of demarcation for legality. According to Ross, concepts are just ‘tool[s] in the technique of presentation’<sup>29</sup>. This however grossly underestimates their value. As vehicles of human thought, concepts are both necessary and meaningful. For example, conceptual structures drive innovation through the use of conceptual blending, where two generally unrelated domains are brought together through the borrowing of a concept, potentially including all its relationships with other concepts, from one domain to another.<sup>30</sup> In this respect, the legal context makes no exception. The role of conceptual blending is for example obvious in the idea of legal personhood. When a corporation is viewed by law as a person in some respects, it becomes progressively easier to expand this view into other areas as well. The current state of this development can for example be seen in some recent high-profile decisions of the U.S. Supreme Court. In *Citizens United*<sup>31</sup>, corporations’

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<sup>28</sup>Ross 1959,p. 172

<sup>29</sup>Ross 1959, p. 175.

<sup>30</sup>Fauconnier & Turner 2002

<sup>31</sup>558 U.S. 08-205 (2010)

right to the freedom of expression was cemented even further, whereas in *FCC v. AT&T*<sup>32</sup>, corporations are not (yet, anyway) afforded a right to privacy (data protection).<sup>33</sup>

To take another example of a structural model of legal knowledge, I consider Kaarlo Tuori’s three-level model<sup>34</sup>. When looking at Tuori’s model in light of the dual-process framework, we can again see that the two are clearly related, but again, none of the proposed divisions correspond with the System 1/2 boundary. Instead, the role of System 2 diminishes as we move on to the deeper levels. On Tuori’s surface level, the division of labour between the two systems is the one presented in this paper. On the level of legal culture, System 1 gains more influence, while the role of System 2 is limited to general conceptual frameworks and principles of interpretation and justification as presented in doctrinal and theoretical jurisprudence, and, finally, on the level of the deep structure of the law, System 1 takes over almost completely, with the possible exception of non-law-specific System 2 contributions such as logic and other general tools of reasoning. Also on the System 1 side of the deep structure level, a significant contribution of non-law-specific faculties, including innate ones, is to be expected. Finally, I consider Jerome Frank, a legal theorist among the earliest to seriously take up psychological themes in their work and probably best known for that. Frank’s *Law and the Modern Mind*<sup>35</sup> would certainly have been a very different book, had it been written eg. 75 years later. After all, psychology as a scientific discipline was still in its infancy at that point. Unfortunately for Frank, the best dual-process theory available in 1930 was the Freudian one. As such, Frank is stuck with concepts such as ‘father-worship’ and ‘word-magic’. Regarding the latter, such linguistic phenomena as the effects of prototypes<sup>36</sup> and frames<sup>37</sup> may indeed seem

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<sup>32</sup>562 U.S. \_\_\_ (2011)

<sup>33</sup>A reinterpretation of trade secrets law as a form of corporate data protection could certainly have far-reaching and even unpredictable consequences.

<sup>34</sup>Tuori 2002, p. 147ff

<sup>35</sup>Frank 1930

<sup>36</sup>Rosch 1978, Lakoff 1987, on applications to law Winter 2001

<sup>37</sup>Filmore 1975, Tversky & Kahneman 1981 (on somewhat different aspects of frames)



strange or even magical when viewed in System 2 terms only, when they are quite simply just predictable artefacts of System 1 information processing mechanisms.

## 4 Creating Dual-Process Legal Reasoners

As an AI & law researcher, my interest in legal theory arises from needs which are very different from those of most other scholars of legal theory. Considering the possibility of automated or computer-supported legal reasoning, it is hardly realistic to expect that hard cases are the best place to start. Instead, easy cases should, as the name suggests, be easier to decide, and in them, computer-supported decision-making should prove to be most beneficial both in terms of achievable economic efficiency and the elimination of unwanted individual variation. In order to do this, a theory of legal reasoning in easy cases is required. Unfortunately, since deciding easy cases is indeed easy, at least for people, even some of the latest work taking otherwise a reality-based approach<sup>38</sup> fails to deliver in this respect.

I would like to suggest that first developing an adequate model-based theory of deciding easy cases and first then viewing the particular aspects of hard cases in light of that theory could offer a new and different approach into some of the central questions of legal theory. At this time and in the following I can offer no such theory, but as a starting point, I do present some ideas both on how the dual-process approach could be used in computational modelling of legal reasoning and on how the process of legal education can be viewed in dual-process perspective.

### 4.1 In Silicon and Electrons

Taking the lead from the majority view of legal theory, also the artificial intelligence (AI) and law community has traditionally taken a completely

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and framing)

<sup>38</sup>Such as Posner 2008, Schauer 2009, and Solan 2010.

System 2-based approach to legal reasoning.<sup>39</sup> In one comprehensive work containing an overview of practically all important lines of research in the field<sup>40</sup>, System 2-like models dominate completely. The only exception even worth mentioning are some limited experiments with neural networks in the 1990s.<sup>41</sup>

Despite advances in such areas as computational modelling of legal argumentation<sup>42</sup> and conceptual structures in law<sup>43</sup>, AI & law research has had little to offer in terms of strong or even practically useful artificial intelligence, such as being able to help with deciding cases by breaking them up into questions of limited complexity and not requiring any type of specifically legal expertise.

One notable and promising exception in this respect are the recent developments in the field of discovery in electronically stored information.<sup>44</sup> As opposed to most AI & law work, the most advanced forms of e-discovery take advantage of such techniques as data mining, in which the point is not to create meaningful intermediate data structures as models but rather to let the sensemaking only show up in the end results. On the other hand, much of e-discovery work barely even lives up to general current standards in information retrieval and even the more respectable variants do not usu-

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<sup>39</sup>In Ronkainen 2011 I present further arguments based on experiences from language technology on why the completely System 2-based Good Old-Fashioned Artificial Intelligence approach should be expected to fail when used as the sole basis for the construction of a large-scale decision-making or decision-support system for judicial use (‘robot judge’). The paper also includes some examples of what the difference between the descriptive and prescriptive positions – not simply a given for a legal Realist – can mean in practice, though again from the context of language technology rather than law.

<sup>40</sup>Sartor 2005

<sup>41</sup>See eg. Philipps & Sartor 1999.

<sup>42</sup>See eg. Atkinson 2005

<sup>43</sup>Ontologies, as they are known in computer science, see eg. Valente 1995, Casellas 2008.

<sup>44</sup>Commonly known as e-discovery, see eg. Oard *et al.* 2010 and the other articles in the same issue. For example, a massive and generally available collection of actual electronic documents used as evidence in the Enron lawsuit now simply known as the Enron corpus has played an important role in this line of research and development.

ally deliver a convincing level of performance in terms of precision and recall.

I suggest that in light of the dual-process model of legal reasoning, similar solutions can also be transferred from information retrieval to the domain of legal decision-making. In this way it is possible to combine the two competing dominant approaches in artificial intelligence: statistical methods and rule-based methods. On the one hand, the idea of representing law without rules just does not compute, at least as long as also people are involved and have to trust the system. On the other hand, rule-based approaches alone do not scale for the level of complexity encountered in real-life problems, but rather the result becomes an unstable and unmanageable pile of rules and exceptions on top of each other which may lead to serious problems with novel cases not covered by the rule base.

A tentative outcome for a case could for example be derived from a self-organizing map created from pleadings in previous cases within the domain. This by itself is however not sufficient, as it only represents the System 1 part of the process, and after that the System 2 part has to take over. Once the most difficult aspects of the case have been settled, aligning the facts of the case with some framework of arguments becomes much easier. The System 2 part should of course also here check that the outcome produced by the System 1 part is correct, and if it is not, suggest that it is dealing with a case from outside its area of expertise (possibly a hard case) and give up. It is most realistic to expect that computerized decision-support systems would be most advantageous and best implementable within domains with large numbers of cases which are not being appealed, that is, presumably easy cases. Hard cases can wait, and indeed they should wait until we understand the details of the legal decision-making process much better than we do now. On the other hand, it is neither necessary nor practical to require absolute perfection in terms of performance before such a system can be deployed, at least in a court of first instance, and for higher level courts the advantages of automated decision support are much lower, anyway. After all, the whole court system is built on the assumption that the first instance is not perfect, for why else would we need courts of appeal at all?

## 4.2 In Flesh and Blood

Even the most firm believer in innate massive modularity would not claim that one is born a lawyer. Being a lawyer is not an innate disposition. On the other hand, not even someone from the other extreme could claim that one enters law school as a blank slate, but rather only after decades of socialization into a community and a society governed by law. As a member of a modern society, one must already be embedded with some kind of a folk theory of legal reasoning, which may be a combination of general moral intuitions (System 1) and, in certain domains subject to a very detailed regulation impacting even everyday life, such as traffic, the plain-fact view of law (System 2). The folk legal theory used by laymen would certainly deserve a more detailed account of its own in light of the dual-process framework, but in the following I only consider the development of a capability of legal reasoning achieved through a professional education.

From a phylogenetic perspective, it is obvious that the use of System 1 in legal reasoning must be based on some sort of pre-legal notions of right and wrong. Thereby we can also establish a connection to the troublesome (for legal theorists, at least) idea of justice. Exposure to the intricacies of a specific legal system takes full advantage of this faculty, which in the service of law can be twisted around even the most technical of issues. On the systemic plane, this development can be observed through legal history, whereas on the individual level the best vantage points for the earlier stages are the members of the few remaining tribal law systems.<sup>45</sup>

From an ontogenetic perspective, on the other hand, the importance of the professional legal education must be emphasized. Law school teaches one to think like a lawyer. The development reasoning abilities especially from the System 2 perspective has already been dealt with extensively in the literature. Regarding System 1 processes specifically, it is clear that the extensive use of cases plays a significant role. Cases, whether completely made-up ones just for educational purposes, or actual precedents in a simplified form relevant for the rule being taught, provide a temporary structure for organizing the different facts around which a more elaborate

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<sup>45</sup>See eg. Fukuyama 2011, esp. pp. x–xiii, 245–261, Goddard 2009

version can be built. The same phenomenon at much earlier stage has been an object of study in the psychology of learning, where the currently preferred technical term for such temporary structures is scaffolding.<sup>46</sup> Scaffolding is constructed in cooperation by the student and the teacher and it provides a temporary frame of reference for understanding the legal issues involved within some particular domain. Once the scaffolding has fulfilled its purpose in supporting the learning process, it is discarded, with the exception of actual precedents used in this manner, which are retained for argumentative purposes.

The result of this process in Ross’s terms is a judicial ideology, that is, ‘the normative ideology which animates the judge’<sup>47</sup>. Only viewing it as a residual source of law used to decide hard cases gives however a quite misleading picture of its function. In particular in hard cases, the individual differences become apparent and even salient. This obscures the fact that, by any account, more than 99% of the judicial ideology will be identical across all individuals with a professional education within some particular legal system, as otherwise any legal system would hardly be able to function. What Ross really was trying to point out was that the judicial ideology is the object of study for all scientific jurisprudence.<sup>48</sup>

## 5 Conclusion

Many of the main points of this article are by no means new. Consider for example a slightly longer version of the earlier quote from Holmes:

The object of this book is to present a general view of the Common Law. To accomplish this, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience.<sup>49</sup>

<sup>46</sup>See eg. Daniels 2007, pp. 317–320 and Newman *et al.*

<sup>47</sup>Ross 1959, p. 43

<sup>48</sup>Ross, p. 44

<sup>49</sup>Holmes 1881, p. 1

Here Holmes acknowledges the role of logical (System 2) processes while maintaining that they alone are not sufficient. What is new, however, is a credible framework of human reasoning and decision-making in general in the dual-process model, and a connection of these different modes of legal reasoning to the different parts in it.

System 1 reasoning plays a crucial yet at this point still poorly understood role in the legal reasoning process. As the opening example shows, our System 1 capacity for intuitive reasoning is powerful, at times even too powerful. As such, seeing System 1 processing in its entirety as beneficial is going too far. On the other hand, seeing it only as a source of cognitive biases and other errors of reasoning also fails to see why it is crucial in handling ill-defined problems that cannot be expressed eg. as a straightforward algorithm, such as practically any non-trivial task of legal reasoning.

By basing the study of legal reasoning on that of more general modes of human cognition, we can immediately access a vast and rapidly developing body of scientific knowledge, which often modifies or even contradicts ancient truths previously thought to be self-evident. A better understanding of the legal reasoning process will certainly also facilitate its formalization into computational models which can be used to improve legal information retrieval or to build legal decision-support systems. In a sense, this could be a way to bring the recent yet already very influential broader trend towards bio-inspired artificial intelligence<sup>50</sup> into AI & law. Admittedly, most of what I have written in this paper specifically about legal reasoning is only conjecture at this point. Studies of general reasoning can however also serve as a template for the extremely challenging task of formulating problems of real-world complexity which can be used for hypothesis testing in empirical studies of legal reasoning.

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<sup>50</sup>See eg. Floreano & Mattiussi 2008

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# Legal Reasoning and Argumentation

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**Abstract.** Reasoning and argumentation occur in many legal contexts, but most theory focuses on adjudication. Normative theories of reasoning in adjudication approximate to a rationalist model, which postulates that the main aim of adjudication is the correct application of legal norms to facts proved to be true. Much reasoning in “easy cases” may be deductive, but most theories address “hard cases”, where some doubt arises about the major premise, or the categorization of the minor premise, or its evidential support. Reasoning about questions of law and of fact is generally treated separately, even though the distinction is problematic. Rationalist theories of reasoning about questions of law may differ about priority rules, validity, and weight; what constitutes a hard case; and whether substantive reasons are an integral part of the law. Critics may question their narrow focus on adjudication and on Western systems, particular models of rationality, whether rationality in adjudication is possible, the determinacy of legal norms, whether cases are inherently easy or hard, and whether highly abstract theories of reasoning capture the complexities of actual discourses of argumentation. Rationalist theories of factual reasoning differ among themselves about the nature of inferential reasoning, whether standard examples fit inductive (Baconian) or mathematical (Pascalian) theories of probability, and whether “atomistic” models can accommodate “holistic” ideas of narrative coherence. Rationalist

theories also face skeptical challenges. Links between normative theories and actual discourses have been intermittent, with some notable exceptions. More work is needed to integrate these diverse inquiries and to explore the implications of modern technology and artificial intelligence.

**Keywords:** argumentation, legal methods, reasoning.

## 1 Reasoning in Adjudication

It is sometimes said that the main aim of legal education is to develop skills of ‘thinking like a lawyer,’ including skills of legal reasoning. This phrase is often taken to imply that all lawyers think alike, that they only think about questions of law in the context of adjudication; that there is a single correct way of thinking about such questions; and that this way of thinking is unique or special to lawyers. An alternative view is that lawyers’ reasoning extends far beyond binary questions of law in adjudication to a wide variety of legal contexts and operations; that what constitute valid, cogent, and appropriate modes of reasoning in each kind of context, and how far rationality is attainable, is contested; and that the relevant skills of reasoning involved are not a lawyers’ monopoly. Special considerations apply in particular legal contexts, such as rules of precedent or evidence or procedure, but the basic criteria of validity and cogency for all of these operations can be subsumed under one or other general theory of practical reasoning. This article proceeds on assumptions that are closer to the second view but, solely for reasons of space, it focuses on reasoning about questions of law and questions of fact in adjudication. It does not deal with the psychological processes by which adjudicators reach decisions.

Reasoning in adjudication is a focal point for some perennial problems of legal philosophy, including contested questions about epistemology, rationality, and skepticism; differing conceptions of law and justice; the relations between law and morality; formalism; the role of judges in a democracy; official discretion; and transparency in decision-making. According to one

view, a question of law is easy or straightforward if a justification for a decision can be rationally reconstructed in the form of a simple syllogism:

*Major premise:* Whenever X happens, then Y ought to happen (Rule (R)).

*Minor premise:* X happened (Facts (F)).

*Conclusion:* Therefore Y ought to happen (Judgment of guilt, liability etc.).

This model of legal reasoning has often been dismissed as ‘mechanical’ jurisprudence, because most problems of interpretation arise in relation to doubts about the formulation and precise interpretation of the major premise (R) and the categorization of the facts in the minor premise (F). However, this is precisely the form in which justifications for decisions in ‘easy’ or ‘clear’ cases can be rationally reconstructed.

What if the major premise or the minor premise requires justification? There is quite widespread, but not universal, agreement among jurists that deduction has only a limited role in such second order justification of R (legal propositions) and in inferential reasoning from evidence about disputed issues of fact (F). For example, the standard alibi defense can be reconstructed in the form of two linked syllogisms:

No person can be in two different places at the same moment of time.

A was in a different place when this crime was committed.

Therefore A was not physically present when this crime was committed.

It is necessary for a person to be physically present to be guilty of this crime.

A was not physically present when this crime was committed.

Therefore A is not guilty of X.

Insofar as deduction plays a limited role in justifying R or F, the reasoning involved does not lead to necessary conclusions (‘open system reasoning’).

## 2 Rationalist Model of Reasoning in Adjudication

Orthodox rationalist views about reasoning in adjudication can be reconstructed as a model or ‘ideal type,’ which the views of many leading jurists approximate. This model represents a set of basic assumptions about the aims and nature of adjudication and what is involved in valid reasoning about disputed questions of law and of fact in this context.

### **Aim and Nature of Adjudication**

- (a) The direct end of adjudication is rectitude of decision, that is the correct application of valid laws to true material facts (facts in issue).
- (b) The logic of justification of judicial decisions involves an application of general principles of practical reasoning in a specific context.
- (c) A judicial decision is legitimate if and only if it is justified by sound arguments that satisfy the moral requirement of formal justice that like cases should be treated alike.
- (d) In clear cases a sound justification satisfies the deductive form: if R, then C; F is a case of R; therefore C.
- (e) Doubts can arise about R (e.g., about its validity, its identity, its scope) or about its application to F, or about whether F has been established to the relevant standard of proof, or a combination of these.
- (f) Doubts about R give rise to questions of law; doubts about F give rise to questions of fact.
- (g) In adjudication both questions of law and questions of fact are typically binary (e.g., liable/not liable; guilty/not guilty).



### Questions of Law

- (h) Resolution of questions of law in hard cases requires second-order justification, which may involve different forms of reasoning, notably deduction, induction, reasoning by analogy, or a combination of these.
- (i) A number of independent material reasons may be advanced in a single argument for or against a decision of a question of interpretation or application of R. These reasons may be of different kinds.
- (j) The validity and cogency of different kinds of material reasons are system-specific; they depend on the rules and conventions of a given system with respect to authoritative sources of law and appropriate modes of argumentation.
- (k) Second order justification of R may involve two kinds of reasons: (a) authority reasons which relate to the compatibility or fit of a line of argument with the rules and principles of the system and the authoritative sources recognized by that system (arguments about validity, consistency, and coherence); (b) substantive reasons, which relate to values, goals, or institutional requirements of the system.<sup>1</sup>

### Questions of Fact

- (l) Rational determination of the truth of alleged facts (F) in adjudication is typically a matter of probabilities, falling short of absolute certainty.
- (m) Judgments about the probabilities of allegations about particular past events can and should be justified by reasoning from relevant and admissible evidence considered by the decision-maker.
- (n) Judgments about probabilities, generally speaking, have to be based on the available stock of knowledge about the common course of events.

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<sup>1</sup>Summers 1992.

- (o) Rational determination of F is a matter of ordinary common-sense reasoning, as modified by the rules of evidence and procedure of a given system.

## 2.1 Questions of Law

Theorists of reasoning about questions of law can be roughly categorized into *rationalists* and *critics*. A reasonably representative sample of leading rationalists might include Aulis Aarnio (Finland), Robert Alexy (Germany), Ronald Dworkin (USA/Britain), Torstein Eckhoff (Norway), Neil MacCormick (Scotland), Joseph Raz (Israel/Britain) and Robert Summers (USA). Although they come from different legal traditions and quite varied intellectual backgrounds, rationalists are in broad agreement on most of the first ten points in the model. Most focus mainly on second-order justification of adjudicative decisions on questions of law in hard cases, because these are perceived to be the most interesting theoretically. These theorists may differ about which kinds of substantive reasons are valid, about their relative weight or cogency, and whether substantive reasons are an integral part of the law or are extraneous to it. Some jurists in the civil law tradition maintain that all second-order justification can be reconstructed in deductive form, but the predominant view among common lawyers is that this kind of justification involves mainly open system reasoning.

Among rationalists there is a variety of views on material reasons in second-order justification (k). Some differences are matters of emphasis or detail or conceptual refinements, but others are seen as significant. For example, Ronald Dworkin<sup>2</sup> has advanced three theses that are regularly disputed: (a) that there is a single right answer to almost every question of law even in very hard cases; (b) that principles of political morality underlying a legal system are an integral part of the law, and are not external to it; (c) that principles of political morality are the only valid substantive reasons for justification in adjudication; policy reasons and other arguments external to the law are not valid. These theses are part of a general theory

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<sup>2</sup>Dworkin 1977 and 1986.

of adjudication that maintains that legal reasoning is essentially a moral enterprise; the duty of judges in a liberal democracy is to uphold the law and to vindicate rights on the basis of interpretations that make ‘it the best it can be.’

At first glance, Dworkin’s theory is in conflict with standard tenets of legal positivism, especially that (a) a sharp distinction must be drawn between law as it is and law as it ought to be; (b) when the law ‘runs out,’ judges may invoke non-legal reasons, including consequentialist reasons; and (c) in such circumstances judges can, may, and do make law interstitially. However, the differences between Dworkin and other rationalists are narrow. Most rationalists agree that moral arguments play a valid role in legal justifications. If ‘one right answer’ means a solution justified by the strongest conceivable argument, most would accept that it is meaningful to talk of stronger and weaker arguments, and that ties are a rarity even with respect to open-system reasoning.

The rationalist model has been subject to several challenges. First, it is narrow. It does not address modes of reasoning in earlier times or in non-western cultures or in the variety of other legal contexts in which practical reasoning is involved. Interpretation by an upright judge may provide a general model of correct interpretation for other officials and for good citizens, but what constitutes valid, cogent, and appropriate reasoning in adjudication will not be exactly the same for other interpreters. For example, a factory or a tax inspector may appropriately take into account different considerations, and interpret the same law differently from a judge.

Second, skeptics may doubt the possibility of rationality in adjudication or challenge the idea that this represents the only possible, or the most appropriate, model of rationality or that a single model is applicable across cultures. Suggestions that judicial opinions are merely ex post facto rationalizations have been shown to be based on confusion between the logic of justification and the psychology of decision<sup>3</sup>. The requirement or expectation that decision-makers should justify their decisions publicly may serve as an institutional constraint or steadying factor that limits arbitrariness.

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<sup>3</sup>Wasserstrom 1961 and Raz 1978.

ness or corruption or pure subjectivity<sup>4</sup>. Recently, critical and postmodern challengers have argued that rationalist models conceal the fundamental indeterminacy of legal decision-making. For example:

“In all the Western systems, the discourse that judges, legal authorities, and political theorists use to legitimate the application of state power denies (suppresses, mystifies, distorts, conceals, evades) two key phenomena: (a) the degree to which the settled rules (whether contained in a Code or in common law) structure public and private life so as to empower some groups at the expense of others, and in general function to reproduce the systems of hierarchy that characterize the society in question; (b) the degree to which the system of legal rules contains gaps, conflicts, and ambiguities that get resolved by judges pursuing conscious, half-conscious, and unconscious ideological projects with respect to these issues of hierarchy.”<sup>5</sup>

The scope of disagreement between rationalists and their critics is easily exaggerated, for few jurists subscribe to extremes of strong philosophical skepticism or of radical indeterminacy on the one hand or of strict rationalism and objectivity on the other.

A third challenge suggests that the distinction between clear and hard cases is problematic. Are cases inherently hard or easy? Or is it that some cases are merely perceived or treated as easy and others as hard? Cannot a creative lawyer construct arguments that raise doubts about what was previously perceived to be settled? Such skepticism receives prima facie support from a consideration of the many different kinds of doubt that can arise in relation to the interpretation of both legal and non-legal rules.<sup>6</sup> Even in a seemingly simple situation, a single factor can be a starting-point for an argument that raises a doubt about what previously may have been treated as clear or settled or simple; but it does not follow from

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<sup>4</sup>Llewellyn 1962.

<sup>5</sup>Kennedy 1997.

<sup>6</sup>Twining and Miers 1999.

such indications of *potential* complexity that in practice every routine or seemingly clear case can easily be treated as hard. There are indeed cases in which a significant development of the law took place because what was previously taken as settled was successfully challenged. But these are ‘leading cases’ just because they were exceptional.

A fourth type of challenge suggests that normative theories of legal reasoning tend to be too abstract and simplistic to catch the complexities and subtleties of actual legal arguments. Judicial opinions that run to many pages are ‘reconstructed’ in just a few propositions. Furthermore, it is often unclear whether the reconstruction is of *actual* or of *possible* arguments. Is a reconstruction of a formalistic, ambiguous, or opaque judicial opinion, or of a decision not backed by any public justification (such as jury verdicts at common law), to be regarded as a reconstruction of the actual justification presented, or of the best justification that might have been advanced, or of something else? For example, the discursive style of appellate judges at common law is often contrasted with the more succinct style of French judgments which, it is said, are typically expressed in deductive form. If hard cases require a second order justification that can only exceptionally be deductive, this suggests that French courts typically do not indulge in explicit second order justification.

## 2.2 Questions of Fact

The study of evidence and inference has roots in the long history of rhetoric and of probabilities, but interest in reasoning about questions of fact in adjudication has been intermittent. Evidence has received more sustained attention in common law countries than in the tradition of civil law, but there the main focus has been on the Law of Evidence. Notable exceptions include Bentham’s *Rationale of Judicial Evidence* and *Wigmore’s Science of Judicial Proof*. Since 1970 ‘The New Evidence Scholarship’ has been the forum for lively debates about the competing claims of different theories of probability; the thesis that the paradigm case of probabilistic reasoning in adjudication is in principle inductive (Baconian) rather than mathematical

(Pascalian)<sup>7</sup>; and whether ‘atomistic’ models of rationality can accommodate ‘holistic’ ideas of narrative coherence on which, according to psychological research, decision-making by jurors is predominantly based. Such legal concerns are relevant to the study of evidence and inference in other disciplines.<sup>8</sup>

### 3 Law and Fact

At first sight, the distinction between law and fact seems simple. ‘What is the scope of this statutory provision?’ is a question of law; ‘What happened on that particular occasion?’ is a question of fact. However, the line is often difficult to draw, especially with regard to the application of rules and the appropriate categorization of a particular fact situation. ‘Was X dishonest?’ or ‘Is this a case of murder?’ could be interpreted as a question of law or a question of fact, or a mixed question of law and fact. How such questions are treated in particular cases varies between systems and among different contexts within the same system for different practical purposes. For example, in English jury cases, questions of law are for the judge while questions of fact are for the jury; decisions on questions of law can have precedent value, but findings of fact do not. Questions relating to appeals, mistake in contract, or the obligation to give reasoned justifications turn on the distinction between law and fact, but where exactly the line is drawn varies according to context. Furthermore, legal cultures differ significantly in the framing of issues in particular disputes as questions of law or of fact<sup>9</sup>.

Reasoning about issues of law and of fact have stimulated two largely separate bodies of literature, despite the intimate connection and similarities between them. Both are perceived to be species of practical reasoning with structures that are binary (guilty/not guilty, liable/not liable) and dialectical (all reasons tend to support or to negate an ultimate proposition or conclusion). The ultimate decision is a normative judgment (e.g., liable/not

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<sup>7</sup>Cohen 1977.

<sup>8</sup>Schum 1994.

<sup>9</sup>Dezalay and Garth 1996

liable). Many questions of fact have normative elements: for example, ‘did X behave reasonably in the circumstances?’ is a question of fact, which involves both evaluative and empirical elements. Categorization of an issue as being of fact or of law can have important practical consequences, and the kinds of reasoning that are deemed appropriate differ; for example, no one has seriously suggested that Bayes’ theorem applies to questions of law, but nevertheless it might be interpreted as providing a suggestive metaphor regarding the combination of judgments based on different kinds of reasons within a single argument. Where decisions on fact, law, and sanctions are the responsibility of a single tribunal, there may be some freedom to consider what is a good solution to the problem of the case as a whole, an option not generally available where responsibility for decisions is divided between judge and jury.

## 4 Argumentation

Theories of legal reasoning are primarily normative theories. ‘Argumentation’ here refers to the actual discourses used in advancing arguments, including reasonings that are explicitly or implicitly embodied in such discourses, nonrational means of persuasion, and the strategy, tactics and styles of argument. Argumentation can be studied from a wide range of empirical, interpretive, and critical perspectives that apply to social discourse generally including rhetoric, conversation analysis, semantics, and semiotics. There has been little sustained research into actual discursive practices of legal actors and, as with the normative literature, most studies have focused on argumentation in adjudication and advocacy.

Most normative theorists claim that their accounts have a more or less close relation to how judges and advocates actually argue. For example, Ronald Dworkin<sup>10</sup> boldly claims that his theory not only prescribes an ideal, but also describes ‘best practice’ in common-law courts; however this claim is not backed by evidence. MacCormick<sup>11</sup> uses actual cases from

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<sup>10</sup>Dworkin 1986.

<sup>11</sup>MacCormick and Summers 1997.

several jurisdictions as illustrations, but his sample is not representative. Some analysis of judicial styles has been based on fairly extensive random samples<sup>12</sup>, but these studies have not been replicated.

Explicit links between normative theories of reasoning and actual discourses have been both diverse and intermittent. In social theory the most important connection has been Max Weber’s thesis that formal rationalization of law is a concomitant of the rise of capitalism and modernity. Critiques of rationalist theories of adjudication are often part of a more general critique of ‘liberal legalism’ and the Rule of Law<sup>13</sup>. Closest to the orthodox juristic literature is the neo-Aristotelian ‘New Rhetoric’ of the Brussels School<sup>14</sup>, whose central concern is to describe the starting-points<sup>15</sup> (*topoi*), argumentation schemes, and material factors that can be deployed to try to convince a specific audience (such as a court) or, more speculatively, a universal audience, to do or to decide something. Sharing some intellectual ancestors with the New Rhetoric but being more empirically oriented, the Amsterdam School of Pragma-dialectics aims to develop a model for the rational analysis and evaluation of legal argumentation as a specific, institutionalized form of argumentation in general (*topoi*), argumentation schemes, and material factors that can be deployed to try to convince a specific audience (such as a court) or, more speculatively, a universal audience, to do or to decide something. Sharing some intellectual ancestors with the New Rhetoric but being more empirically oriented, the Amsterdam School of Pragma-dialectics aims to develop a model for the rational analysis and evaluation of legal argumentation as a specific, institutionalized form of argumentation in general<sup>16</sup>. This is part of a general effort to develop a model and code of conduct for rational discussants in a conversation intended to resolve disputes. Applied to law, this model sits somewhat awkwardly with robust adversarial argument. The self-imposed

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<sup>12</sup>Wigmore 1937.

<sup>13</sup>Kennedy 1997.

<sup>14</sup>Perelman Olbrechts-Tyteca 1969.

<sup>15</sup>Viehweg 1993.

<sup>16</sup>Van Eemeren, Grootendorst and Henkemans 1996.



limitation of analyzing what is actually said ensures that the approach is quite concrete, but makes it difficult to catch unspoken conventions.

## 5 Conclusion

There is a rich body of normative theories about reasoning in modern Western adjudication, but more work is needed to integrate the literature on reasoning about questions of law and questions of fact and to extend the focus of attention to other legal operations and other legal traditions. With respect to argumentation, one can agree with two leading theorists that ‘what is needed are reflective hermeneutic studies of the current actuality of reasoning practice in modern legal systems.’<sup>17</sup>

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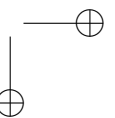
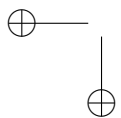
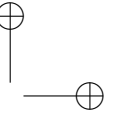
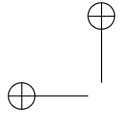
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# Determining the Fallacy and Non-Fallacy of the Ad Hominem Argument

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**Abstract.** The article presents a scheme for how fallacy or non-fallacy can be determined in the *ad hominem* argument. First I focus on the theoretical side of the *ad hominem* argument — its definition, how fallacy and non-fallacy is understood, its importance for legal argumentation, and the philosophical background of my considerations. Then I present 4 criteria: genuineness, time, construction and significance, which yield 11 specific types of *ad hominem* argument and can help determine fallacy or non-fallacy. Furthermore, several examples are presented from the scheme and go to show that *ad hominem* argument is a mostly non-fallacious type of argument (in 7 out of 11 cases).

**Keywords:** argumentum ad hominem, scheme, fallacies, practical argumentation.

The *ad hominem* argument is usually recognized as a fallacy.<sup>1</sup> However, several authors refute this thesis.<sup>2</sup> In particular, I have the impression that law students in the beginning of their education are being taught only the perspective that it is fallacious. This article gives my thoughts about *ad hominem* as non-fallacious argumentation; in my opinion, recognizing only its fallacious qualities leads to the omission of its essential elements.

### 1.1 Theoretical side of the *ad hominem* argument — the definition

I have decided first to set up a definition of the *ad hominem* argument. To have a possibility of successful analysis, all the situations when such an argument can occur should be found. Arthur Schopenhauer in his work “The Art of Being Right: 38 Ways to Win an Argument” defines it as an antinomy between the person’s argument and the person’s role, beliefs, further statements or group affiliation.<sup>3</sup> Marek Kochan elaborates on it by creating a list of contradictions that can be the aim of personal attack.<sup>4</sup> In my view they can be categorized into four groups revealing any lack of coherence in what is being preached by the interlocutor and: 1) his previously given opinions, 2) his behavior, 3) principles coming from his membership to a particular group, or 4) his personal beliefs. Furthermore, K. Szymanek, K.A. Wieczorek and A. Wójcik take into consideration the qualifications of the interlocutor — according to them, the contradiction can be found in his lack of objectivity.<sup>5</sup> Yet, in my opinion, this allegation is based on former information about the interlocutor — that we could only have obtained in the situations listed above. Therefore, depending on the context, it can be assigned to one of those groups. The distinction of M. Pirie and D. Walton is based on the intention of the person using *ad hominem*.<sup>6</sup> The

<sup>1</sup>See Copi and Cohen 1990, p. 97; Pirie 2006, pp. 53–58; Kochan 2005, pp. 72–82

<sup>2</sup>See Battaly 2010, pp. 361–390; Mizrahi 2010, pp. 435–456; Walton 1998, pp. 50–55; Woods 2007, pp. 109–134

<sup>3</sup>See Schopenhauer

<sup>4</sup>Kochan 2005, pp. 74–75

<sup>5</sup>Szymanek, Wieczorek and Wójcik 2008, pp. 73–75

<sup>6</sup>See Pirie 2006 and Walton 1998

main division includes the abusive — “occurs where one party in a discussion criticizes or attempts to refute the others party’s argument by directly attacking that second party personally”<sup>7</sup> and circumstantial *ad hominem* — “requires some kind of practical inconsistency between the speaker’s argument and something about the speaker’s person or circumstances”.<sup>8</sup> D. Walton broadens it to: bias — “occurs where a critic questions the impartiality of an arguer”<sup>9</sup>, the *tu quoque* — “the primary case of *tu quoque* type of an *ad hominem* retort occurs where an *ad hominem* reply is used to respond to an *ad hominem* attack”<sup>10</sup> and “poisoning the well” — “the arguer claims that her opponent is espousing a particular case, is an advocate of some point of view of a partisan kind, in such a way that he will always reflexively argue only from this particular interest or standpoint so that one can never take what he says seriously, or at face value, as an argument based on a real evidence”.<sup>11</sup> Summarizing, the *ad hominem* argument occurs in the following cases: 1) a lack of coherence between what is being preached by interlocutor and his previously given opinions, 2) the abusive *ad hominem*, 3) the circumstantial *ad hominem* — corresponding with the third and fourth groups of Kochan, 4) bias — corresponding with a lack of objectivity, 5) *tu quoque* — corresponding with the second Kochan’s group, and 6) “poisoning the well”.

## 1.2 Fallacy and Non-Fallacy

*Ad hominem* argument is a fallacy when it is irrelevant to the person’s character, social role, behavior, membership to certain groups, history etc., or when it is not logically connected to the topic and the context of the discussion. Therefore it is a non-fallacy when it is relevant to those factors. Non-fallacious *ad hominem* undermines the credibility of the interlocutor in a logically consistent manner and in the end demonstrates that any

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<sup>7</sup>Walton 1998, p. 2

<sup>8</sup>See Walton 1998, p. 6

<sup>9</sup>See Walton 1998, p. 11

<sup>10</sup>See Walton 1998, p. 16

<sup>11</sup>See Walton 1998, p. 14

discussion with the particular person is pointless, because of her disability to make pertinent, valid and accurate remarks to the topic in dispute.

### 1.3 The Importance for Legal Argumentation

The *ad hominem* argument may have an important role in legal argumentation. If legal argumentation is considered as the whole set of arguments used by lawyers, it means, that not only legal status is taken into account, but also the actual status. Therefore the whole surroundings of the particular people associated with the case can be the base for building an *ad hominem*. It can be noticed for example in the process of the interrogation, where obtaining information about a suspect is related with *ad hominem* arguments.

However, *ad hominem* appears also when considering legal status. In the law applying process the provisions are interpreted by a lawyer. According to R. Dworkin, the principles have an important material significance in this process. One of them is the cohesion of judicial decisions. Drastic differences in the judgments given in similar cases can be the basis for the *ad hominem* argument — especially when evaluating policy of the jurisdiction on the meta-level. Moreover, bias, which can be revealed also with this argument, is usually the basis for the exclusion of the judge or the witness.

### 1.4 Philosophical Background

My thesis assumes that a discussion of merit alone is indefensible. To justify this view let's take a closer look on Hans-Georg Gadamer's philosophy. This German philosopher developed some of the ideas of his teacher Martin Heidegger. The *Vorurteil* is a term describing the unconscious, pre-determined judgments and convictions which affect the conscious perceptions.<sup>12</sup> Moreover, he claims, that any statement, even abstract ones, cannot be contextless — because of the *Vorurteil*, tradition, history, and finally, thoughts in a specific language affection.<sup>13</sup> Therefore it suggests that

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<sup>12</sup>Przylebski 2006, p. 27

<sup>13</sup>Przylebski 2006, p. 49 and 157



there is always a starting point for the *ad hominem*. Ergo, if the discourse cannot be purely based on merit *ad hominem* arguments should be allowed in every discussion.

## 2.1 Criteria Determining Fallacy and Non-Fallacy

All types of the *ad hominem* mentioned in the definition have some factors in common. Having analyzed each type of the *ad hominem* thoroughly, I decided to distinguish the following criteria: 1) genuineness, 2) time, 3) construction, 4) significance. To specify, they all describe the information on which the *ad hominem* can be based.

Furthermore, all these factors variously combined together lead to a decision on the fallacy or non-fallacy of the argument. Not only genuineness (described below) determines it, but the other criteria (2, 3, 4) — which are not the elements of the theory of truth, because they are based on relevance to the topic — also have an important effect on the considerations.

Let us assume  $p$  is person A’s statement being attacked by person B by *ad hominem* argument  $q$ .

## 2.2 Genuineness

The genuineness is the basic criterion when determining the fallacy. For any fact its veracity can always be checked — in the sense of Aristotle’s definition of the truth. Mentioning contrived facts, that actually have never taken place is undoubtedly dishonest and an unworthy trick. Furthermore it can usually be easily proved that the allegation is true.

### Example 1

A: In my opinion lawyers should take part in seminars more often.

B: You assert that lawyers need such meetings, but you have taken part in only three seminars in the last five years!

A: That’s not true, I have got certificates of attendance to at least eight.

Moreover, it needs to be emphasized, that not only the fact of performing the actions (*facere*) can be recognized as true or false. *Non facere* meets this criterion also.

**Example 2**

A: Everyone should have the right to commit suicide, whenever they want to.

B: Why don't you hang yourself then?

The fact on which the *ad hominem* is based “A doesn't hang himself” is definitely true — A is still alive and arguing with B. Therefore not performing the action is the criterion which veracity can be verified.

**2.3 Time**

The next criterion of the *ad hominem* argument is time. It can be categorized into 1) past or 2) recent/present. The distinction is important, because one must take into consideration that people can change their opinions or behavior due to the passage of time. I take it that as people gain new experiences, they can change their minds.

**Example 3**

A: Euthanasia should be allowed for anyone who is able to clearly express his will.

B: You used to say that it's murder and should be absolutely prohibited!

A: I've changed my mind after my grandfather's death last year. He suffered so much.

Obviously, it is impossible to say precisely when “the past” ends and “recent” begins. This criterion should be taken into consideration responsibly. The question is, if in between the time mentioned in the argument and the moment of discussion person A could have gained such experience that it would change his opinion. This particular *ad hominem* argument

attempts to successfully apply Kochan’s first definition — contradiction with previously given opinions.

The general rule is: the longer the segment of time that has passed, the higher the possibility of appearing changing opinion factors.

## 2.4 Construction

The construction criterion describes the logical relation between  $p$  and  $q$ . Therefore we can distinguish: 1)  $q$  implies  $\sim p$  ( $q \Rightarrow \sim p$ ), 2)  $q$  does not imply  $\sim p$  ( $q \not\Rightarrow \sim p$ ). If 1) the *ad hominem* argument  $q$  reveals a contradiction when compared with  $p$  preached by A.

### Example 4

A: You shouldn’t smoke, it’s unhealthy.

B: But you smoke yourself, hypocrite!

Sentence A stands for  $p$  while sentence B stands for  $q$ . In the example above the relation is  $q \Rightarrow \sim p$ , because in surmise B implied that if smoking was unhealthy A wouldn’t smoke. Therefore a contradiction appears. Note that  $q \Rightarrow \sim p$  not even directly then (as in the example above, where surmise is necessary). The type of *ad hominem* used above is *tu quoque* and also fulfills the second group of Kochan’s list — contradiction between what is being preached and what is being practiced.

## 2.5 Significance

The last factor — significance describes the essential interrelationship between the content of the plea and the thesis, by focusing on a context and subjective evaluation. The essential relationship is an ambiguous term, analogically to the “essential similarity” of the analogy. It can be 1) questionable or 2) unquestionable. Situations when the significance would be unquestionable appear seldom, usually when the former experience or incident that occurred in the past, is undoubtedly important to the topic of the discussion.

**Example 5**

A: I want to be given this job offer. I’m a reliable worker.

B: Really? At your last job you were absent for a month and didn’t even inform your boss about it!

Normally the significance of the fact that A avoided work for one month wouldn’t be sufficient to say that the *ad hominem* is non-fallacious. However, the context of the situation of a job interview is associated with the necessity of having good references and worthy experience. Therefore the significance of the statement *q* is unquestionable here.

The questionable factors deal with the subjectivity and the morality of each person.

**Example 6**

A: After work I can do whatever I want. Even if it’s improper.

B: But you’re a deputy! You represent your nation!

The significance is questionable, because it depends on the interlocutor, what his view on behavior after hours is. A more conservative person would probably say that a deputy should always behave well, even if he is not at work and is not breaking the law. A more liberal person might not be against it. Therefore the statement uttered by B would not have any significance to them — it would be concerned as irrelevant to the topic.

**3.1 Scheme**

These four criteria combine to show the fallacy or non-fallacy of an argument, as it can be seen at Figure 1. Moreover, they create 11 possible types of the *ad hominem* argument, which correspond with the types set up in the definition.

Let’s examine one of the A. Schopenhauer’s examples.<sup>14</sup>

**Example 7**

A: Berlin is an unpleasant place to live in.

B: Why don’t you leave by the first train?!

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<sup>14</sup>See Schopenhauer

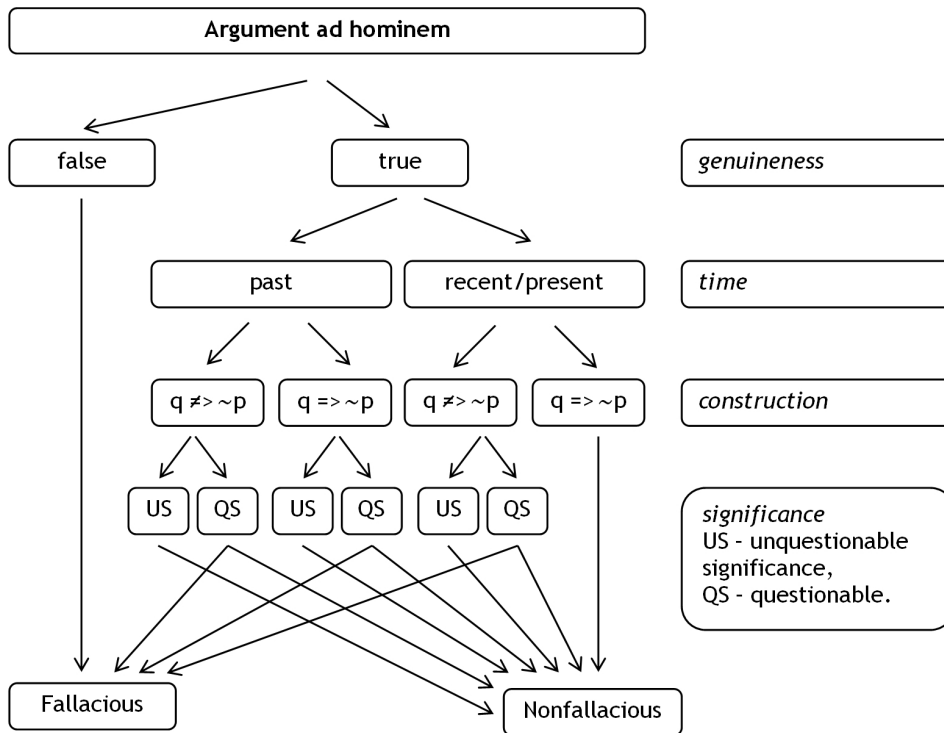


Figure 1. Ad hominem argument scheme.

$p$  stands for the whole sentence uttered by A,  $q$  stands for “A is not leaving Berlin by the first train (and A thinks that Berlin is an unpleasant place to live in)”. It can be guessed that A is not leaving Berlin and only expresses his opinion. Therefore the sentence  $q$  is true.  $q$  concerns the present. The construction of the argument shows that  $q$  doesn’t imply  $\sim p$ . No contradiction is being revealed by uttering  $q$ . The significance here is questionable, but generally most people would say that it’s irrelevant to the topic. In summary, the *ad hominem*  $q$  is fallacious. However, if the surmise

that “anybody who doesn’t like Berlin — leaves it as quickly as possible” is true — this argument would fulfill Kochan’s fourth group. The addition of the implicit premise creates the contradiction.

### 3.2 Scheme Examination

Let’s examine every scheme moving from left to right, to study the fallacy of every possible *ad hominem* type and find out if it’s more often fallacious or non-fallacious. Example 1 mentioned above fulfills the option “false — fallacious”.

To the scheme “true”, “past”, “ $q \not\Rightarrow \sim p$ ”, “unquestionable significance” the following example will be suitable:

#### Example 8

A: I want to be a lawyer. I think I am able to find weaknesses in my opponents easily.

B: You’ve got a criminal record from the past!

Although  $q$  doesn’t imply  $\sim p$ , the significance of the sentence uttered by B is unquestionable — a person with a criminal record cannot become a lawyer. The argument disqualifies the person from becoming a lawyer, therefore the whole discussion is pointless. The argument is nonfallacious.

#### Example 9

A: I should be elected for a president, I want to make our country a better place.

B: You were a member of the communist party in the times of People’s Republic of Poland!

The sentence B in the example 9 is true (A had been a member of the communist party), it is in the past, but doesn’t imply that the sentence uttered by A is false. Therefore the significance factor is the most important one. In this situation the significance of A’s membership to a communist party in the past depends on the person. Some people would say that it is definitely not connected with the ability to be a good president, and

then this would be an example of an abusive *ad hominem*. In the eyes of others this former party membership would be sufficient ground for A’s disqualification. The fallacy of the argument depends on the person.

The other example that fulfills this branch is presented below. It’s a “poisoning the well” type. Although its significance is questionable, the whole argument should be recognized as a fallacy (this particular example is also connected with the *argumentum ad Hitlerum*<sup>15</sup>).

**Example 10**

- A: I support the prohibition of smoking in the public places.
- B: You know who was the first person to say so? Adolf Hitler!

Example 5 (job offer) shows the situation of the same type, which is “true”, “past”, “ $q \not\Rightarrow \sim p$ ”, but with the unquestionable significance, what was explained earlier. The *ad hominem* is non-fallacious.

**Example 11**

- A: Abortion should be forbidden.
- B: You used to be a member of a party which promoted abortion!

Sentence *q* is true, past and reveals the contradiction in what A is uttering. However, the fact of being a member of a party a long time ago doesn’t imply that A couldn’t have changed his mind. Therefore the significance is questionable and depends on a wider context. As a result it can be assumed that it is a fallacy — because over a long period of time it is possible that A has changed his opinion on abortion.

The next example shows the situation when *q* is recent, doesn’t imply  $\sim p$ , but however is about to have unquestionable significance — and is non-fallacious.

**Example 12**

- A: I didn’t steal anything!
- B: You were suspected of various offences five times last month!

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<sup>15</sup>“If Hitler liked neoclassical art, that means that classicism in every form is Nazi.” (See Fleming 2000)

Although what B utters doesn't reveal any contradiction with A's sentence, its significance is unquestionable in the context of the interrogation. Therefore *ad hominem* is non-fallacious. Note, that in this type of situation the personal sphere needs to be examined and this justifies using the *ad hominem* as non-fallacy.

**Example 13**

A: Abortion should be legal!

B: Of course you say that! Your girlfriend is for the abortion, isn't she?!

Example 12 is similar to Example 11 — its last factor is questionable. The significance of the B's statement is questionable, however, in this particular case it is non-fallacious if it is taken into consideration that surmise of the boy being dominated by his girlfriend is true. This example fulfills the type of bias *ad hominem*.

In the last situation, when the argument given is true, recent and denies the interlocutor's sentence, the factor of significance is omitted, because if  $q$  implies  $\sim p$  any other considerations would be superfluous.

**Example 14**

A: Pedophiles should be executed.

B: You're a Catholic, how can you say that!

$q$  reveals a contradiction between what is being preached by A and the sentence uttered by him. According to the *Vorurteil* theory the membership to a certain group is a significant background of the discussion — its equal part. The speaker B revealed the hypocrisy of A — he is for and against the capital punishment at the same time. It is also an example of the circumstantial *ad hominem* and fulfills the third group of Kochan's list.

**3.3 Conclusion**

It is concluded that *ad hominem* argument is more often non-fallacious — in 7 out of 11 cases. Therefore all statements uttering that it is a fallacy are



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not true if any other reservations are not made. Also it shows clearly that each *ad hominem* can depend on one of four factors. Moreover, arguers should be more careful when judging arguments of the second party as fallacies, because it's not always obvious, as is explained above.

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# Semantic Sting and Legal Argumentation

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**Abstract.** The paper discusses the famous semantic sting argument (SSA) addressed by R. Dworkin against the legal positivism. Dworkin maintains that most legal theories cannot explain theoretical disagreements arising in legal practice, because they maintain that lawyers are simply using uncontroversial criteria provided by the conventional meaning of the word law when considering the truth of propositions of law. We argue that the significance of the SSA depends on the role and functions ascribed to legal theory. The positivistic legal theory may explain why such disagreements arise in the practice of law. Such explanation is in positivism a matter of description as opposed to construction. It is important to make a distinction (which Dworkin, as we consider fails to make) between the questions of validity and the questions of interpretation. Positivism is a plain facts theory only in the sense that it is a matter of fact what criteria of validity are adopted in a given legal community, but not in the sense that the validity of law can always be decided by reference to plain facts only. The subject matter of interpretation is valid law. This means that any interpretation must necessarily presuppose a certain method or way of identifying valid law. The fundamental difference between positivism and Dworkinian theory of law can be described as follows: Dworkin opts for an axiologically engaged legal theory, in the sense that it is the fundamental task of legal theory (as an interpretative theory) to

take an active part in the practical legal discourse aiming at justification of propositions of law. Positivist theory of law is axiologically neutral in the sense that it does not take part in the practical legal discourse relating to the question of how a particular legal case is to be resolved.

**Keywords:** semantic sting, legal argumentation, validity, interpretation, positivism, interpretative theory of law.

The purpose of this paper is to reconsider the famous semantic sting argument (the SSA) formulated by R. Dworkin in his *Law's Empire*<sup>1</sup>. There is a certain disagreement regarding what the SSA actually purports and against whom it is directed<sup>2</sup>. Certainly, it may be considered a symptom of Dworkin's outright rejection of the analytical approach to legal theorizing<sup>3</sup>. Let us, therefore, start with an explicit formulation of the SSA.

Dworkin observes that most legal theorists (including H.L.A. Hart) insist that lawyers all follow certain linguistic criteria for judging propositions of law. Therefore, most legal theories cannot explain theoretical disagreements arising in legal practice, because they maintain that lawyers are simply using uncontroversial criteria provided by the conventional meaning of the word “law” when considering the truth of propositions of law. This means that no deep or substantive disagreement about the law may arise, because all competent users of the concept of “law” must agree on the criteria for its application. Otherwise they would be “only talking past one

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<sup>1</sup>The SSA was originally an argument which Dworkin explicitly ascribed to legal positivism and other “semantic theories of law”, and formulated as follows: “... unless lawyers and judges share factual criteria about the grounds of law there can be no significant debate about what the law is” (Dworkin 1998, p. 44). Therefore the argument, which was previously ascribed to positivists, has been mislabelled (see Marmor, p. 5, note 6). However, supplemented with reasons for which Dworkin rejected such a statement, it can be, as it is usually done (see Raz 2001 and Smith 2009), considered as a complex counter-argument against “semantic theories of law”.

<sup>2</sup>See Smith 2010, pp. 635 et seq. who, following S. Shapiro, distinguishes the semantic sting argument (the SSA) and the argument from theoretical disagreement (the ATD) and claims that the latter is more powerful.

<sup>3</sup>Cf. Marmor 2005, p. 2.

another”<sup>4</sup>. The only disagreements that may arise involve either empirical questions (for example: whether a statute has been enacted with the required majority of votes) or how penumbral cases should be decided<sup>5</sup>.

As a number of important and deep theoretical disagreements actually arise in practice, such theories of law which adopt the thesis that the concept of law is of the criterial nature must fail. One of those theories is legal positivism, which is a plain fact theory, as it claims “...that law depends only on matters of plain historical fact, that the only sensible disagreement about law is empirical disagreement about what legal institutions have actually decided in the past”<sup>6</sup>.

It appears that for Dworkin the occurrence of deep theoretical disagreements in legal practice is the central feature of law and legal order<sup>7</sup>. Otherwise, positivistic inability to provide a satisfactory account of theoretical disagreement would be of no great significance, and therefore a flaw of being “semantically stung” would not affect a positivistic account’s explanatory powers (like a small scratch on the body of a race car probably affects its beauty, but does not limit its speeding abilities).

Semantic theories of law necessarily lead to the conclusion that unless lawyers (especially judges and other officials) follow the same rules in using the word “law” (i.e. in understanding the concept of law)<sup>8</sup>, here will be

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<sup>4</sup>Dworkin 1998, pp. 43–44.

<sup>5</sup>Comp. Endicott 2010, pp. 19 et seq.

<sup>6</sup>Dworkin 1998, p. 33.

<sup>7</sup>See Leiter 2009, p. 1220. Such Dworkinean assumption allows to develop the conception of law as integrity, but as an Archimedean point it may be easily defeated. Leiter points out that “theoretical disagreements about law represent only a miniscule fraction of all *judgments* rendered about law, since most judgments about law involve agreement, not disagreement” (Leiter 2009, p. 1226)

<sup>8</sup>For the sake of simplicity, we assume that there is no crucial difference between “understanding of the concept of X” and “proper use of the word ‘X’”, as far as the word X refers to the same shared criteria, which allow to use a concept of X, simply because using a word presuppose its (at least implicitly) understanding. That does not certainly mean that to understand the concept-word (to know the meaning of the concept-word) one have to be able to articulate a detailed and correct theory about what it signifies.

no genuine argument over the question “What is law?” to account for<sup>9</sup>. A semantic theory of legal positivism, which is a causal theory, that finds its roots in some established and widely accepted criteria (which stand, at least, for a necessary basis for successful communication), is opposed to the theory of constructive interpretation. This theory is not based on any criterial-causal model, but is conceived of as a culturally and historically determined “matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong”<sup>10</sup>. The semantic, positivistic theory is therefore not constructive, but re-constructive. The point of Dworkin’s effort undertaken in *Law’s Empire* is to explain how a theoretical disagreement is possible by constructing a particular theory of law as integrity. Moreover, he is convinced that legal positivism, as “semantically stung”, is unable to furnish such an explanation.

There are many interpretations of the SSA. According to the first interpretation, its aim is to explain why most legal philosophers deny that theoretical disagreements exist, even though such disagreements appear to be a commonplace. The explanation is as follows: “such theorists accept criterialism and are led astray by the semantic sting, which is a certain picture of what is necessary for successful communication to occur”<sup>11</sup>. Another interpretation reformulates the SSA into the “old controversy argument over conventionalism”<sup>12</sup>, which, according to the maxim of charity, we do not treat as Dworkin’s real intention. (The anti-conventionalist argument, in which Dworkin refers to the self-defeating character of conventionalism and which is unable to account for controversies arising in legal practice, is a different thing.) Therefore we can treat the SSA as a rejection of the claim that agreement and disagreement about law are possible only if we share the same criteria for determining when propositions of law are true<sup>13</sup>. Acceptance of such a claim entails the acceptance of “criterial semantics.”

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<sup>9</sup>See Marmor 2005, p. 6.

<sup>10</sup>Dworkin 1998, p. 52.

<sup>11</sup>Smith 2010, p. 647

<sup>12</sup>See Marmor, p. 7 et seq.

<sup>13</sup>Cf. Smith 2009, p. 296.

The crux of the argument is as follows:

1. concepts that can be criterially explained cannot be the subject of theoretical disagreement;
2. the concept of law can be the subject of theoretical disagreement;
3. therefore, the concept of law cannot be criterially explained<sup>14</sup>.

It is noteworthy that in such a formulation the SSA is different from “the argument from the theoretical disagreement” (the ATD), which is an objection to any theory of law that denies that legal officials can engage in theoretical disagreements. Recently, S. Shapiro has suggested that the ATD, and not (in his opinion, the badly flawed) SSA, is the essential argument against legal positivism presented in *Law’s Empire*. In such a formulation, the ATD contends that positivists are committed to the existence of agreement among legal officials about “the grounds of law”, and that they therefore cannot explain the fact that legal officials actually often disagree about such grounds<sup>15</sup>. The ATD argument is broader than the SSA, because “it calls our attention to cases in which people disagree about the ‘grounds of the law’ even in the absence of any criteria (even criteria unknown to the speakers) that settle what the grounds of law are”<sup>16</sup>. Refuting the SSA does not ultimately undermine the ATD. We will concentrate on the SSA, which we still suppose to be Dworkin’s main claim insofar as semantic theories, in his approach, are strictly opposed to interpretive accounts of legal theorizing, and we will discuss the ATD only on occasion.

There are basically two routes of refutation of the SSA. Some legal positivists argue that even if the SSA is sound, it simply does not apply to the legal theories advocated by them, as their theories are not concerned with the linguistic meaning of the word “law” and do not strive at reconstruction

<sup>14</sup>See Raz 2001; Ccf. Smith 2009, p. 299.

<sup>15</sup>Shapiro 2007, pp. 49–50.

<sup>16</sup>Leiter 2009, p. 1217, note 8.

and elucidation of criteria for application of this word<sup>17</sup>. Other positivists admit that the SSA applies to their theories, but claim that it is not sound, since criterial explanations of the concept of law do not exclude theoretical disagreements of the sort Dworkin has in mind<sup>18</sup>. We would like to pursue another route of refuting the SSA. In particular, we would like to argue that the significance of the SSA depends on the role and functions ascribed to legal theory. In our view positivism can be conceived of in such a way that it is not the role of positivism as a legal theory to take any position toward “theoretical disagreements” in the Dworkinian sense. On the other hand the positivistic legal theory may explain why such disagreements arise in the practice of law, without “imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.” Such explanation is in positivism a matter of description as opposed to construction.

Before we start, let us take a closer look at the Dworkinian concept of theoretical disagreement. He defines theoretical disagreement as disagreement “... about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true”<sup>19</sup>. It appears that by a “proposition of law” Dworkin means a statement that a certain person has a certain right or a certain duty (i.e. statements about content of the law). Empirical disagreements, concerning exclusively the different assessment of certain propositions of law, yet accepting the same “grounds of law”, are contrasted to theoretical disagreements, which, roughly speaking, are disagreements about the criteria of legal validity (for positivists: about the content of the Hartian rule of recognition).

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<sup>17</sup>According to Hart, who noticed that the word “law” has more than one meaning, the dispute between rival legal theories over the appropriate concept of law is “ill presented as a verbal one”. Moreover, the choice between rival concepts of law must be reasoned one: “it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both” (Hart 1961, p. 204–205; cf. Marmor 2005, p. 5).

<sup>18</sup>Cf. Raz 2001; See also Smith 2009, p. 291 et seq.

<sup>19</sup>Dworkin 1998, p. 5.



Dworkin gives several examples of theoretical disagreements arising in practice. For the sake of brevity, let us refer to just two of them: the famous *Riggs v. Palmer* and *Tennessee Valley Authority v. Hill*. The question to be answered by the court in *Riggs v. Palmer* was whether someone could inherit under a will when he murdered the testator in order to inherit. According to Dworkin, the judges represented different views of how to interpret the New York statute of wills. In other words, they disagreed what law was created by that statute, as they adopted different theories of interpretation: the minority advocated for the theory that the words should be given their literal meaning, whereas the majority argued that the legislator’s hypothetical intention was important in determining the meaning of the statute. Thus, a dispute between various theories of statutory interpretation is an example of a theoretical disagreement in the Dworkinian sense. Dworkin derives another example of theoretical disagreement from *Tennessee Valley Authority v. Hill*, where the question was whether the court should adopt a literal interpretation of a statute which would lead to obviously absurd consequences.

As we consider the nature of the problem in *Riggs v. Palmer* is different than in *Tennessee Valley Authority v. Hill*. In our view the problem in the former case does not have much to do with interpretation of the statute, but rather is equivalent to the question whether in addition to statutes and precedents, certain general moral principles constitute the source of law of the State of New York, binding on judges and having, at least in this particular case, priority over the statute. In other words, the problem of the case was related to identification of valid law. In the latter case the problem was whether *argumentum ad absurdum* justifies the departure from the literal meaning of the statute. In any case, Dworkin describes both cases as posing a theoretical disagreement about interpretation or, more precisely, about application of different theories of statutory interpretation.

Those examples are puzzling, at least from the perspective of continental legal theory, for several fundamental reasons.

According to Dworkin, a dispute relating to statutory interpretation constitutes a theoretical disagreement pertaining to “the grounds of the law.” It is a disagreement “about which other kinds of propositions, when

true, make a particular proposition of law true.” In his example, the proposition of law in dispute is the proposition “X has inherited under the will of Y.” The “other kinds of proposition” which are supposed to make this proposition true are either “Only the literal wording of the New York statute of will is important” or “The statute should be disregarded, if it brings about consequences incompatible with basic principles of law” (or, alternatively, as Dworkin says, with the hypothetical intention of the legislator). Obviously, those propositions are contradictory. The former makes the proposition of law in question true; the latter makes it false. Both, according to Dworkin, pertain to the “grounds of the law.”

All that is trivially true. It is, however, puzzling why Dworkin believes that positivism, as a plain fact theory, is not able to account for this type of disagreement<sup>20</sup>. First, contemporary positivism is a descriptive-analytical, and not a normative, theory<sup>21</sup>. The task of the legal theory (in its positivistic version) is not to answer the question whether X has inherited under the will of Y. Positivism (unlike Dworkin’s theory) is nothing to be followed by the legal practice. Positivistic legal theory is not a “silent prologue to any decision of law”<sup>22</sup>. Positivism does not give any recommendations for how difficult cases are to be decided (except perhaps for some purely formal requirements imposed on judicial reasoning, in particular the requirements of clarity, disclosure of all premises, and complying with logical standards). Therefore, positivism is not bound to take any stance in the dispute relating to the canons of statutory interpretation. The role of positivism as a descriptive theory is only to provide for an analytical description of such disputes, to reconstruct the premises on which opposite positions are

<sup>20</sup>Cf. Hart 1961, p. 246.

<sup>21</sup>Hart, in the Preface to *The Concept of Law* characterizes his book as “an exercise in descriptive sociology” (Hart 1961, p. iv; the descriptive focus is repeatedly reaffirmed in the Postscript, see H.L.A. Hart, *The Concept of Law* (revised edition), p. 239-244). We shall say that the primary aim of *The Concept of Law* was scientifically to describe and explain the social phenomenon of law rather than to analyze the terms in which participants in modern legal systems understand their own practice (Moore 2002, p. 100). Of course, such an attitude is not characteristic to all kinds of legal positivism (surely not to normative positivism and classical German positivism as well).

<sup>22</sup>Dworkin 1998, p. 90.

based, and to consider the consequences of both positions. And that is what positivism actually does<sup>23</sup>.

Second, unlike Dworkin’s theory, positivism understands itself as a general theory of law. It is not a theory of English, French, or American law, but a theory of law *tout court*<sup>24</sup>. A positivist may concentrate on problems of legal interpretation but, doing so in a purely descriptive manner, would not commit himself to an “interpretative” approach, which is essentially particular and normative. Positivism is a kind of general jurisprudential theory, which aims at the proper understanding of legal practice. The point of positivism is to grasp legal phenomena in a general context, especially with respect to their functions and features which allow us to speak of a “legal system.” From the Hartian perspective such a fundamental feature of every system is the famous discrimination between two different though related types of rules (primary and secondary)<sup>25</sup>. The accurate description of universal psychosocial features constituting the conditions of legal validity and their (logical, factual) relation to valid norms (which itself limits the domain of interpretation) is the main task of legal positivism as a general theory of law. The same objection to Dworkin has been presented by major adherents of contemporary positivism. J. Raz claims that “... a determination of the content of the law of this legal system or that and the explanation of the concept of law are very different enterprises”<sup>26</sup>. That means simply that “when in the course of rendering judgment a court interprets the law, it does not interpret the concept of law”<sup>27</sup>. On the other hand, it is not the aim of a general theory of law to answer questions pertaining to a particular legal order<sup>28</sup>.

<sup>23</sup>Cf. Wróblwski 1990, p. 12 et seq.

<sup>24</sup>Ambitions of legal positivism are certainly tied with western legal cultures. It is however arguable if it could refer to Islam or Asian legal orders.

<sup>25</sup>Cf. Hart 1961, pp. 80–81.

<sup>26</sup>Raz 2001, p. 27.

<sup>27</sup>Raz 2001, p. 31; cf. Smith 2009, p. 319.

<sup>28</sup>Both K.E. Himma and J. Coleman claims that Dworkin confuses criteria for the application of the concept of law with the criteria of legal validity in a particular legal system (cf. Himma 2002, pp. 160–162; cf. Coleman 2001, pp. 180–182). D. Smith calls these two similar arguments of Raz and soft positivists against the SSA the “alternative

Third, positivism makes a clear analytical distinction between the question of validity and the question of interpretation. When a judge is considering a case such as *Riggs v. Palmer*, she must first decide what is the legal basis for her decision, or in other words she must identify statutes, precedents, and, as Dworkin wishes, general principles relevant for resolution of the dispute. In order to do so, she must solve the problem of validity of rules/principles that she considers applicable, by use of such criteria of validity as are adopted in the given legal order. H.L.A. Hart would say that the judge identifies valid laws by application of the rule or recognition. Obviously, such criteria are different in various jurisdictions (although they have certain similarities in civil law countries and in common law countries). The adopted criteria of validity usually refer to various tests of pedigree (specific for a given jurisdiction), but as Hart demonstrates, they may refer also to moral and other criteria. The general concept of law itself does not entail any such criteria, but at the most requires that such criteria exist (and, therefore, that law is identifiable). The criteria may be uncertain and vague, but in order to make law operative, there must exist a general consensus within the legal community with respect to such criteria. Positivism is a plain facts theory only in the sense that it is a matter of fact what criteria are adopted in a given legal community, but not in the sense that the validity of law can always be decided by reference to plain facts only. If the rule of recognition refers to moral criteria or other criteria relating to the content of legal rules, examination of plain facts is not sufficient for answering the question whether x is a piece of valid law.

It is indeed true that positivism adopts a criterial concept of law. This means, however, only that positivism formulates a descriptive thesis — in each jurisdiction there exist certain criteria for identification of valid law. The criteria may be vague and/or uncertain, and disputes may arise as to their application in a given case, but the pre-condition for existence of a legal order is that such criteria are shared by members of the given legal community. Positivism as a general theory of law does not identify the nature of such criteria, but only describes their function. The question

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objection” (see Smith 2009, p. 319).

as to the nature of those criteria can be answered only with respect to a particular legal order.

Some of the potential criteria are necessarily uncertain or vague. If the rule of recognition in a particular legal order provides for moral criteria (“no law can be immoral”) or for criteria referring to common sense (“no law can bring about consequences which contradict the common sense”), obviously the application of such criteria may become a matter of controversy. This, however, does not mean that such criteria do not exist. They may not entail any particular decision in a particular case, but they at least delimit the scope and topic of any potential dispute. Otherwise, there would be no limits of the validity discourse, as any arguments could be invoked. It appears that positivism as a general theory of law makes an important distinction between the legal discourse regarding validity of law and the political discourse regarding what the law should be like. Politicians are free to invoke any arguments in their disputes about how the law should be shaped. Legal practitioners are not so free in their discussion of what valid law is. They may invoke only such arguments which are of legal (as opposed to political or moral) nature. The role of the rule of recognition is to define what arguments count as legal arguments. We suggest that an interpretative theory of law of the Dworkinian sort fails to make such a distinction.

We do not think that Dworkin’s examples are able to falsify such stance of positivism. In *Palmer v. Riggs* the panel of judges identified the New York statute of wills as valid law applicable to the case. How could they have done so without using criteria adopted in the U.S. (or rather the State of New York’s) legal community? The problem confronting the judges was whether there existed a valid principle with priority over the rules contained in this statute. We do not think, irrespective of the final outcome of the case, that any member of the panel of judges denied that the New York statute of wills was a piece of valid law.

The subject matter of interpretation is valid law. This means that any interpretation must presuppose a certain method or way of identifying valid law. Judges are not concerned with interpretation of such rules that do not belong to the body of valid law. Basically, answering questions relating to

the legal validity of certain rules must precede answering questions relating to interpretation of such rules. Only exceptionally may the validity of a rule depend on its interpretation. Such dependence is created by the principle, adopted in most legal orders, providing that *lex inferior not potest derogare legi superiori*. For example, such dependence may arise once the substantive constitutionality of a given statutory rule is examined. In most legal orders statutory rules cannot be in contradiction to the constitution. If a statutory rule is declared unconstitutional, it ceases to be valid. The problem of constitutionality, however, may arise only with respect to such rules that meet the criteria of validity adopted in a given legal culture (Hartian primary rule of recognition). If such criteria are not met, the problem regarding whether the substance of the rule in question complies with the constitution does not arise at all. Only if such criteria are met can the constitutional court decide whether the statutory rule in question violates the constitution. The decision of the constitutional court depends on interpretation of the statutory rule examined. In particular, the constitutional court may decide that the rule is constitutional provided that it is interpreted in a specific way.

With the exception described above, the discourse relating to validity of a statutory rule and the discourse relating to its interpretation are separate<sup>29</sup>. To use Dworkin’s language again: the propositions which make the statement “R is a valid rule” true are different from propositions which make the statement “R means M” true<sup>30</sup>. Although in legal practice both discourses may be conducted simultaneously, it is analytically possible to draw a line between them.

There is at least one obvious objection which adherents of Dworkin can raise against the above argument. Namely, if one separates the validity discourse from the interpretation discourse, one must admit that the validity discourse alone (which logically precedes the interpretation discourse)

<sup>29</sup>Cf. Grabowski 2009, pp. 559–562.

<sup>30</sup>Smith 2010, p. 641 suggests a different distinction (i) what sources of law are there in a particular jurisdiction and (ii) what effect does a given source of law have on the content of the law. In our view, the former question is a validity question and the latter is an interpretation question.

is not able to answer the question regarding what the law says with respect to a given case or, in other words, how such a case is to be decided, as obviously, the decision depends not only on validity of the rules applied but also on their interpretation. Further, in the examples of cases given by Dworkin, theoretical disputes arose at the stage of interpretation. One of the stances in such disputes (the majority view in *Riggs v Palmer*) leads to the conclusion that the statutory rule derived from the New York statute of wills is not binding due to specific circumstances of the case. Therefore, interpretation affects validity, and the validity discourse cannot be separated from the interpretation discourse. However, in this case the interpretation discourse is not the same discourse of interpretative jurisprudence which Dworkin has in mind.

We think that such an argument would be based on a misunderstanding and would be inconsistent with Dworkin’s theory of legal principles. In *Riggs v Palmer* the court came to the conclusion that one of the basic principles of U.S. law in this particular case had priority over the rules of the New York statute of wills. This does not mean, however, that the court denied the validity of the statute. The court denied only the applicability of the statute to this particular case, due to the fact that its application would lead to a decision violating an important legal principle. In the opinion of the majority of judges, the issue of interpretation of the statute did not arise at all.

Positivists, we think, accept the thesis that the outcome of the discourse relating to validity of rules does not *per se*, at least in hard cases, entail how the case is to be solved. In many (if not all) cases the validity discourse must be followed by the discourse relating to interpretation of valid legal rules. Even if a legal rule R is unclear, obscure, or vague, it does make sense to say that R is a valid legal rule, although the mere wording of R does not entail any resolution of the case under consideration. Even if a valid legal rule is linguistically clear, a dispute may arise about whether its literal interpretation is to be adopted. It is a commonplace that lawyers frequently engage in disputes relating to the proper interpretation of legal rules. It is also a commonplace that although certain methods or canons or rules of interpretation are commonly adopted (such as canons of linguistic

interpretation, systematic interpretation, and teleological interpretation), the sequence and hierarchy of such methods or canons is extremely controversial. The point, however, is that positivism as a descriptive theory of law does not take any position in such disputes. The role of legal theory in its positivistic version is only to explain why such controversies arise, what positions are or may be taken by adversaries, how such positions are justified, and what the practical consequences of particular positions are.

Every act of legal interpretation has its subject-matter, which comprises norms previously identified as valid. Dworkin claims that such rules and principles (those recognized as valid) are identified during a so-called “pre-interpretative stage.” Since rules and principles do not have etiquettes (they are not pre-labeled as legal), there is also a need to abstract them from the vast cultural background. In other words, some version of the positivistic social fact thesis, which allows for a minimum of consensus regarding the basic criteria of identification of valid law, must be sustained<sup>31</sup>. There is no interpretation (in the strict meaning of the word) at the argumentative stage without previous, more fundamental identification of valid rules and principles (the abstract content of law). Let us agree with Dworkin that such identification requires a sort of interpretation in the broad sense of the word. It is the case that both kinds of interpretation (identification of valid law and ascription of sense to the law previously identified) consist in application of and are limited by some shared criteria, but from the analytical point of view, these are two different things (different types of intellectual enterprise). Dworkin uses the homogeneous concept of interpretation and claims that interpretative legal theory accurately describes the argumentative character of particular legal practice. He claims that the truth of certain propositions of law depends on the sense they are given only by and within the practice (i.e. a sincere participation in practice, tied with having own sense of what counts as a good or bad argument within that practice)<sup>32</sup>. The nature of legal argumentation is, however, predominantly related to the second type of interpretation. On the other hand, the

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<sup>31</sup>See Moreso 2001, p. 110.

<sup>32</sup>Dworkin 1998, pp. 13–14.



first type of interpretation, which refers to the “grounds of law”, is the one which would allow the theoretical disagreement to appear. Even if disputes relating to the grounds of law in the Dworkinean sense arise (due to the uncertainty of criteria imposed by the rule of recognition), such disputes do not define the nature of legal argumentation. Thus, the argumentative nature of law has very little to do with the alleged central position of theoretical disagreement in legal practice. Even in the positivistic, criterial approach, argumentative legal practice is possible, because contrary to Dworkin it may encompass the interpretative discourse in the strict meaning of the term, thus relating to interpretation of rules previously identified as valid.

As follows from the examples given by Dworkin, such controversies relating to the proper methods or canons of interpretation of law are theoretical disagreements in the Dworkinean sense. A positivist would say rather that those disputes are of a practical, not of a theoretical, nature, as they relate to practical normative questions such as “How the law is to be interpreted?” Positivism is able to give (and actually gives) answers to the question regarding why such controversies arise, but positivism does not resolve such controversies, as doing so is not a task of legal theory but of legal practice and legal dogmatics. Unlike Dworkin’s philosophy of law, positivism is a meta-theory in the sense that it understands its task as the explanation of what lawyers do when they resolve legal problems (or, using Dworkinean language, when they engage in disputes as to the truth-value of “propositions of law”) and not as the resolution of such disputes<sup>33</sup>. Finally, the resolution of such disputes depends on ethical convictions of the parties, and in particular on the hierarchy of values accepted by them. It is a well know fact, stressed by many positivistically oriented legal theories, that legal reasonings aiming at justification of propositions of law are not axiologically neutral, in the sense that external justification of the premises of such reasonings must make recourse to values<sup>34</sup>.

<sup>33</sup>Cf. Hart 1961, pp. 253–254; Hart claims that the objective standing of moral judgments is left open to legal theory.

<sup>34</sup>Wróblewski 1972, p. 227.

The fundamental difference between positivism and Dworkinian theory of law can be described as follows: Dworkin opts for an “axiologically engaged” legal theory, in the sense that it is the fundamental task of legal theory (as an interpretative theory) to take an active part in the practical legal discourse aiming at justification of propositions of law, e.g. propositions of the form “P has the legal right to x” or “P has the legal duty to do y.” Legal-theoretical discourse is, therefore, a part of practical legal discourse, or, as Dworkin says “a prologue to any decision of law.” As explained above, such a definition of the task of legal theory makes the Dworkinian theory a “particular theory” in the sense that no general theory of law may exist. By definition, the legal theory of U.S. law must be different than the legal theory of Polish, German, or Czech law, as the underlying values guiding the interpretative task are at least partially different in each country.

Positivist theory of law is axiologically neutral in the sense that it does not take part in the practical legal discourse relating to the question of how a particular legal case is to be resolved. It does not say which propositions of law are true and which are false. It only describes how legal practitioners identify valid law and how they solve problems of interpretation. It is predominantly descriptive. Its only normative aspect relates to formal requirements for legal reasonings which it imposes on legal practice: clear language, lack of contradiction, disclosure of premises, and rules of reasoning.

In that sense there is no contradiction between Dworkin and Hart, as no contradiction may exist between a normative and a descriptive legal theory. The point is to understand the crucial difference between the concepts of interpretation used in general and particular theories of law. The SSA seems to blur that difference, and suggests that only Dworkinian, particular, and therefore “interpretative theory” can explain theoretical disagreement. However, it seems that the notion of theoretical disagreement is closely related to the monistic understanding of interpretation. Moreover, such understanding will lead to the conclusion that a theory of law, which does not consider theoretical disagreement as a central problem in jurisprudence, cannot explain the argumentative character of legal practice.

In our view, however, the pride of place which Dworkin gives to theoretical disagreement is unjustified. It is rather that “there is massive and pervasive agreement about the law throughout the system”<sup>35</sup>; and such agreement is a much more interesting phenomenon, and one which legal theory must address. Legal positivism captures such a feature of law, by investigation of the nature of criteria which preserve widespread agreement. Moreover, the methodological stance of legal positivism as a meta-theory potentially allows, without any further conflict, for the existence of some theoretical disagreement within particular legal practices. However, the notion of theoretical disagreement is not a central case to be considered<sup>36</sup>.

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<sup>35</sup>Leiter 2009, p. 1227.

<sup>36</sup>Moreover, a closer examination of the “sample cases” (Riggs, Hill), apart from our own analytic distinctions, shows that there in fact there were no “theoretical disagreements”. Recently B. Leiter has presented the adequate evidence (Leiter 2009). The real conditions for the “theoretical disagreement” to occur are more difficult to satisfy than one may suppose.

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# Rhetoric and Persuasive Strategies in High Courts’ Decisions. Some remarks on the recent decisions of the Portuguese Tribunal Constitucional and the Italian Corte Costituzionale on same-sex marriage

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**Abstract.** Legal argumentation is usually considered the more formal kind of practical argumentation, thanks to the long tradition of “legal syllogism” as its formal instrument, but also to its legal restraint. Yet, in arguments such as those used by high courts in their justifications, we may find not only strict formalism and adherence to the letter of the law, but also the attempt to resolve differences of opinion and conflicts of interest, and perhaps also the rhetorical

attempt to persuade the legal community, the legislator or even public opinion of the soundness of the court’s decision. Contemporary theories of legal argumentation have let aside the idea that the analysis of legal argumentations can show the judges’ hidden ideological and political positions by resorting to traditional legal arguments. Just as an example, it may be interesting to analyze the justificatory function of argumentations contained in two decisions taken by two constitutional courts, in Italy and in Portugal, on the same question. Constitutional judges, apparently, do not need to persuade anybody: there is no higher judicial authority, and their interpretation of constitutional text is definitive. For this reason, one can assume that strategic argumentation plays little role in the arguments justifying their verdicts. I hope I can show that this assumption may not, fully, reflect the reality.

**Keywords:** rhetorical devices in legal reasoning, natural language, argument mapping.

Legal argumentation is usually considered the more formal (or, at least, formalistic) kind of practical argumentation, thanks to the long tradition of “legal syllogism”, its logical instrument, but also to its legal restraint (the formalistic aspect). Yet, arguments such as those used by high courts in their justifications, have also a rhetorical dimension, based on the strategic attempt to persuade the legal community, the legislator or even public opinion of the soundness of court’s decisions. Just as an example, it may be interesting to analyze the justificatory function of argumentations contained in two decisions taken by two constitutional courts, in Italy and in Portugal, on the same issue. The choice of high courts’ decisions as a field of inquiry for rhetoric is grounded in the fact that Constitutional judges, apparently, do not need to persuade anybody: there is no higher judicial authority, and their interpretation of constitutional text is definitive. For this reason, one can assume that strategic argumentation plays little role in the arguments justifying their verdicts. I hope I can show that this assumption may not, fully, reflect the reality.

Rhetorically focused approaches to legal argumentation share the idea that the analysis of legal argumentations can show the judges’ hidden ide-

ological and political positions by resorting to traditional legal arguments. This point of view, exemplified by Neil MacCormick and Robert Summers with the opposition between “façade legitimation” and “genuine justification”, is based on the idea that the analysis of the use of legal arguments must look behind the decision’s surface and indentify the real motives of the decision itself. However, if this approach is based on the introduction of some psychological approach to measuring judges’ real intensions, it is hard to conciliate it with the argumentative analysis of legal texts. Furthermore, as MacCormick and Summers pointed out, it could be a mistake to suppose that “even in those cases where the psychological motivations diverge from the stated justification, the allege ‘façade’ that results is itself somehow unreal”. On the contrary, the “façade” is “worthy of study itself, since at the very least it represents an effort at self-conscious public justification”. In that vein, the rhetorical analysis of strategic aspects contained in judicial decisions can enable us “to understand what are regarded as satisfactory and publicly acknowledgeable grounds for decision making”<sup>1</sup>. Thus, to look at the rhetorical side of legal argumentations does not necessary imply that judicial decisions are merely “façade legitimation” but, more modestly, that the strategic dimension is “innate” in legal argumentation like in any other type of practical argumentation and must be analyzed, both for showing the inner structure of judicial decisions and for indentifying the underlining characteristics of strategic argumentation.

Now, let us consider the examples: two decisions taken almost at the same time by two separate authorities in two different countries on the same matter, same-sex marriage. Also the judicial course is almost the same: same-sex couples applied for a marriage licence, and their application was refused, on the grounds that same-sex marriage is a violation of the Civil Code. Finally, the couples challenge the ban in court.

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<sup>1</sup>MacCormick and Summers 1991, p. 30.

## 1 The Italian case

In the Italian case, in April 2009 the Court of Venice sent the issue to the Constitutional Court, claiming a possible conflict between the Civil Code, which does not allow for same-sex marriage, and article 3 of the Italian Constitution, which forbids any kind of discrimination, and article 29, which is the article of the Italian Constitution concerning family. The Constitutional Court ruled on April 2010 that the statutory ban on same-sex marriage is not a violation of the Constitution<sup>2</sup>.

In the grounds of the judgement, the Court briefly mentions art. 3 of the Constitution (which states that all citizens “are equal before the law, without consideration of sex, race, tongue, religion”)<sup>3</sup>, saying that this article does not prohibit any form of discrimination, but only unjustified or unnecessary or disproportionate discriminations<sup>4</sup>. So, the question is whether the ban of same-sex marriage is a justified discrimination. For this purpose, the Court begins by examining “for logical reasons”<sup>5</sup> (that are instead reasons based on the content of the article) article 29 of the Italian Constitution, which defines family as a “natural society based on marriage”<sup>6</sup>. This definition is clearly gender-neutral, but the problem, obviously, is the qualification of the family as a “natural society”. In order to clarify this qualification, the Court resorts to traditional legal arguments. In these cases, the main argument is obviously the naturalistic argument. Yet, this argument has become less effective in post-traditional and multi-

<sup>2</sup>Corte Costituzionale, Sentenza n. 138/210

<sup>3</sup>“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions”. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

<sup>4</sup>Corte Costituzionale, Sentenza n. 138/210, 3, *Considerato in diritto*

<sup>5</sup>9, *Considerato in diritto*

<sup>6</sup>“The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family”.



ethic societies: for this reason, the Court resorts also to a psychological argument, saying that “with this expression, as one can deduce from the preliminary work of the constituent assembly, the constitutional legislator meant underline that the family has original rights, not derived from the authority of the State or of the legal order”. As we can see, the naturalistic argument is still implicit, but the strategy of the Court is to hide this argument, which ultimately states the unnaturalness of same-sex marriage, by resorting to the intention of the legislator. It thus shifts the burden of proof to the “Constituent Fathers”. This strategy comes out most clearly in the following lines. First of all, the Court states that a legal concept such as “family” cannot be “crystallized” (“cristallizzato”), say, entrenched in a stable definition once and for all (thus, the Court is apparently avoiding the naturalistic argument), but immediately thereafter it adds that one cannot push the interpretation of a statute to the point to distort the “nucleus” of the content of a norm, and cannot reframe the statute in a way which incorporates phenomena and problems that could not have been foreseen at the time of its promulgation<sup>7</sup>. Now, to say that a legal concept is not closed or “crystallized” is equal to saying that it can incorporate phenomena and problems not foreseen at the time of its promulgation. But we can leave this aside, for the moment. What it is clear is that the pivot of the argument is the definition of this “core” or “nucleus” of the legal statement that cannot be changed.

In order to make this definition more precise the judges resort again to the psychological argument, saying that as one can deduce from the preliminary work of the constituent assembly, the problem of the same-sex marriage was completely ignored by the assembly, though the homosex-

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<sup>7</sup>9, *Considerato in diritto*: “è vero che i concetti di famiglia e di matrimonio non si possono ritenere “cristallizzati” con riferimento all’epoca in cui la Costituzione entrò in vigore, perché sono dotati della duttilità propria dei principi costituzionali e, quindi, vanno interpretati tenendo conto non soltanto delle trasformazioni dell’ordinamento, ma anche dell’evoluzione della società e dei costumi. Detta interpretazione, però, non può spingersi fino al punto d’incidere sul nucleo della norma, modificandola in modo tale da includere in essa fenomeni e problematiche non considerati in alcun modo quando fu emanata”.

ual condition was not unknown. And again: the constituent fathers, while writing the art. 29, made reference to an institution [the family] already shaped in the civil code<sup>8</sup>. In other words: when the constituent assembly talked about “family” it made reference to heterosexual marriage because: a) by using the expression “natural society” they meant an institution pre-existent to the legal order (that is assumed to be the heterosexual marriage); b) during the session of the constituent assembly, nobody talked about homosexual marriage; c) in any case, while discussing this issue, the constituent fathers made reference to the civil code.

The first argument is obviously naturalistic, the second one presupposes the intentional silence of the legislator, the third one turns the discourse into an historic argument: “Because of the absence of references, we must deduce that the constituent fathers made an implicit reference to the civil code”, which ban, *de facto*, homosexual marriage<sup>9</sup>. In order to strengthen this opinion, the Court uses finally the systematic argument, in this case the *sedes materiae* argument: the following article of the Constitution, which is art. 30, concerns filiation and its effects, this means that the family “as natural society” is the family that can potentially procreate biological children<sup>10</sup> So, all included, the concept of “family” intended by the

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<sup>8</sup>9, *Considerato in diritto*: “come risulta dai citati lavori preparatori, la questione delle unioni omosessuali rimase del tutto estranea al dibattito svoltosi in sede di Assemblea, benché la condizione omosessuale non fosse certo sconosciuta. I costituenti, elaborando l’art. 29 Cost., discussero di un istituto che aveva una precisa conformazione ed un’articolata disciplina nell’ordinamento civile”...

<sup>9</sup>9, *Considerato in diritto*: “in assenza di diversi riferimenti, è inevitabile concludere che essi tennero presente la nozione di matrimonio definita dal codice civile entrato in vigore nel 1942, che, come sopra si è visto, stabiliva (e tuttora stabilisce) che i coniugi dovessero essere persone di sesso diverso”.

<sup>10</sup>9, *Considerato in diritto*, “Non è casuale, del resto, che la Carta costituzionale, dopo aver trattato del matrimonio, abbia ritenuto necessario occuparsi della tutela dei figli (art. 30), assicurando parità di trattamento anche a quelli nati fuori dal matrimonio, sia pur compatibilmente con i membri della famiglia legittima. La giusta e doverosa tutela, garantita ai figli naturali, nulla toglie al rilievo costituzionale attribuito alla famiglia legittima ed alla (potenziale) finalità procreativa del matrimonio che vale a differenziarlo dall’unione omosessuale”.

Constitution is the traditional one. And we come back to the naturalistic argument.

Once the legal concept of family has been defined, as the judges did in their ruling, it is clear that this concept does not include same-sex marriage. For this reason, the discrimination between heterosexual and homosexual couples is not unjustified and, ultimately, the civil code articles are not unconstitutional on the basis of the article 3 of the Constitution, which only ban unjustified discrimination.

## 2 The Portuguese case

The Portuguese case is quite similar. A same-sex couple challenges the ban in court, saying that the ban discriminates on the basis of sex and sexual orientation, and that discrimination on the basis of sex is banned by the 1976 constitution. Moreover, in 2004 a constitutional amendment explicitly protected sexual orientation from discrimination<sup>11</sup>. In May 2007 the Court rejected the couple’s claim<sup>12</sup>. The couple then appealed to the Portuguese Constitutional Court (*Tribunal Constitucional*). Similar is the judicial course, similar is the conclusion: the *Tribunal Constitucional* received the case in July 2007 and, in July 2009, decided that the constitution does not demand the recognition of same-sex marriage. Also the arguments used by Portuguese constitutional judges are quite similar. The appellants based their claim on the alleged unconstitutionality of article 1577 of the Civil Codes (that clearly states: “two persons of different sex”)<sup>13</sup>, but the Tribunal Constitucional, due to the fact that art. 36 of the Portuguese

<sup>11</sup>Constitution of the Portuguese Republic, art. 13, 2: “No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or *sexual orientation*”.

<sup>12</sup>Tribunal da Relação de Lisboa, acórdão 6284/2006-8, 15/02/2007

<sup>13</sup>Art. 1577 (“Noção de casamento”): “Casamento è o contrato celebrado entre duas pessoas de sexo diferente que pretendem constituir família mediante uma plena comunhão de vida, nos termos das disposições deste Código” (emphasis mine); art. 1628 (“Casamentos inexistentes”), comma e): “È juridicamente inexistente [...] o casamento contraído por duas pessoas do mesmo sexo”.

Constitution gives an ambiguously gender-neutral definition of marriage<sup>14</sup>, ultimately decides to interpret the Constitution in the light of the Civil Code. The argument, roughly speaking, is that the Constitution only says “family”, generically, because it accepts implicitly the concept of family stated in the Civil Code. In order to strengthen this argument, which could appear unusual, the Portuguese Tribunal Constitutional resorts to the systematic argument, underlying the consonance between two different sections (the Constitution and the Civil Code) of the Portuguese legal system. In order to do this, they need something more: they need what we could call a “coherentist interpretation”, which can be obtained using the historical argument<sup>15</sup> or, more generically, a restrictive interpretative attitude as expressed by the brocard (legal maxim) *ubi lex voluit, dixit; ubi noluit tacuit* (“when the law wanted to regulate the matter, it did regulate the matter; when it did not want to regulate the matter, it remained silent”), a principle used in order to limit an excessively expansive interpretation that can go beyond the intention of the legislator<sup>16</sup>

As we can see, the two examples are analogous to each other. The main difference (which should not be underestimated) is that the Portuguese Constitution does not make reference to the family as a “natural society”. Actually, it does not specify how the concept of “family” should be understood. Using systematic arguments, the Portuguese Constitutional Court

<sup>14</sup>Constitution of the Portuguese Republic, art. 13, 1 (“Everyone shall possess the right to found a family and to marry on terms of full equality”) and 3 (“Spouses shall possess equal rights and duties in relation to their civil and political capacity and to the maintenance and education of their children”).

<sup>15</sup>A recepção constitucional do conceito histórico de casamento como união entre duas pessoas de sexo diferente radicado intersubjectivamente na comunidade como instituição não permite retirar da Constituição um reconhecimento directo e obrigatório dos casamentos entre pessoas do mesmo sexo. (cf. Gomes Canotilho / Vital Moreira, Constituição da República Portuguesa Anotada, vol. I, 4.<sup>a</sup> edição, Coimbra, 2007, pág. 362).

<sup>16</sup>Na verdade, se o legislador constitucional pretendesse introduzir uma alteração da configuração legal do casamento, impondo ao legislador ordinário a obrigação de legislar no sentido de passar a ser permitido a sua celebração por pessoas do mesmo sexo, certamente que o teria afirmado explicitamente, sem se limitar a legitimar o conceito configurado pela lei civil; e não lhe faltaram ocasiões para esse efeito, ao longo das revisões constitucionais subsequentes.

ultimately decided to interpret the Constitution in the light of Civil Code, which explicitly declares that the marriage is a relationship between a man and a woman. This could seem surprising, especially if we consider that the Portuguese Civil Code was drafted before the current Portuguese Constitution. Therefore, what the Court wanted to do in this case was, obviously, to transfer the responsibility of any decision to the Parliament.

### 3 Conclusions

The argumentative tools used by both constitutional courts are almost the same and they are neither surprising nor unusual. The use of arguments such as the systematic argument, the historical argument, the psychological argument, and the appeal to the (both chronological and topographical) coherence of the legal system, are part of a strategy to emphasize the consistency of the latter, even where there is no such consistency. In the Portuguese example, this kind of strategy has been the core of the Courts strategy. In the Italian example, due to the constitutional definition of “family” as “natural society”, the Court decides to resort to the naturalistic argument. However, the use of the naturalistic argument, which has been more common over the past decades, is now ancillary because of its lack of persuasiveness. For this reason the Court chooses, perhaps unconsciously, to disguise this argument about the “naturalness of (heterosexual) family” into one about the coherence of the legal system.

Furthermore, the use of arguments of “originalist” or “psychological” character, as Tarello pointed out<sup>17</sup>, encourage a static point of view of legal interpretation, ultimately requiring the intervention of the legislator for any modification. These arguments are often preferred by judges when dealing with controversial topics, such as homosexual marriage, in order to avoid, at least apparently, “creative” interpretations. The problematic character of this kind of argument has been discussed elsewhere<sup>18</sup>, it is sufficient,

<sup>17</sup>Tarello 1980, p. 367.

<sup>18</sup>Brest 1980, pp. 204–238; Scalia 1988–1989, pp. 849–865; Dworkin 1986 and 2006, pp. 117–139.

here, to mention the difficulty of attributing communicative intention to a collective agency<sup>19</sup>, whose decisions, moreover, are the result of negotiations that leave disagreements strategically unexpressed. However, it could be interesting look at the strategic use of the “originalist” argument, somewhat evident in the Italian case.

As we have seen, the Italian Constitutional Court seems to resort to the “originalist” or “psychological” argument with the (unexpressed) aim to shift the burden of proof to the “Constituent Fathers”. In this way, a highly controversial question is faced with a somewhat generic reference to the “travaux préparatoires” of Article 29 of Italian Constitution (the definition of “natural society”) and with the argument of the silence of legislator (*ubi lex voluit, dixit; ubi noluit tacuit*). Interestingly enough, the Court of Venice (the judge *a quo*) used an analogous strategy, while justifying his decision to reach the question of constitutionality, resorting to the psychological argument. Curiously, but not surprisingly, the Court of Venice provided a more accurate reference to the “travaux préparatoires” of the same constitutional article. Quoting a long passage of an intervention of the Christian Democrat deputy Aldo Moro, the Court of Venice tried to demonstrate that the Constitutional Assembly did not interpret the formula “natural society” as a “definition”, recognizing, instead, the historical character of the institution of the family and using the term “natural” only with the purpose of emphasizing the obligation, for the State, to respect their “original rights”<sup>20</sup>. By doing so, the judge *a quo* reversed the psycho-

<sup>19</sup>Marmor 2008, pp. 127–140.

<sup>20</sup>Tribunale di Venezia, Sezione III civile, Ordinanza 3 aprile 2009 — Motivazione. This is the Aldo Moro’s passage quoted in the grounds of the decision: “[‘a famiglia è una società naturale’] non è affatto una definizione, anche se ne ha la forma esterna, in quanto si tratta in questo caso di definire la sfera di competenza dello Stato nei confronti di una delle formazioni sociali alle quali la persona umana dà liberamente vita”. E ancora: “Non si vuole dire con questa formula che la famiglia sia una società creata al di fuori di ogni vincolo razionale ed etico. Non è un fatto, la famiglia, ma è appunto un ordinamento giuridico e quindi qui ‘naturale’ sta per ‘razionale’. D’altra parte non si vuole escludere che la famiglia abbia un suo processo di formazione storica, né si vuole negare che vi sia sempre un più perfetto adeguamento della famiglia a questa razionalità nel cono della storia; ma quando si dice ‘società naturale’ in questo momento storico si allude a

logical argument, traditionally considered as conservative (if not politically conservative, at least restrictive from the interpretive point of view), resorting to it in order to justify a more expansive interpretation of the Article 29.

One of the main reasons of this twofold use of the psychological argument, in this example, is probably that in a case like that of the Article 29 of the Italian Constitution it is easy to identify a case of those “compromise solutions” on the normative statement, recognized by Tarello<sup>21</sup>, that exactly for their interpretability in different and sometimes opposite meanings can be represented as a kind of delegation of normative power to the interpreters, that can base their decisions on any kind of argument, except the psychological one. And indeed, we may say that, once chosen, the naturalistic argument was sufficient in order to justify the Constitutional Court’s decision. The argumentation would certainly be more consistent, but would also be, probably, less persuasive.

Hence, the main question is, again, the way in which high courts use arguments, which is, often, eminently rhetoric. In the sense that, mainly in controversial topics involving societal, cultural, historical and religious reasons or when the meaning of the legal text is particularly unclear (such as in the case of the “natural society” definition, described in a Constitutional Court decision of 1960 as “lacking in any precise legal content”), the persuasive purpose seems to overcome any other consideration, including the argumentation’s inner coherence. Resorting to two military metaphors, we may say that sometimes judges use arguments like the artillery resorts to canister shot: not a single shell directly to the target, but a cluster of many bullets that spread the impact, in the hope that at least one will reach its target. The quantity of arguments sometimes prevails on the quantity

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quell’ordinamento che, perfezionata attraverso il processo detta storia, costituisce la linea ideate della vita familiare. Quando si afferma che la famiglia è una ‘società naturale’, si intende qualche cosa di più dei diritti della famiglia. Non si tratta soltanto di riconoscere i diritti naturali alla famiglia, ma di riconoscere la famiglia come società naturale, la quale abbia le sue leggi ed i suoi diritti di fronte ai quali lo Stato, nella sua attività legislativa, si deve inchinare”.

<sup>21</sup>Tarello 1980, p. 365.

and on the inner coherence of argumentation. In other cases, arguments have the function of smoke screens, hiding under more “technical” or “juridical” arguments (coherence of the legal system, reference to the “travaux préparatoires” and so forth), political or moral based considerations.

One of the standing results of modern theory on legal argumentation is that we have to differentiate between at least two levels of argumentation. On the lower level, a judicial decision is justified by reference to an existing legal statement. But it is possible that, in a given case, no applicable rule exists, or that several rules exist, which support, however, different decisions, or even that the interpretation of an existing rule, which is in principle applicable to the case, is unclear. In these situations, we are compelled to progress to a second level of justification. On this level we have to justify what rule, or interpretation of a rule, should be applied<sup>22</sup>. At the first level, logical deduction is sufficient: judges do actually reason deductively. At the second level the question could be basically, from an argumentative point of view, persuading the audience about the correctness of an interpretation. For this reason, the second level is basically rhetorical, in the sense that strategic argumentation plays here a central role. In the two examples mentioned above, arguments are rhetorically balanced in order to persuade of the validity of the interpretation, while hiding political choices or ideological preferences by means of an appeal to the coherence of the legal system or to the “naturalness” of a social institution.

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<sup>22</sup>Soeteman 1987, p. 102.



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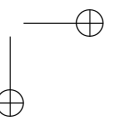
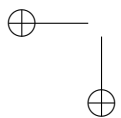
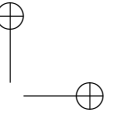
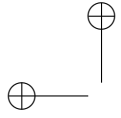
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# Vagueness in Legal Language

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**Abstract.** The Paper deals with the relationship between Law and Language from the point of view of Legal Language. The topic of Legal Language is focused on the vague terms in it. The Authors recognize, that vague terms are permanent and considerably stable element of legal order, but on the other hand, the use of such terms violates the requirements of clear and comprehensive legal communication, legal certainty and other attributes of the legal state.

**Keywords:** language, legal language, vague content, legal certainty

## 1 Introduction

Law is the normative and systematic regulation of the life of a community by standards treated as binding the members of the community and its institutions. From inscribed results, that law is also specific information system, which by rule of law reflects its audience’s rights and duties as well as informing them how to behave or not.

Generally, there are many relationships between language and law. Most rules of law in our society are rules written. They are laid down in statutes. In some legal systems, are found in court decisions. It follows that law and language are closely related. Law needs language, language is influencing law, also law has a considerable influence on language as well.

Weinberger notes that the law, as heteronymous standards system, can work only if a language of communication between the maker of laws and standards addressee exists. It is necessary to assume that each legal norm can, or more precisely, has to be linguistically formulated if the law should be scientifically examined.<sup>1</sup> German theorist R uthers states that out of language no law exists.<sup>2</sup> The life of the law is the life of words, of written and verbal expressions. Those words are embedded in phrases. Words of the law cast future realizations ahead, they determine behavior before it has taken place, their speech expresses future behaviour and events. The display of legal words and concepts entails the general normative character of legal expressiveness.<sup>3</sup>

For factual knowledge of the legal norms has therefore crucial importance, primarily the method of specific legal norm is mediated by specified subject of its normative action. This communication of legal norm operates with language marked by certain peculiarities, which is a legal language.

In each literary language, there are technical languages used to express ideas in certain areas of social life. Every branch of science, whether philosophical, medical or economic, has its own technical language, and therefore the legal language has, in its literary as well as in commonly used language, position of technical language. Science, on one hand, develops own linguistic means for fixation and inter-communication in the process of its scientific research, on the other hand, science also uses language that wants to reach the public awareness and overcome the lack of clarity of science.<sup>4</sup> By legal language, as part of literary language, we understand more or less standardized language expressing law norms, legal actions or other legal realities.<sup>5</sup>

In the literature, we can find different approach in legal language. Generally, legal language is considered a language of legal profession. Some writers identify legal language as language of legal texts. It means that

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<sup>1</sup>Weinberger 1995, p. 35

<sup>2</sup>R uthers 2005, p. 118

<sup>3</sup>Broekman 1996, pp. 47–48.

<sup>4</sup>Gadamer 1999, p. 37.

<sup>5</sup>Knapp, Holl ander et al. 1989, p. 83.

legal texts are considered as starting-point of legal communication. Other writers focus legal language on communication between lawyers and clients, or as language of legal science. For the purpose of this paper, we approach legal language as a language of legal texts.

The legal language is important medium, which influences the effect of legal statutes; it means that legal language has a pervasive effect on purposes, achieved through the law. The aim of this paper with reference to the basic demands given to the language of legal enactment is to consider about vague concepts in connection with creation, application and interpretation of legal enactment.

## 2 The Basic Requirements of the Legal Language

Analysis of the issue of indefinite legal concepts require explication and clarification of the relationship of legal language to native language, and therefore remittance of primer individualities that arise from the specificity of linguistic means, used in the communication process between the law makers and legal norm addressee.

The focus on the legal language differences undoubtedly lies in the lexis, therefore in its vocabulary, which is considerably less comprehensive than the vocabulary of natural language. The difference is reflected not only in the choice of words, such as using words and phrases that are not used in natural language, but also in the meaning of used words that have different meaning than natural language in legal language. Legal standards, except words and phrases of linguistic language, include words and phrases of legal language, and therefore, there is an overlapping of their vocabularies.

The particularity of legal language is reflected also in the terms of its style. The specificity of legal thinking revolves into legal language, which is exempt from any emotionality, fineness and does not possess the beauty of expression. It is a strict language, specialized, neutral, and these characteristics postulates pragmatic viewpoint of legal language.

Legal norm as language expression nominates directions, restrictions and permissions of human behavior. Legal language is expressed by pre-

scriptive sentences, which are generally characterized as sentences expressing the injunctions, directions or rules, and by descriptive phrases — expressing the subject matters, i.e. hypothesis of legal norms. Prescriptive sentences are divided into normative sentences, which reflect the injunctions and prohibitions and into permissive sentences expressing permission. Prescriptive and descriptive phrases in legal language are not the same as declarative, exclamatory or imperative grammatical sentences.<sup>6</sup>

From the point of view of stylistics results, another sign of the legal language contradistinguish from the natural language, and that is inadmissibility of any spontaneity and uncertainty of verbalization, commonly used in spoken language. While the standard literary language is not too formal, it does not have to have accurately defined semantic outline, it is rich in synonyms, homonyms, metaphors, the legal language should strive to define the meaning of words accurately and avoid the use of homonyms and synonyms.

Based on the above-mentioned specificities of legal language can be defined the basic demands, required from the legal language, such as accuracy, unity, stability and clarity. According to Š. Luby, appropriateness of the law terms is clear language, professional, therefore the legal, accuracy, unity, accuracy, stability, clarity.<sup>7</sup>

Basic requirements imposed on the legal language, reflected in various forms in the rules, which modify rules and formations of law and other legal acts. In order to analyze the problems of vague legal terms we consider advisable to describe briefly the significance of these individual requirements.

Clarity of legal language is related to the information function of legal norm and its importance is obvious especially from the point of view of its consistent interpretation and application in practice. Expressive aspect of legal norm should allow in particular its general intelligibility. The requirement of intelligibility also depends greatly on the style of expression of the legal norm, which requires the absence of unnecessarily long and complicated formulations.

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<sup>6</sup>Knapp 1995, p. 121

<sup>7</sup>Luby 1974.

Accuracy requirement of the legal language is based on the concepts with certain, well-defined meaning, uncalled doubt. This can be achieved either by tradition, i.e. by creating a legislative practice constantly using certain concept in certain well-defined meaning, or it can be achieved by the meaning in legal statutes of used term specifies and stabilizes the legal science, or even that the legal statute itself explains or defines the used term.<sup>8</sup>

Another requirement of legal language is unification of terms, which closely follows the requirement of accuracy and means that for every legal concept should always be used one term, and that this used term would always have the same meaning in the text of the legal regulation. For unity of terms are therefore important inadmissibility use of different language expressions for specific terms and equally the use of homonyms.

The stability of legal terminology in accordance with the principle of legal certainty suggests time stability of the legal terms and their content. At development of the legal statutes is required steady and generally fixed in legal terminology.

### 3 Vague legal terms in the legal statutes

After a brief introduction to the issue of legal language in this section, we will focus more on its uncertainty, on the vague content and scope of the terms used in legal statutes. Legal language is formalized by the legislative activities from natural language. Due to intelligibility of law, in the creation of legal statute is used natural language, characterized by the large degree of vagueness and homonyms. Intelligibility, certainty and unity of legal language are then restricted by the limits of natural language. Generally, it cannot conclude that the vagueness of definitions in the legal statutes is solely due to uncertainty in natural language. Uncertainty of language causes only the primer essential degree of uncertainty in law and

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<sup>8</sup>Knapp 1995, p. 123.

what goes beyond this rate is already the result of legislative inability of the lawmaker.<sup>9</sup>

The issue of vagueness of legal language in relation to the application of law is in legal theory understood as so-called marginal case. According to T. Sobek problem of vagueness is a problem of existence, or more precisely absence of marginal cases. Marginal case understands so that people, who are conceptually and cognitively competent, will not agree whether in this case it is or is not an instance of some attribute. In the case of vague terms do not exist acute categorical bounds. In principle, it is always possible that a disagreement occurs, if something is clear or unclear. Judge cannot refuse the case due to uncertainty of the law.<sup>10</sup>

Hart says in the context of uncertainty of legal language about the so-called hard core of imperative, and so-called fuzzy edges of imperative. The so-called hard imperative core represents a condition, when the rules are legal provisions supported by the statute of the authoritative text. Words of the law may be perfectly clear as to what the law requires in a particular case.<sup>11</sup> Hart's so-called hard core of imperative represents its application in cases, where application issue does not arise, thus a dispute about the importance of certain legal term does not arise. In relation to open texture of the law, simultaneously Hart distinguishes also above mentioned, fuzzy edges, which cover cases where the court serves as the creator of rules and elaborates variable, and so vague standards or administrative establishment applies delegated powers for the creation of the rules.<sup>12</sup>

By analyzing the legal statutes, we establish that vague legal terms are permanent and considerably stable element of legal order. However, their existence in the law provisions conflicts with the requirements of clear and comprehensive legal communication and its associated factuality of legal regulations providing the fulfillments of the requirements of legal certainty, foresight of the law and other attributes of the legal state.

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<sup>9</sup>Melzer 2010.

<sup>10</sup>Sobek 2008, pp. 74–75

<sup>11</sup>Hart 2004, p. 150.

<sup>12</sup>Hart 2004, p. 139



In this context, it is necessary to distinguish undesirable uncertainty of legal terms, which is consequence of insufficient legislative practice, and necessary uncertainty, which corresponds with the universality as an essential sign of legal norm. Universality of legal norm means that it applies not only to one specific relationship, but also to a larger circle of social relations of the same type. This means that the norm maker has to control the same relations the same way, and for this purpose has to use the general concept under which these relations can all be included. However, if the lawmaker uses too general term in the text of legal statute, once again we come into the uncertainty causing the application and interpretation problems. From above mentioned results, that for the vague legal terms applies contradictory relation that can be expressed so that they are undesirable, and in the same time inevitable.

This contradiction of the legal language P. Holländer marks as so-called paradox of legal language. Increasing the unity, accuracy of legal language, and increasing the degree of exactness, leads to its incoherency, reduction of the informational value of the law, and on the contrary, increasing clarity leads to a reduction in accuracy. Solving the paradox of legal language, according Holländer, rests in mutual proportionality, in balance of the functions of legal language and its resulting attributes. This balance will be reflected in the lexis as well as in stylistics in legal language.<sup>13</sup>

Philosophical approaches to the paradox seem to have implications for legal theory: arguments that vague terms are incoherent, and that reasoning with them is impossible, would support arguments that vague laws are incoherent. Since vague laws are an important part of every legal system the implications seem to be far-reaching.<sup>14</sup>

On the problem of vague legal terms as well as more complex phenomenon highlights V. Knapp, according to whom the postulate of accuracy and unity of legal terms has its limits. Fuzziness of terms is sometimes widely conditional with universality of legal norm, of which formulation requires expressing not only universality of meanings of used terms, but in

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<sup>13</sup>Holländer 2006, p. 217.

<sup>14</sup>Endicott 2010.

some degree also their fuzziness. This means that law intentionally uses some fuzzy “vague” terms and would not be reasonable to prevent it from doing so.<sup>15</sup>

Problem of uncertain terms by V. Knapp has to be addressed in terms of overall clarity of legal statute, stating that this requirement is considerably vulgarized. “Vulgarized idea of general clarity emerges from fact that that next to vague language of “caste” of professional lawyers generally exist clear and accessible language expression of legal norms. But is it true? Experiences do not confirm this. They show that even people without legal training fairly easy understand texts of legal norms, and therefore that the lack of legal education generally does not preclude the importance of understanding the used words in legal norm, however, it prevents, or at least makes more difficult to understand the nature and interrelation of legal institutions. However, this does not fix by “popularizing” legal language.”<sup>16</sup> V. Knapp sees the reason of vulgarization demand clarity of legal norm that the understanding of the text of legal norm identifies with the law knowledge.

Requirement for maximum clarity defends as proper, but it cannot be achieved at the cost of trespass at the expense of primer postulates of legal language, especially at the expense of precision and formality requirements. Increase of general standards of legal norms can be achieved by means of other language, so lexical, syntactic and stylistic, but can not do without professional legal terms, therefore without stable and precise legal terminology.<sup>17</sup>

In this controversy concerning the use of vague legal terms, though, in a legal theory we can find opinions in justifying the validity of their wide usage. Necessity for widespread use of vague legal terms lies in the need to respond to the diversity and variability of relations and in the need to take into consideration all possible conditions of application of legal norms concerning changing circumstances.<sup>18</sup> According to E. Hácha vague terms

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<sup>15</sup>Knapp 1988, p. 99.

<sup>16</sup>Knapp 1988, p. 99.

<sup>17</sup>Knapp 1988, p. 100.

<sup>18</sup>Hendrych 2006, p. 84.

are a necessary means of expression of legislative technique, which does not want to rush casuistic of abstract norms to the extreme.<sup>19</sup>

Wróblewski sees the uncertainty as a key feature of legal language as the language of fuzzy determining its legal function in society<sup>20</sup>. Wróblewski distinguishes two sources of uncertainty of the legal language<sup>21</sup>:

- (a) semantic, inherent in the structure of words, identifying meanings of the conjugations and semantic relationships of the individual compound sentence,
- (b) qualification, which consists in solving the basic mechanism for the application of legal texts: submissiveness to element x into certain class A.

Solution eliminating the vagueness of the legal language is by Wróblewski in contextual interpretation of legal language terms. The lawmaker has two options:

- (a) try to specify the maximum of legal language,
- (b) or utilize the maximum benefit from the general linguistic basis.

Lack of legal terms, which consist in the uncertainty of the legislative practice, is trying to solve the so-called legal definition, as stated by Wróblewski in point a). Legal definition means a legally binding definition presented directly in the text of legal norm. In terms of compliance with the principle of legal certainty and predictability of the law, the use of legal definitions seems advisable, because they lighten application and interpretation of legal norms and avoid possible confusion about the content and scope. On the other hand, taking into account the general requirement of legal norm, the extent of their usability is questionable. Using legal definitions in excessive extent and in improper case the text overloads and

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<sup>19</sup>Hácha 2000, s. 843.

<sup>20</sup>Wróblewski 1990, p. 32.

<sup>21</sup>Wróblewski 1990, pp. 34–38.

becomes confusing, binds the application experience, causing rigidity and abandonment legal norm in relation to reality and its evolution.<sup>22</sup> Liability of legal communication by exact definition of legal terms is rejected also by Hart. “But even without regard for the fact that the language on which we depend, is open-textured language, we must be aware of the need to abandon — even as an ideal — a concept of rule so detailed, within which we would question whether for a particular case is valid or not, always settle in advance and at the actual use of this rule, we would never have to choose between open alternatives.”<sup>23</sup>

Application and interpretive difficulties arising from the vagueness of the terms used in legislation are often the focus of the activities of judicial practice. Constitutional Court of Slovak Republic on the issue of vagueness of terms introduced

Legal uncertainty (vagueness) of the terms used in the legal regulation is proceeding according to legal statute in front of the Constitutional Court frequently used argument. It is an objection for unpredictability and incomprehensibility of legal statute, resulting in unreachable quality of legal regulation required in accordance with Art. 1 par. 1. of the Constitution. The Constitutional Court in connection with this type of argument introduced that the application requirements of predictability of behavior assigned legal regulation when observing accordance with the legal norm with Art. 1 par. 1 of the Constitution cannot extract from the context of Art. 152. par. 4 of the Constitution: “The principle of legal state proclaimed in Art. 1 of the Constitution is a constitutional-legal principle in the Slovak republic. If the legal norm contained in the provision of the statute is not formulized clearly and for its recipient it is not sufficiently clear, while this deficiency cannot be removed nor with interpretation under Art. 152. par 4 of the Constitution,

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<sup>22</sup>Šín 2003, p. 169.

<sup>23</sup>Hart 2004, p. 132.

its content is not in accordance with a legal statute expressed in Art. 1 of the Constitution. (Pl. U.S. 19/98)

From the predictability of the law results that it has to be formulated with sufficient precision to enable individual, if necessary for the adequate legal assistance, to regulate their behavior (Case of the Sunday Times, 26 April 1979, Series A no. 30). Required standard of accuracy of the law, which does not cover every eventuality, depends largely on its content, area, which it should regulate, the number and position of those to whom it is addressed. (Harshman and Harrup in The United Kingdom, complaint no. 25594/94 , ECHR 1999-VIII)

The principle of legal certainty includes several elements, including clarity of legal norms and predictability of the proceedings of public authorities based on it. Predictability, which the law should allow is not absolutely certain, since experience shows inapproachability of such certainty; although it is very desirable certainty, may entail excessive rigidity, although the law must be able to keep up with changing circumstances; thus many laws uses the terms that are more or less vague and whose interpretation and application are questions of practice. (Finding of the Constitutional Court PL. U.S. 22/06)

The necessity of uncertainty of legal terms declared the Constitutional Court of Czech republic:

Uncertainty of any provision of legal statute must be regarded as contrary to the requirement of legal certainty, and thus of the legal statute (Art. 1 of the Constitution) only if the intensity of this uncertainty excludes the possibility of establishing normative content given provisions as well by using interpretation conventional procedures. (Constitutional Court of the CR Pl. US. 23/02)

## 4 Conclusion

Taking into account the knowledge of legal science and practice of the courts resolve contradictory inevitable and uncertainty vagueness of legal terms that cannot be concluded by adopting a general deduction determining the precise limits within which the legal term is sufficiently precise and definite, and when not. The lawmaker in pursuit of achieving a general rule deliberately adds to the text of the legal statutes uncertain terms. In this sense, the requirement of clarity and certainty attainable only relatively, depends on the particular case.

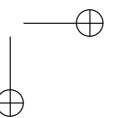
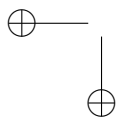
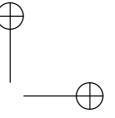
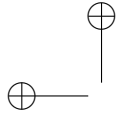
It is important to realize that the use of vague legal terms sometimes does not have specific reasoning, but is simply used without discretion only because in legal terminology it has its own tradition. Among such traditional vague legal terms includes, for example “without delay”, “adequate”, “good manners”, “public order”, etc. These terms are then sequentially created and defined by application activities of the competent authorities or court decision-making.

We also consider that the degree of uncertainty of the legal term, understood as the opposite of its accuracy, is relative and depends on the area given by legal regulation comprehend, specific case and the entities to which it is intended. Selected legal term for someone can be sufficiently precise and certain, for another, it seems uncertain. The most important role in this level has the law maker, who bringing a vague legal term must be approached with particular caution and consider whether their use in a legal statute will not cause non-compliance of application and interpretation, resulting in a creation of loopholes in the law and thereby disruption of the principle of legal certainty.

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# Law, Language and Their Influence on Cognition

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**Abstract.** This paper aims at analyzing the multiple relations between natural, every-day language and the language of law (understood as the language of legal text and not the language used by lawyers). As natural language is a primary phenomenon, it should be examined in the first place. The most crucial questions to be asked are: what does it imply to use a language? Can it influence us and our way of perceiving the world? And if this question is to be answered in the positive, then how does it influence our thinking? Secondly it is to be determined what are the differences and similarities between the every day speech and the legal language itself. Another question to be posed is what are their implications? Finally I will attempt to determine whether legal language can influence our thinking and in what way. Language allows us to “do things with words” that is to “perform” with speech acts. As far as legal parlance is concerned, its performative function is even stronger. That makes legal language a very powerful tool, much more effective than any other natural language.

**Keywords:** law, language, cognition.

## 1 Introduction

This paper aims at analyzing the multiple relations between natural, everyday language and the language of law (understood as the language of legal text and not the language used by lawyers or by courts). As natural language is a primary phenomenon, it should be examined in the first place. The most crucial questions to be asked are: what does it imply to use a language? Can it influence us and our way of perceiving the world? And if this question is to be answered in the positive, then how does it influence our thinking?

Secondly, it is to be determined what are the differences and similarities between the every day speech and the legal language itself. Another question to be posed is what are their implications?

Finally, I will attempt to determine whether legal language can influence our thinking and in what way. Language allows us to “do things with words” that is to “perform” with speech acts.<sup>1</sup> As far as legal parlance is concerned, its performative function is even stronger. That makes legal language a very powerful tool, much more effective than any other natural language.

## 2 The Linguistic Determinism (LD) Hypothesis

The inquiry whether language could influence our thinking has been initiated a long time ago in philosophy. Johann Gottfried Herder, a German philosopher living in the XVIIIth century, was the first to notice that language is a social creation, that can function only within a community. While it seems obvious, that a natural language cannot be developed by an individual, by contrast, the language of law, can be the creation of one person and yet it can bond an entire community. It is to be noted, however, that legal language is based on natural language and is therefore a more complex issue to be dealt with.<sup>2</sup>

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<sup>1</sup>Austin 1975

<sup>2</sup>Prechtel, 2007, p. 63.

It should be mentioned here that a valuable ground for the development of the linguistic determinism hypothesis was brought by W. von Humboldt’s and his view of language. Edward Sapir<sup>3</sup> and Benjamin Lee Whorf<sup>4</sup>, two American linguists, were the first to give an utterly positive answer to the question whether language could determine our thinking. Their work was based on observations made among a tribe of north American Indians, the Hopis, whose language seemed to differ in a substantial way from the Indo-European ones.

To begin with, in the Hopi language, objects were categorized as animate or inanimate in a completely different manner. Clouds or stones were considered as animate.<sup>5</sup>

Large differences were also noticed within the notion of time. There seemed to be no clear distinction between the past, the present and the future. What happened three years ago was situated as being further away something that happened a year ago. The past was defined as an objective notion, and the future as something subjective.

A stronger and weaker version of the hypothesis was developed, depending on the size of the hypothetical influence of language on perceiving the world.

The abovementioned observations were met with a great dose of criticism. Sampson made a remark that we are confronted with a confusion of biological (alive) and linguistic (animate) categories, which can explain also the differences in “gender” (*femininum*, *masculinum*, *neutrum*) that can appear between languages. For example the French word “*la table*” (*femininum*) corresponds to the German “*der Tisch*” (*masculinum*).

It was also pointed out that language users do not inherit a fixed set of rules, but the possibility to manipulate, adjust and create language to express their beliefs. If mental processes were strictly determined by language then any change or evolution of the language would be impossible. “It is the human that manipulates language and not the other way round.”<sup>6</sup>

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<sup>3</sup>Sapir 1978

<sup>4</sup>Whorf 1962

<sup>5</sup>Yule 1985, p. 198.

<sup>6</sup>Yule 1985, p. 198.

At present, as can be seen from the works of Lera Boroditsky, carried out at Stanford (USA), we are faced with a true renaissance of the LD hypothesis. Let’s take a closer look on some of her arguments:

To begin with, a slight reformulation of the problem, proposed by D. Slobin, seems essential.

The replacement of language and thought by notions like ‘thinking’, ‘speaking’ and ‘thinking for speaking’ allows us to differentiate between linguistic and non-linguistic thought. “Cognitive processes involved in accessing and selecting words, placing them in grammatical structures, planning speech, and so on, are all instances of thinking for speaking. Thinking for speaking differs from one language to another.”<sup>7</sup> Now it is to be examined whether “thinking for speaking” in a particular language can have an influence on thinking itself. The analysis of grammatical gender is prone to give us many clues on the subject. In L. Boroditsky’s view “The perceptual information available for most objects does not provide much evidence as to their gender, and so conclusive information about the gender of objects is only available in language (and only in those languages that have grammatical gender).”<sup>8</sup> As inanimate objects do not have a biological gender, it is solely the language that introduces the grammatical one. Although at first grammatical gender can seem arbitrary and meaningless, experimental work made by Boroditsky proved the contrary. People (whose mother tongue were languages possessing pronouns indicating grammatical gender) were asked to, after being given a random noun, indicate the first adjective connected with the noun that came to their minds. If the noun was grammatically “masculine” the adjectives were mostly connected with stereotypically male traits. However if the noun was grammatically “feminine” then the adjectives were demonstrating more feminine features. This proved that arbitrary “thinking for speaking” requirements (here the choosing of a proper pronoun) played an important role in the perceiving of individuals.

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<sup>7</sup>Boroditsky, Schmidt & Phillips 2003, p. 62

<sup>8</sup>Boroditsky, Schmidt & Phillips 2003, p. 63.

Spatio-temporal representations are also an important factor in the process of language influence on thought. The way an individual considers, or imagines such abstract terms like time and space in different languages and cultures seem to depend on many factors such as: “the available spatial representations, spatio-temporal metaphors, cultural artifacts, and on individual disposition, age and experience (...)”<sup>9</sup>

A thorough understanding of the differences can be brought by a comparative analysis of English and Mandarin. In both of them “front/back metaphors” (horizontal ones), while talking about time, are common. Facts from the past are said to be behind us and the upcoming is ahead of us. In English exceptions are extremely scarce, for instance the expression: ‘from generation to generation’, that has a more vertical character. However, in Mandarin, event order is frequently presented vertically. “Earlier events are said to be shǐng or “up”, and later events are said to be xià or “down” (...)”<sup>10</sup>. Such bold observations are built on an experimental basis: “For example, when asked to spatially arrange temporal sequences shown in pictures, Mandarin speakers arranged the pictures in vertical arrays 30% of the time (18–39% depending on group), whereas English speakers never did so (...)”<sup>11</sup>.

It is to be noted, that the abovementioned situation seems in an important part the result of not only linguistic, but also cultural and environmental differences.

Another interesting argument analysed by Boroditsky is the aboriginal language of the Kuuk Thaayorre tribe. Instead of using expression like “forward”, “right”, “back” and “left”, they use the following terms: “north”, “east”, “south” and “west”. Such an approach requires them to stay permanently self-oriented. “The result is a profound difference in navigational ability and spatial knowledge between speakers of languages that rely primarily on absolute reference frames (like Kuuk Thaayorre) and languages that rely on relative reference frames (like English). Simply put, speakers

<sup>9</sup>Boroditsky *et al.* 2010, p. 1.

<sup>10</sup>Boroditsky *et al.* 2010, p. 1.

<sup>11</sup>Boroditsky *et al.* 2010, p. 2.

of languages like Kuuk Thaayorre are much better than English speakers at staying oriented and keeping track of where they are, even in unfamiliar landscapes or inside unfamiliar buildings.”<sup>12</sup>

Quantity and duration can also be a proof for interference of language and perceiving. In some languages a conversation is said to be “long” and in others it is simply “big”. Experiments carried out in outer linguistic conditions have depicted a strong influence in graphical representations (made by language users) of the abovementioned abstract notions.<sup>13</sup>

The recalled experiments lead us to the irrefutable conclusion that language, or to be more precise, the “thinking for speaking” process influence, to a certain extent, our cognitive processes. It is true however that arguments backing a contrary thesis are also possible to be formed. For example languages, independent of their type or their cultural root are used to convey the same ideas. They differ only at first sight. The most suitable example are fixed expressions, which with the use of different associations present the same concepts:

- In English: “To beat around the bush”
- In French: “Tourner autour du pot” (turn around a cup<sup>14</sup>)
- In Polish: “Owijać w bawełnę” (wrap something in cotton<sup>15</sup>)

The use of different nouns in those expressions does not alter the fact that the meaning is identical in all three cases.

But how about the language of law? Does it exert a similar influence on us? The seeking of a solution to this question forces us first to analyze the differences between natural and legal parlance.

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<sup>12</sup>Boroditsky 2011.

<sup>13</sup>Boroditsky 2009.

<sup>14</sup>Translation I.S.

<sup>15</sup>Translation I.S.

### 3 Natural and Legal Language — a Brief Comparison

Firstly, it has to be noted that legal language is secondary to the natural one. That is why it is governed by rather different rules. As Tomasz Gizbert-Studnicki ascertained, in legal language subjectivity is defined through relations that we maintain with other members of the legal system, not through possessed features (as in natural speech). In public law, subjectivity is defined as a relation to the legal system.<sup>16</sup> Furthermore in legal language we do not formulate gradational relations like: “A has to a greater extent than B the feature p”.<sup>17</sup> Also the classification of objects differs. In the legal world we classify objects to one category while they have nothing in common in the every-day world.<sup>18</sup> In law time is usually relative. We characterize an occurrence only by relating it to another one and measuring the time gap between them.<sup>19</sup> The performative function of the legal language also constitutes an important difference (this view I will develop later).<sup>20</sup> The effects of an action aren’t causally determined, but they depend on the fulfillment of a convention.

Despite all those differences in structure, “law and language are inter-related at various levels”<sup>21</sup>, especially at the philosophical one.

“(…) the realm of law lies within the realm of language — in the sense that law exists only as a textual manifestation. Whatever happens within law, it takes the form of texts: laws, contracts, sentences etc. On the other hand, this level of interrelation has its reverse side too. Our claim is that the phenomenon of law was or must have been constitutive for the formation of language, or at least the perlocutionary function of it.”<sup>22</sup>

<sup>16</sup>Gizbert-Studnicki 1992, p. 156.

<sup>17</sup>Gizbert-Studnicki 1992, p. 156.

<sup>18</sup>Gizbert-Studnicki 1992, p. 157.

<sup>19</sup>Gizbert-Studnicki 1992, p. 157.

<sup>20</sup>Gizbert-Studnicki 1992, p. 158.

<sup>21</sup>Szabó 2010, p. 28.

<sup>22</sup>Szabó 2010, p. 28–29

What’s more, “an act by language use is possible through the capacity of speech acts: the transformation of the world with the tool of linguistic expression.”<sup>23</sup> The performative function of law is an equivalent of the speech act in linguistics.

According to M. Szabó language and law can be considered in different ways:

- Both language and law (at least in its positivist form) seek to become **deductive** systems (consisting of rules), which is impossible to be realized fully. “All things considered, this idea requires from language that it become artificial language (e.g. logic); and it requires from law that it become a system without gaps and contradictions.”<sup>24</sup>
- The opposite idea is the perceiving of the above mentioned notions as **historical-organic systems**. “This possibility has such different representatives as Friedrich Carl von Savigny, Nicolai Hartmann or even Hegel (followed by Marksists), trying to find behind law (and in the same way behind language) some ‘spiritual’ objectivity, some ‘ideal’ or ‘historical’ existence — be it Volksgeist, Weltgeist or Welthistorie. The cornerstone of this concept is that the formation of law and language is not contingent and not voluntary but it is determined by higher/deeper forces, giving way to some background reason.”<sup>25</sup>
- Finally, the third option, identified by M. Szabó, is to name systems of law and language as **complex, stochastic systems**.<sup>26</sup> “Complexity is to mean here that the combination of limited number of elements is able to generate an unlimited number of outputs and one cannot foresee which of these are to be realized. Systemicity is to mean that both phenomena form a complex (...) of elements. The borderline of such a system cannot be drawn sharply and its internal relations cannot be enumerated exhaustively. (...) We call them ‘stochastic’

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<sup>23</sup>Szabó 2010, p. 28–29

<sup>24</sup>Szabó 2010, p. 28–29

<sup>25</sup>Szabó 2010, p. 30

<sup>26</sup>Szabó 2010, p. 30



because only probable and situational statements can be made within and about them.”<sup>27</sup>

It should be noted that the relation of legal and natural languages can be considered not only as a relation of the language of legal texts to the every day speech, but also as a relation of the language of legal norms (which are the result of an interpretation of a written regulation) to the natural one.<sup>28</sup> The language of legal texts is considered rather as a functional type of the ethnical (natural) language. It is distinguished by specific functions rather than a specific construction. The differences occur mostly on the semantic and lexical levels as well as in syntax. There are no differences in phonetics. This characteristic seems relevant from a sociolinguistic point of view.<sup>29</sup>

By contrast, as long as the interpretation process is concerned, the language of legal texts becomes the language of the legislator. While eliminating polysemy the interpreting person takes under consideration some traits of the legislator, that go beyond his characteristics as a language user. So the language of the legislator becomes for the interpreting individual an idiolect (the unique variety of languages used by the legislator).<sup>30</sup>

A different relation exists between the language of legal norms and the ethnical speech. Let’s consider a legal norm as an unequivocal enunciation in ethnical language. As a result the language of legal norms will occur as a fragment of ethnical language in its standard form. We should attempt to formulate norms in the language of semantic description. It is an idealization, a language perfectly unequivocal, that suffices to the formulation of definitions of every expression. Obviously, it is unachievable in practice, were some expressions have an irremovable vagueness.<sup>31</sup>

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<sup>27</sup>Szabó 2010, p. 30

<sup>28</sup>Gizbert-Studnicki 1978, p. 157.

<sup>29</sup>Gizbert-Studnicki 1978, p. 157.

<sup>30</sup>Gizbert-Studnicki 1978, p. 158.

<sup>31</sup>Gizbert-Studnicki 1978, p. 158–159.

## 4 Does Legal Language Influence Our Thought?

It has to be underlined that the formulation of an answer poses many difficulties. As was already mentioned, legal language has an almost identical structure to the ethnical one and differs rather in function. This should lead one to the conclusion that legal language by virtue of its structure, influences our cognition in the same way as natural speech. However, legal language shapes our notions of society and social conventions. In the process of learning about legal institutions, we assimilate definitions of various ideas that seem simple (like property) and attribute them a new meaning. As an example, we stop considering property as the mere fact of possessing an object, but we see it as a condition demanding a legal title. Next comes the awareness of the performative function of legal parlance. We perceive the fact of becoming a proprietor of an object not by for instance stealing, but by buying. Social convention becomes reality.

As J. L. Austin stated, language allows us ‘*to do things with words*’, to perform with speech acts. With the use of utterances we can for instance convince somebody to do something. In his article M. Szabó distinguishes two ‘human natures’: the ‘first nature’ that is “a complex of physical laws and genetic determinations — making us able to state apodictic assertions.”<sup>32</sup> The ‘second nature’, crucial to these considerations, is defined as “a complex of moral laws and cultural predispositions — making us able to state contingent assertions.”<sup>33</sup> Consequently, he states that “If we are to locate the capacity of speech acts, then we have to try to find it within the realm of the abovementioned ‘second nature’. The ‘second nature’ is constructed by habit and convention. (...) (It) is artificial, as it is created by man. (...) However ‘artificial’ does not mean ‘virtual’: the second nature is real from top to toe.”<sup>34</sup>

Developing the effectiveness of speech acts has been a long and difficult process. The beginnings were probably connected with beliefs related to

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<sup>32</sup>Szabó 2010, p. 32.

<sup>33</sup>Szabó 2010, p. 32.

<sup>34</sup>Szabó 2010, p. 33.

“praxes from magic to voodoo (...)”<sup>35</sup>. People believed in the direct impact of words on the physical world. Then, the indirect impact was invented, consisting of a causative mode, that is making somebody to do something. Later the reinforcement of words could have taken the form of an oath (as in Roman times).<sup>36</sup> “The next task is ‘de-sacralisation’ and institutionalization of the force of the ‘given word’. By taking this step sacral bond becomes legal bond. It is all about civilization. Barbarians do not adhere to the rules of ‘second nature’, while those who are civilized (...) do.”<sup>37</sup> Finally, speech acts became institutionalized and the rule: ‘agreements are to be fulfilled’ (*pacta sunt servanda*) appeared.<sup>38</sup>

The result of the abovementioned process is the development of a whole new reality that doesn’t only influence our cognition, but shapes the way we think and define abstract notions.

## 5 Conclusion

The attempts of answering the initially posed questions (Can language influence our thinking? What are the differences between natural and legal parlance? Does the language of law shape our worldview?) led us to the following conclusions:

- There is much evidence, based on experimental data, that language can influence our thought. This view seems stronger as far as abstract notions like time, space, quantity, duration or gender are concerned. However, the exact extent of this influence, as well as its implications remain still a riddle to be solved.
- Legal and natural languages are very closely related. They do not differ in structure, their phonetics are identical. Slight differences can be observed in syntax, semantics and at a lexical level. Legal texts

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<sup>35</sup>Szabó 2010, p. 33.

<sup>36</sup>Szabó 2010, p. 33.

<sup>37</sup>Szabó 2010, p. 34.

<sup>38</sup>Szabó 2010, p. 35.

are built of mostly imperatives, and sentences with word order not commonly found in natural speech. Legal definitions often create an altered scope of meaning. Legal text comprises words, that aren't commonly used in the every-day parlance, but are popular among lawyers. Nevertheless, it is the function of legal language that is dramatically different. It isn't created for the sole purpose of communication, but also has to organize an entire society, enable performatives and many more.

- The development of speech acts has been a long and complex process. Its course still remains only a hypothesis. Nevertheless, it is an established fact that doing things with words, performing actions with the use of utterances, by bringing changes in the physical world as their result, manifests itself best in the legal language. Law reinforces and develops this interesting phenomenon, making it a powerful tool in civilized societies.

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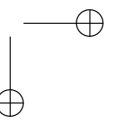
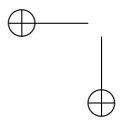
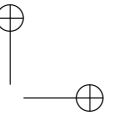
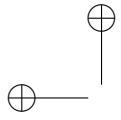
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# Reflections on the Use of Visual Representations of Legal and Institutional Constructs as Assignments in Legal Education for Pre-Service Teachers in Canada

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**Abstract.** This essay is a qualitative reflection on an assignment I have employed over three years in undergraduate legal education classes for pre-service teachers at a Canadian university. I reflect on my practice as a university professor and my use of visual representations as means of engaging and assessing undergraduate student understanding related to the structure of the education system in which they will soon be employed. My purpose in this essay is twofold: first, I engage in systematic reflection on my use of visual representation of legal phenomena (structures, relationships, functions) in an educa-

tional context; second, I seek to advance challenges drawn out of my practice for those who similarly use visual representations as a means of communicating legal content

**Keywords:** visual representation, educational law, visualisation in legal education, course assignment, self-assessment of practice.

*“... The midterm was the most frustrating and most thought provoking and interesting midterm I have ever taken. I really learned more from it than I would have learned from any other type of midterm evaluation. ...”*

The epigraph that opens this essay is taken from an anonymous student’s written evaluation of an undergraduate course I have taught for the past five years. Specifically, the excerpted text refers to a midterm assignment I have recently employed that is heavily reliant on student engagement with a visual representation of a particular legal phenomenon — the legal and institutional structure of the education system in the Canadian province of Saskatchewan. What follows in this essay is a qualitative reflection on an assignment I have employed over three years in undergraduate legal education classes for pre-service teachers at a Canadian university. I reflect on my practice as a university professor and my use of visual representations as means of engaging and assessing undergraduate student understanding related to the structure of the education system in which they will soon be employed.

The essay is organized into four parts. In the first part, I offer a brief description of the legal and institutional structure of education in Saskatchewan and the academic context for my use of a series of visual representations of this structure in pre-service teacher education. In the second part, I explore the pedagogic context for the use of such visual representations (here I distinguish between the academic context found in part I as the university-based context for legal education within the Bachelor of



Education degree program, and the pedagogic context in part II that offers insight into the use of visual representations of information for the purposes of teaching and learning). In the third part, I describe the case embedded in my own experiences engaging undergraduate students in this form of assignment and my assessment of their work. Finally, in the fourth part, I explore my own experiences through analysis based upon self-assessment of teaching practice literature, as well as literature outlined in part II. This is principally based in an adaptation of Schön’s conception of a reflective practitioner.

My purpose in this essay is twofold: first, I engage in systematic reflection on my use of visual representation of legal phenomena (structures, relationships, functions) in an educational context, and in so doing publicly expose my foibles of practice as a professor. I do not, however, do so lightly; rather, it is for the benefit of my future students that I engage myself in a self-assessment and draw out challenges for my practice as a teacher. This may, it is hoped, benefit my colleagues who might consider employing similar techniques (both in terms of the academic subject of the self-assessment, and the method of professional teacher self-assessment of practice more generally). Yet, I also seek to advance challenges drawn out of my practice for those who similarly use visual representations as a means of communicating legal content. I provide the reader, therefore, with two inextricably linked discussions in one.

## 1 The Legal and Academic Context

Canada is a constitutional monarchy that maintains a federal bicameral parliamentary structure based on the British Westminster model where citizens elect representatives to the federal lower House of Commons, and a provincial unicameral legislative structure where citizens of a province elect representatives to their respective provincial Legislatures. No matter the jurisdiction, elections are held at least once every five years. A federal upper house — called the Senate, the members of which are appointed on the advice of the Prime Minister by the monarch’s representative in Ottawa

— also exists. The Canadian *Constitution Act*<sup>1</sup> is the supreme law of the Canadian federal state and all federal and provincial powers cascade from this *Act*.

Written in 1867 as an act to unify four previously semi-autonomous North American colonies of the British realm into a confederation, the *Constitution* strictly separates powers of legislative concern between the federal Parliament and the provincial and, to a lesser degree, territorial Legislatures. Of significance for the present discussion is the provincial exclusivity over the power to enact statutes respecting education, found in section 93.<sup>2</sup> Given that since Confederation in 1867 the number of Canadian provinces has increased from the original four, a wide variety of education systems exist, many with distinct characteristics. The landscape is further complicated by the constitutional responsibility of the federal government for all affairs of Canada’s Aboriginal populations (including education — to the derogation of the provincial powers), and English and French bilingualism and language-based minority rights, all of which often interrupt clarity that might be found in the original intent of section 93. Furthermore, if a province were established through an Act of the British Parliament prior to entering into Confederation (as was the case for the provinces of British Columbia, Prince Edward Island, Nova Scotia, New Brunswick, and Newfoundland and Labrador), section 93 does not apply — rather, the province retains the education system existing at its creation and may alter this system without the requirement of a constitutional amendment.

Each provincial legislature in Canada has enacted its own statutes establishing the powers, roles, and responsibilities within, and operations of the province’s primary (or elementary) and secondary (or high school) education system(s). In all provincial jurisdictions, these acts are variously

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<sup>1</sup>1867, 30 & 31 Victoria, c. 3 (United Kingdom); hereafter *the Constitution*. Before the repatriation of the *Constitution* to Canada in 1982, this document was referred to as the *British North America Act*, 1867. Both documents are Acts of the British Parliament at Westminster.

<sup>2</sup>These powers are subject to historically embedded provisions related to taxation and the religious denomination (either Protestant or Roman Catholic) of the majority and minority of the electors within any geographic subdivision of certain provinces.

known as the *Education or Schools Act*. A host of acts and regulations lend further structure to the profession of teaching, the funding of schools, and the content of curriculum in each province.<sup>3</sup> Saskatchewan, the provincial context of the present study explored in depth in the following sections of this paper, is a particular case in point. A brief overview of this case will offer the reader insight into the complexity of the legal context for this study.

### **The Saskatchewan Case-Study**

Saskatchewan was created and entered Confederation as a province in 1905, following the enactment of a Canadian federal statute.<sup>4</sup> As such, Saskatchewan is subject to section 93 of the Constitution, and the structure of public education in the province must conform to the strictures outlined within. The language of section 93 remains an historical testament to the concerns of the authors of the *Constitution* in the mid-1860s regarding compromise between the predominantly Protestant and anglophone majority in the province of Ontario, the predominantly Roman Catholic and francophone majority in the province of Québec, and the reciprocal Roman Catholic francophone minority in Ontario and Protestant anglophone minority in Québec. At that time, most schools in Canada were operated by the various denominations of Christian churches, and it was felt that religious-based schooling offered the tangential benefits of linguistic and cultural promotion, and community development. Section 93 offers protection to majority and minority faith communities (but only so long as that majority or minority is Protestant or Roman Catholic) to tax all property in a given area in order to fund the establishment and operation of schools; Saskatchewan inherited this structure for publicly funded schools.

Saskatchewan’s current *Education Act*<sup>5</sup> maintains a dual faith-based, publicly funded school system modeled on the section 93-model. In all of

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<sup>3</sup>Bezeau 2007.

<sup>4</sup>*The Saskatchewan Act*, 1905, 4–5 Edward VII, c. 42 (Canada)

<sup>5</sup>1995, SS (Consolidated Statutes of Saskatchewan) 1995, c E-0.2 (Saskatchewan); hereafter the *Education Act*.

the 17 school division areas, Protestant electors represent the majority — what is referred to as the “public” school divisions — and where demographically significant populations of Roman Catholic electors reside they occupy the minority — referred to as the “separate” school divisions. These public and separate school divisions establish what are known as public and separate schools in communities (urban and rural) where sufficient school-aged populations merit. Some public and separate school boards have coterminous boundaries, while others do not. Most Protestant public school divisions have, as a matter of recent school board policy, all but abandoned religious practices within the school and are largely secular in nature.<sup>6</sup> Roman Catholic separate school divisions (and historical cases where the faith majority in a school division had been Roman Catholic) claim to maintain religious instruction both formally within Christian Ethics course material, and informally diffused throughout all aspects of curriculum and instruction.

In addition to publicly funded public and separate school divisions, the *Education Act* permits the formation of “independent” schools (often referred to in other jurisdictions as “private” schools), where the parents of children who attend pay a tuition fee to the independent school owner or board; “home” schools, where the parent of a child must register themselves with an existing public or separate school board but the parent maintains the responsibility for the education of their own children; and “fransaskois” schools, wherein instruction is offered exclusively in the French language, and where the siblings or parent of a child who attends must have, themselves, received primary and secondary education in the French language.<sup>7</sup>

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<sup>6</sup>The catalyst for this policy change was the human rights complaint raised in the Saskatchewan Board of Inquiry case of *Fancy v Saskatoon School Div. No 13* (1999), 35 C.H.R.R. D/9 (Sask. Bd. Inq.).

<sup>7</sup>Fransaskois schools in Saskatchewan operate under the framework of a singular *division scolaire*, and sustain public funding via an insertion, called the *Charter of Rights and Freedoms* (hereafter the *Charter*), into the *Constitution* at the time of its repatriation from Britain in 1982. Specifically, section 23 of the *Charter* offers Canadian citizens living in the linguistic minority in any province (in the case of Saskatchewan, French is the minority language) who have themselves received their schooling in the minority language (or whose children have previously received or are currently receiving schooling

In all of the three types of schools discussed above, parents of children who do not attend public or separate schools are not exempted from paying property taxes to either public or separate school boards. Rather, in Saskatchewan, all property owners are legally required to pay property tax to the board to which they declare support at the time the legal title is transferred into their name. If none is named, an owner automatically supports the public board.<sup>8</sup> The sixth type of school operating in any given province in Canada is under the bailiwick of the federal Ministry of Indian and Northern Affairs; called “Indian Band” schools, these exist outside of provincial mandates, although some Indian Bands in Saskatchewan have elected to adopt the provincial curriculum. No education act exists that outlines the structure of schooling for First Nations children living on Indian Band Reservations,<sup>9</sup> but eight sections of the federal *Indian Act*<sup>10</sup> do offer something, albeit meager, of a statutory framework for the provision of education to these students. In practice, Indian Bands in Canada are largely responsible for the structure of the schools they operate, or for signing agreements with public or separate school divisions for the education of First Nations students off-Reservation. First Nations individuals living on Reservations are typically exempted from tax on property, and the federal government exclusively pays for Reservation schools.

### Teachers and Teacher Education in Saskatchewan

To teach in a publicly funded school in Saskatchewan (save Band schools), an individual must hold a license and must be a member of the professional

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in the minority language) the right to have their children receive primary and secondary schooling in the minority language at public expense. Notwithstanding section 93 of the *Constitution*, minority language schools and boards receive their funding through agreements between the respective provincial ministries of education and the federal Canadian Heritage (Ministry of Heritage).

<sup>8</sup>*Education Act* at §. 53.

<sup>9</sup>The legal terminology used in Canada to classify the subset of Aboriginal citizens who are neither Inuit nor Métis is “Indian.” “First Nations” is often the preferred non-legal terminology for “Indian.”

<sup>10</sup>RSC (Revised Statutes of Canada) 1985, c I-5 (Canada); see §§. 114–122.

association — the Saskatchewan Teachers’ Federation.<sup>11</sup> Licensure and membership in the Federation requires the completion of an undergraduate university degree with a specialization in education (Bachelor of Education), and a practicum of no less than 16 weeks as a teaching student in a school under the guidance and mentorship of a professional teacher and the supervision of university officials.<sup>12</sup> While a valid license is a requirement for employment, obtaining a license is not equivalent to employment as a teacher nor does it confer membership in the professional association.<sup>13</sup>

The responsibility for teacher education in Canada rests at the university level.<sup>14</sup> In all provincial jurisdictions, universities offer Bachelor of Education degree programmes that typically include a combination of course-based instruction and practical experiences. These programmes are frequently offered within Faculties or Colleges of Education, or in combination with Faculties or Colleges of Arts and Sciences (who provide subject-specific training for specialist teachers). Graduate programmes are typically the purview of larger universities and in most jurisdictions completion of a Master’s of Education serves as the *de facto* credential for headship of schools.<sup>15</sup> Courses offered vary from university to university and jurisdiction to jurisdiction, but two observations may be universally made: (a) programming is typically focused around four key areas of study (educational psychology, educational philosophy, curriculum and methods of teaching, and educational policy and administration); and (b) in the area of educational policy and administration, the most predominant subject matter taught in Canadian undergraduate programmes is educational law.<sup>16</sup> Subject matter discussed in undergraduate educational law classes tend to fall along a spectrum between ethical and legal decision-making on the one side, and understanding ones legal and fiduciary responsibilities as a professional

<sup>11</sup>Teachers’ Federation Act, 2006, SS 2006, c T-7.1 (Saskatchewan); see §. 17.

<sup>12</sup>*Teacher Certification and Classification Regulations*, 2002, RRS (Revised Regulations of Saskatchewan) c E-0.2 Reg 11 (Saskatchewan); Bezeau (2007).

<sup>13</sup>Walker, Chomos and Burgess 2009; *Education Act* at §. 198.

<sup>14</sup>Bezeau 2007.

<sup>15</sup>Wallace, Foster and da Costa 2007.

<sup>16</sup>Burgess and Newton 2010.

working with children on the other. In educational law courses taught by the present author, a significant focus is placed on the historical and statutory context for teaching as a profession in Saskatchewan. As such, much of the material covered above in previous paragraphs represents at least part of the curriculum assessed as addressed in the following sections of this paper.

## 2 The Pedagogic Context

The central goal underlying all instructional development is to increase the effectiveness and quality of an educational experience for the learner.<sup>17</sup> In this section of the paper, I briefly explore recent literature on the subject of multimedia learning and its effectiveness as an instructional strategy in student achievement. This focus offers support for the broader analysis drawn out in the fourth section, wherein a self-evaluation of such an instructional strategy was employed in an undergraduate classroom as an assessment of student understandings of the statutory context for education in the Canadian province of Saskatchewan. I begin by presenting some personal musings on general use of visual representations in university classrooms, but follow shortly with a more substantive and theoretical frame for multimedia instruction developed in psychology and cognitive science. I proceed to offer this frame as an explanation for promising results published on meta-analyses of student-achievement studies related to nonlinguistic representation strategies employed by teachers in classrooms.

### An Instructor’s Intuition

Intuitively, I see visual representation of data as a double-edged sword for teaching academics. One side offers the benefit of clarity in the discussion of data otherwise provided in lists or tables in quantitative reporting, or hidden within often paragraphs of *thick description* found in qualitative narratives. Further, visual representations often engage the student by

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<sup>17</sup>Seidel, Perencevich and Kett 2005.

abstracting or minimizing the minutia of detail offered in complex relationships. This does, however, shed light on the potentially disadvantageous side of visual representation: its abstraction may lead students to believe relationships among points of data, groups of such points, or relationships among entities are less complex than found in reality.

In the context of linguistic representations, the semanticist Hayakawa<sup>18</sup> noted that as one steps higher on the ladder of conceptual abstraction, a general understanding of data (or an *object of experience*) is produced, which “omit(s) almost all reference to the characteristics of (the original data).”<sup>19</sup> This has direct implications for teaching, as Hayakawa continues:

If our ideas and beliefs are held with an awareness of abstracting, they can be changed if found to be inadequate or erroneous. ... As teachers or parents, we cannot help passing on to the young a certain amount of misinformation and error, however hard we may try not to. But if we teach them to be habitually conscious of the process of abstraction, we give them the means by which to free themselves from whatever erroneous notions we may have inadvertently taught them.<sup>20</sup>

In this light, the failings of abstraction might be mitigated through awareness on the part of the learner. The abstracted representation can be understood as a model, where particular abstractions are made for particular purposes — purposes to which the learner ought to rightly be made aware.<sup>21</sup>

So then, how is it that representations offer the learner an opportunity to see the object of experience in a different light, or in a way that might extend understanding rather than obscure it? Key, it would seem, is the need for the experience of a representation as an abstraction to be examined as one of many experiences with any particular object. For some,

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<sup>18</sup>Hayakawa and Hayakawa 1990.

<sup>19</sup>Hayakawa and Hayakawa 1990, p. 101.

<sup>20</sup>Hayakawa and Hayakawa 1990, p. 119.

<sup>21</sup>For further analysis on this point, see Newton, Burgess and Burns 2010.



the primary experience is recalled from the *a priori* of memory and integrated with the representation; for others, it is combined *in situ* through simultaneous interaction with other forms of representations or experiences (themselves abstracted in other ways — as textual, auditory, or otherwise visual material — and atop another rung along Hayakawa’s ladder); for still others, it is the representation in question that is recalled from the *a priori* in the individual’s analysis of a post hoc experience. Much of this, it would appear, lends itself to the work of educational psychology in general, and the dual coding theory in the area of cognitive psychology offered by Paivio,<sup>22</sup> in particular.

### **A Brief Framework for Instructional Practices**

Psychologist Allan Paivio has advanced a theory of cognition that offered an alternative to the wide variety of theories historically constructed as a means of explaining the relationship between thoughts of mind (as phenomena unto themselves) and the representations humans place upon them (textual or visual). It rests beyond the scope of this paper to identify and explore this collection against which Paivio’s theory has been juxtaposed; suffice it to say that more recently, Paivio has endeavoured to scaffold and deepen research support for his theory by investigating and emphasizing roots in the biological evolution of the human brain.<sup>23</sup> This focus on coherence with evolutionary accounts of human development is reminiscent of an epistemological project known as *naturalistic coherentism* in my own field (educational administration) that has increased in sophistication over the past two decades;<sup>24</sup> I find this particularly appealing as a point of departure for any exploration of cognition in peda- and androgogy<sup>25</sup> — and an element of personal epistemology I would be remiss if not to identify.

Dual coding is a theory that suggests human thinking has evolved as both the singular and parallel activity of two distinct systems in the brain:

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<sup>22</sup>Paivio 1969, 1990 and 2007.

<sup>23</sup>See Paivio 2007.

<sup>24</sup>Evers and Lakomski 1991, 1996 and 2000 and Lakomski 2005.

<sup>25</sup>Hereafter, I shall treat pedagogy and androgogy synonymously.

(a) “a verbal system specialized for dealing directly with language,” and (b) “a nonverbal system specialized for dealing with nonlinguistic objects and events.”<sup>26</sup> On Paivio’s view, both of these systems provide representations of objects and events in the world, and “thinking is (a) variable pattern of the interplay of the two systems.”<sup>27</sup> Further, Paivio offers an additional point of particular salience: everyone, to varying degrees, transcodes text into nonlinguistic imagery, and the reverse.

Consistent with the work of Paivio (who himself has drawn out parenthetical commentary on the historical if not natural link to educational practice), Richard Mayer has offered his theory of multimedia learning that extends dual coding theory into the area of pedagogy.<sup>28</sup> Mayer, in his introductory chapter to the *Cambridge Handbook of Multimedia Learning*, defined multimedia learning as learning that takes place through the

building of mental representations from words and pictures. ... By words, I mean that the material is presented in verbal form, such as using printed text or spoken text. By pictures, I mean that the material is presented in pictorial form, such as using static graphics, including illustrations, graphs, diagrams, maps, or photos, or using dynamic graphics, including animation or video.<sup>29</sup>

This is a broad definition, to be sure, but one that permits learning opportunities to be easily assessed in terms of *retention or transfer*. The former can be thought of as analogous to the ability of students to form memories of material covered (a lower level cognitive task within Bloom’s taxonomy<sup>30</sup>), the latter refers to the ability of students to employ specifics and concepts to solve new problems (a higher order task in Bloom’s work).

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<sup>26</sup>Paivio 2007, p. 13.

<sup>27</sup>Paivio 2007, p. 13.

<sup>28</sup>Mayer 2001, 2005a and 2005b.

<sup>29</sup>Mayer 2005b, p. 2.

<sup>30</sup>Anderson and Kratwohl 2001.

### Meta-analyses of Student Achievement

Sweller,<sup>31</sup> a colleague of Mayer, has drawn upon the need for coherence between any cognitive theory for educational practice and the structure of the human mind when he suggested that

[g]ood instructional design is driven by our knowledge of human cognitive structures and the manner in which those structures are organized into a cognitive architecture. Without knowledge of relevant aspects of human cognitive architecture ... the effectiveness of instructional design is likely to be random.<sup>32</sup>

Such sentiments permeate the broader philosophical positions of widely cited contemporary authors in the study of instructional methods. Marzano, Pickering, and Pollock<sup>33</sup> have offered a meta-analysis of meta-analyses of research conducted in the 1990s on what they have dubbed *nonlinguistic representations* (which they define as “the imagery mode of representation”<sup>34</sup>) within education. Theirs was a literature review, followed by exemplars from the variety of nonlinguistic representation tools they found.

The results of Marzano et al.’s analyses were presented as an increase (positive) or decrease (negative) in the average achievement level of students in an experimental group (when compared to a control group) in terms of standard deviations and percentile gains. Drawing upon the results of 246 effect size reports of teaching practice and student assessment, according to Marzano et al., nonlinguistic representation instructional strategies offer an average achievement effect size of .75, representing an average percentile gain of just over 27. In terms offered by Cohen,<sup>35</sup> an effect size of .50 can be understood as a medium gain, and .80 can be understood as a large gain. The exemplars offered by Marzano et al. include (a) six

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<sup>31</sup>Sweller 2005.

<sup>32</sup>Sweller 2005, p. 19.

<sup>33</sup>Marzano, Pickering and Pollock 2001.

<sup>34</sup>Marzano, Pickering and Pollock 2001, p. 73.

<sup>35</sup>Cohen 1992/2003.

visual representation tools categorized as graphic pattern organizers (descriptive patterns, time-sequence patterns, process/cause-effect patterns, episode patterns, generalization/principle patterns, and concept patterns), (b) physical and mental model construction, (c) pictographic design, and (d) kinesthetic activity.

While Marzano et al. held that visual representation as a means of pedagogy provides benefits for learners as they engage concepts and seek to understand them, research on its employment as a means of knowledge assessment is difficult to find.<sup>36</sup> Some have claimed that inattention to the question of *visual representations as assessment tool* is linked to the predominance of more standardized and traditional testing mechanisms, particularly in the United States, and particularly as students rise through the education system from elementary into secondary and then on to post-secondary institutions.<sup>37</sup> While this may be true, if one accepts Mayer’s earlier presented suggestion that assessment of multimedia learning (which has been argued offers both a biological and philosophical basis for visual representation in educational practice) is possible through attention to retention and transfer, a scientific means of analysis seems in the offing.

The argument I am advancing is one where, if as an instructor I am keenly interested in the advancement of my students’ understanding of the material I present, I ought to be as keenly interested in developing a practice that supports their learning in ways linked to human cognitive capacities. If Marzano et al.’s research is accepted as a comment on the effectiveness of employing visual representations as educational practice, and further if the work of Paivio and Mayer suggests that such visual representation exists as one of two interrelated systems through which humans naturally cognize, I ought to be keenly interested in presenting material for which I expect students to develop deep appreciation and understanding through visual representations. Furthermore, offering students the opportunity to engage material through visual representation strategies that coax investment in

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<sup>36</sup>Bustle 2004.

<sup>37</sup>Bustle 2004.

transfer presents a means of assessing the depth to which their understanding has developed.

### **3 Three Assignments in an Educational Law Classroom**

I am a pre-tenured member of the Department of Educational Administration within the University of Saskatchewan at the rank of Assistant Professor. In Canada, the University of Saskatchewan is known as a medical-doctoral university, offering undergraduate and graduate programmes in social science, science and professional colleges. The student body is roughly composed of 20 000 undergraduate (85%) and graduate (15%) students — international students comprise roughly 6% of the total student body. In the College of Education, both undergraduate (serving roughly 570 students) and graduate (roughly 400 students) programmes are offered.<sup>38</sup>

The Department of Educational Administration, within the College of Education, is largely focused on graduate programming, but offers several courses to undergraduate students; one course offered by the Department, titled EADM 425.3: *Legal and Institutional Contexts of Education*, is required for students wishing to graduate with a Bachelor of Education degree. The curriculum for this course is largely focused on the historical and contemporary context of education as a legal and institutional entity within the province of Saskatchewan, and more broadly in Canada. Of specific interest for the present discussion is the material covered related to the statutory context for education in Saskatchewan, elaborated in part I of this paper.

Four the past five years, I have been assigned to teach EADM 425 each year to classes varying in size from 35 to 90 students. Unless special permission were granted, all students enrolled in my course section will have completed at least three years of undergraduate university education (one of which within the College of Education) and a 16 week practicum in

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<sup>38</sup>Hannah, Islinger and Lang 2010.

the previous term. In many cases however, students have completed five or more years of undergraduate education, including a four-year honours-level Bachelor of Arts or Bachelor of Science degree in a subject specific to their area of teaching specialization prior to entering the College of Education.

Many students report that when they return to the university following their practicum they begrudgingly face the prospect of studying a topic they feel is of little consequence to their future daily life as a classroom teacher — namely, educational law within my and my colleagues’ EADM 425 class. Quickly, however, the somewhat sensational school-based record of negligence, liable, and sexual impropriety found in case law transfixes my students, perhaps not unlike the morbid fascination some have watching motor-vehicle accidents.<sup>39</sup> However, to understand (a) the environment in Canadian law that has led to these intersections of classroom and court, (b) a teacher’s rights and responsibilities, and (c) the collective interests of the profession, students cannot avoid examining the historical and statutory context of education in Canada. It is this subject matter that I discuss in the first quarter of the term, often offering in a promissory note my intention to later deal with the spectacle once the context has been established.

The content of the course is thick, and progression through material within the syllabus is often paced faster than my teaching philosophy might prefer. I hold a constructivist philosophy, perhaps best summarized by Jean Piaget<sup>40</sup> as one dependent upon the experience of the individual and the manner in which that individual’s experience is consistent with (or deviates from) a prior experience or learning. Thus the process of education is one of experience and then the re-visitation of experience through multiple processes and reflections. This type of learning is situational, social, and heavily dependent upon the stimulation of a learner’s internal motivation. John Dewey<sup>41</sup> has pointed to the importance of play in this respect (to which he dedicates great effort in the distinguishing of its education implications and its economic ones when juxtaposed against “work”: they

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<sup>39</sup>Masinick and Teng 2004.

<sup>40</sup>Piaget 1968.

<sup>41</sup>Dewey 1967.

are one in the same in an educational milieu) — and I have attempted to offer just such constructivist play in the manifestation of the assignment described below.

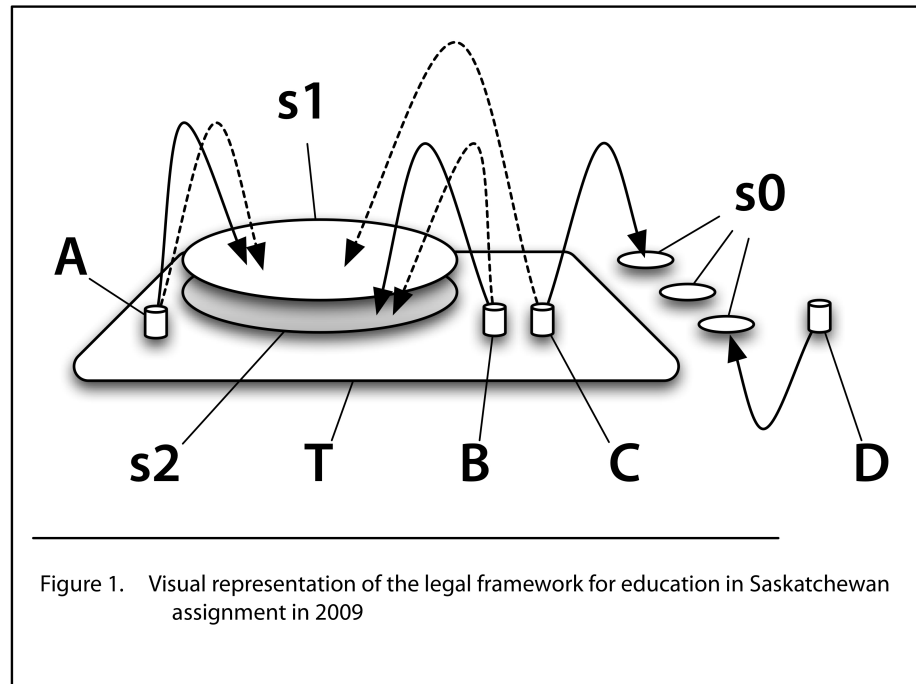
### **Year One: 2009**

Over the past three years, I have designed an assignment for all students in my undergraduate educational law class to complete that is heavily reliant on visual representations of one type or another. Foundationally, the representation has always been based upon a full or partial view of the education system in Saskatchewan. Additionally, the purpose of the assignment has been to assess the degree to which my students have been able to correctly, logically, and/or defensibly (more on the distinctions I drawn among these is offered below) identify and transfer data provided in the course lectures and texts as demonstrable within a visual representation. Underscoring this cognitive application is a professional experience analogous to that found in any school: a cadre of professionals have been given a problem (for which incomplete information is explicitly known to be the case) and are required to respond to this problem in as accurate, logical, and defensible (*pari passu*, professional) manner as possible within a given time frame. Further to this point, a human resources-based position is taken from Elliott Jaques<sup>42</sup> where groups may operate up until the product of the endeavour is due, but each individual member of the group is responsible for their own actions and decisions either similar to their colleagues, or deviating from them.

The assignment has evolved in each subsequent year; a brief overview of each year’s follows shortly and is presented in figures 1 through 3 below. In all cases, the assignment was provided to students ahead of the date on which it was to be returned, all students were permitted to work together in groups up until the time at which the assignment was to be returned, each student was to return their own individually completed response, and one class immediately prior to the date on which responses

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<sup>42</sup>Jaques 1990.

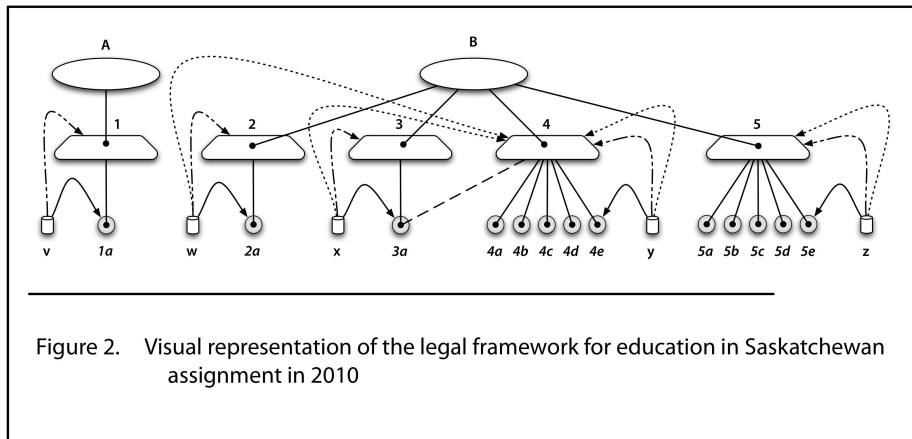


were to be returned operated as a plenary discussion/question and answer session (viz., either two or five days prior) where I agreed to confirm or correct students’ understanding of the education system in Saskatchewan (but not reveal particular associations between the system and the content of the assignment at hand). Each of these above, I shall hereafter refer to as the *process-rules* for the assignment.

In the years prior to the time frame under examination here, I had been, almost contemporaneously, exposed to both the work of Marzano et al. on the subject of nonlinguistic representations — explored in the previous sections as well as the work of Göran Sonesson<sup>43</sup> on pictorial semiotics. Together

<sup>43</sup>Sonesson 1988 and 2011.





these provided the inspiration for further reading in multimodal literacy<sup>44</sup> and, indeed, multimedia learning. The opportunity to devise an assignment incorporating the cognitive and professional goals for the course-focus on the statutory/legal and institutional contexts of education seemed, intuitively, appropriate. The visual representations I employed in the first two years under examination were created using OmniGraffle for Mac (professional version 5.3.2), a commercially available diagramming, graphing, and visualization application based on the open-source Graphviz layout engine. Furthermore, qualitatively described, these visual representations can be understood as vertical constructed and broadly hierarchically dependent in nature.

In 2009, an assignment was provided to the students in my section of EADM 425 based on a visual representation I created (see figure 1). Each of the process-rules noted earlier were followed. Additionally, the response was to answer the following question:

*In a concise essay of not more than 5 double spaced pages, explore the relationship among the elements within the figure.*

<sup>44</sup>See Jewitt and Kress 2003.

*Consider, but do not limit yourself to, the following questions:*

1. *What do each of the elements represent?*
2. *Is the figure an accurate representation of education in Saskatchewan or Canada, and why do you believe it to be, or not to be so?*

During class-based discussions, students questioned whether or not items of similar shape and size in the figure represented similar phenomena, and this was confirmed. Students were further instructed to ensure that the response fulfilled department-based expectations for upper-level undergraduate written work, as well as to employ a referencing system to justify claims made. I would expect that the former goes without saying, but the latter was in place so that the students’ experience would be grounded in a conception of professional practice wherein evidence is required for claims made about states of affairs in the world. This piece was particularly important as a reflection of my concern for the “correctly, logically, and/or defensibly” issue noted above. If based upon some kind of evidence, a claim can be assessed to be academically correct (at least beyond the singular intuition of any given student, and if not normatively correct), as well as academically defensible (given the variety of source material from which evidence might be offered, a question of defensible strength becomes central). In 2009, 37 students participated in this assignment.

### **Year Two: 2010**

The following year, in 2010, an assignment was provided to the students in my section of EADM 425 based on a visual representation (see figure 2) I created in partnership with Sara Hildebrandt, a doctoral candidate whom I was mentoring in the instruction of this course. Again, each of the process-rules noted earlier were followed, and students were asked to respond to a slightly amended version of the question asked in the year previous:

*In a concise essay, explore the relationship among the elements within the figure. Consider, but do not limit yourself to, the following questions:*

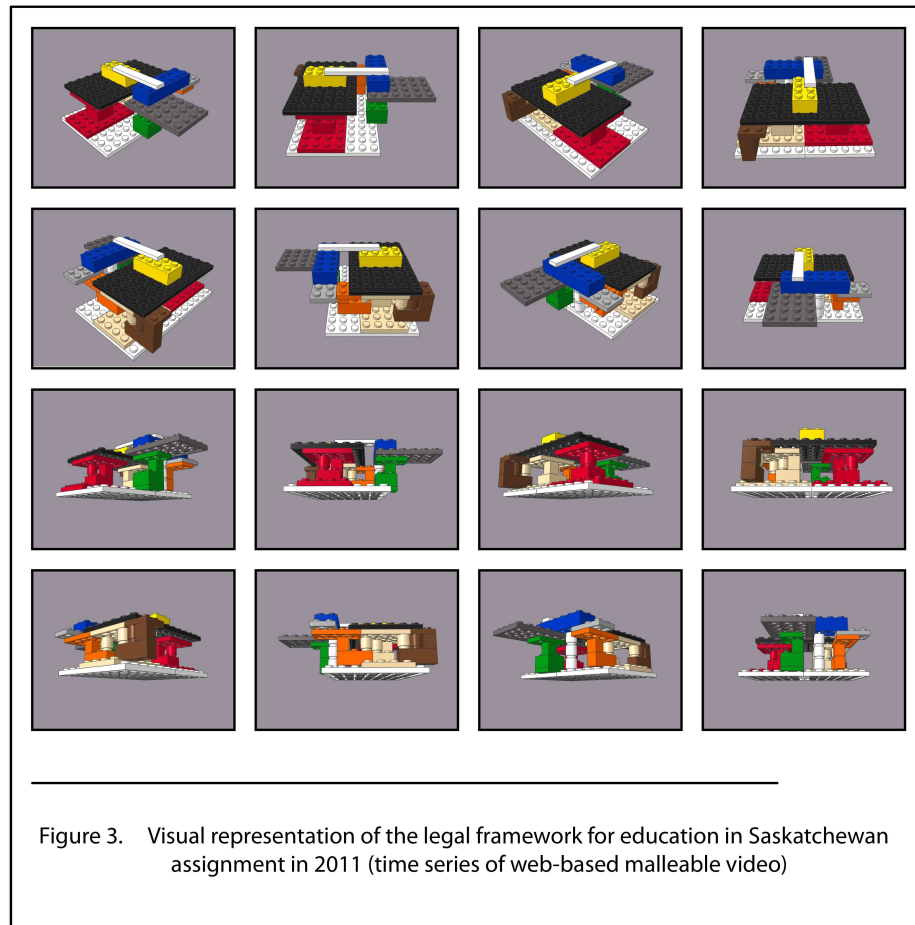
1. *What do each of the elements represent?*
2. *Is the figure an accurate representation of education in Saskatchewan or Canada, and what evidence do you have to suggest it is either accurate or inaccurate?*

As was the case in 2009, students were expected to observe Department-based expectations and justify claims with the aid of a referencing system. Students were proactively instructed that items of similar shape and size in the figure represented similar phenomena. Alterations were made in the question because it was my impression that insufficient attention had been paid by students in the previous year to the concept of justification for claims through the use of evidence. In fact, much effort was made on my part generally throughout the course, but particularly during the run-up to the submission of responses to this question, to articulate the professional expectations that educational practice be based upon evidence (in, for example, ensuring the nature of factual information pertaining to subject matter taught) and justifications (for particular methods employed in instruction). In 2010, 76 students participated in this assignment.

### **Year Three: 2011**

In 2011, a rather dramatic shift was undertaken in the nature of the visual representation upon which the assignment was based (see figure 3). Furthermore, the expectation that the full representation be explored in essay format was abandoned for practical purposes — in the year previous 76 essays were returned and, as will be explored later, both Hildebrandt and I agreed the evaluative workload was unreasonably labourious. As can be seen in figure 3, the structure of the representation was designed in an internationally known, interlocking, children’s building material. Several open-source and proprietary, computer-assisted, design applications are available

for the construction of models in the aforementioned interlocking building material; LEGO Digital Designer, a proprietary but free tool, was used to construct the representation. The resulting file (in .ldr format) was opened in the open-source application LDView (version 4.1). LDView permitted control over manipulation and animation of the representation in 3d-space.



Where as distribution of the visual representation was easily provided to students through the medium of photocopied sheets in previous years, the choice to engage students through a representation in three dimensions presented particular challenges in this respect. As an alternative, two animations of the figure moving in 3d-space (both yaw and roll rotations of  $360^\circ$ ) were rendered in .avi and .mp4 formats (for which students would have forward, backward, stop, pause, and play controls) and distributed via the course website. These rendered animations (the .avi and .mp4 files) were generated with the assistance of the video screen-capturing application Snapz Pro X (version 2.2.3). This representation can, again, be understood as vertical constructed and broadly hierarchically dependent in nature.

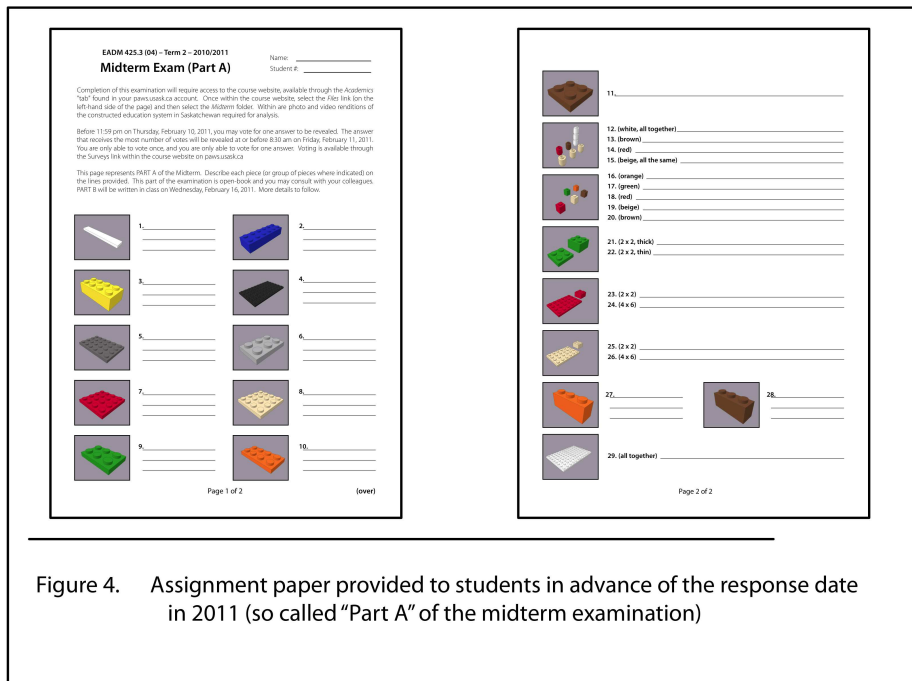


Figure 4. Assignment paper provided to students in advance of the response date in 2011 (so called “Part A” of the midterm examination)

In an attempt to mitigate some of the excesses of labour found in the evaluation in 2010 (recall that 76 students sat for that assessment), a two-part assignment was prepared. The first of these offered the students a pictorial rendering of each of the “pieces” with space for a description of that piece to be handwritten by the student (see figure 4). This part of the assignment was intended to be completed prior to the due date for responses. On the day of the examination, the second part (figure 5) was distributed and students were required to respond to a modified version of the essay question administered in previous years:

*In a written paragraph and within the space provided below and on the reverse side of this page, please explain the relationships among the numbered pieces indicated by the orange arrows in figures i and ii.*

Consistent with the year before, students were proactively instructed that items of similar shape and size in the figure represented similar phenomena. Some students questioned whether the case was similar for the relative “level” of pieces within the figure, and this was confirmed. Unlike previous years, students were not required to observe department-based expectations, nor were they required to justify claims with the aid of a referencing system.

Again unlike previous years, students were offered the opportunity to vote in advance of the plenary discussion/question and answer session for one piece on the distributed part A to be revealed. A first-past-the-post system was established, wherein each student was able to vote once. At a specified time, the polls closed, and votes were tallied. Voting took place through an automatic voting tool provided by the University on the course website. Results were presented to the class in advance of the plenary discussion/question and answer session, wherein it was noted that 50% of the class participated in the voting (higher than for recent civic elections in the area by 23 percentage points). Of those who voted, 46% opted for piece 15, 22% for piece 12, 11% for 1, 4% for 29, and of the remaining pieces seven others garnered little more than 2% each. Piece 15 was revealed as

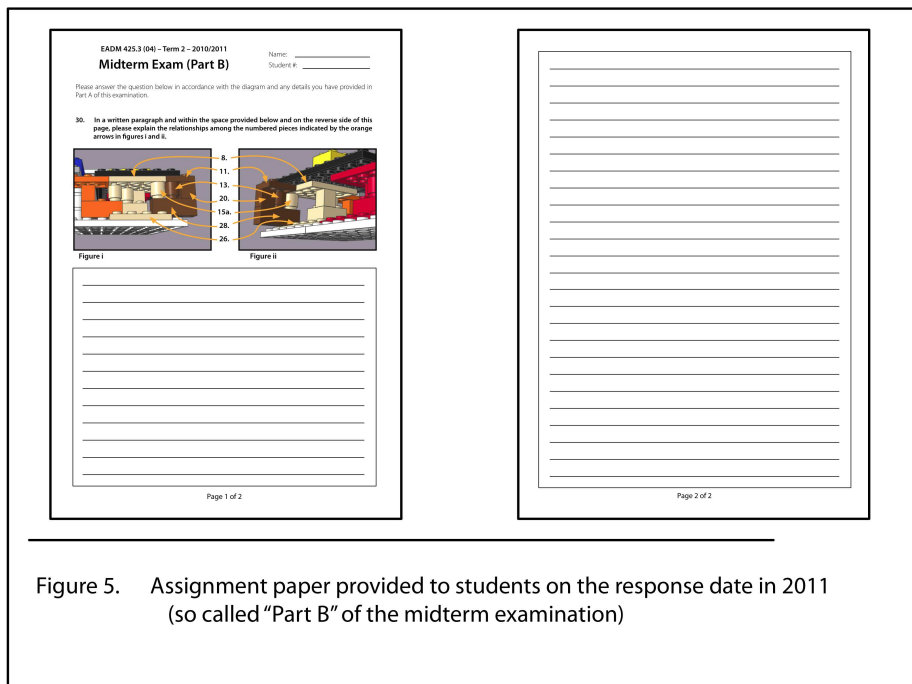


Figure 5. Assignment paper provided to students on the response date in 2011 (so called “Part B” of the midterm examination)

“Public or Separate Property Tax,” to the great relief of some students, and the great consternation of others. In 2011, 90 students participated in this assessment.

#### 4 Analysis of Visual Representation in an Educational Law Class

In this final section, I offer analysis of the three assignments discussed in the previous section. I begin by providing the reader with an overview of self-assessment principles that undergird this analysis; I then highlight several issues that emerge through the self-assessment of my teaching practice.

Student reactions are noted, and finally a collection of recommendations for future practice is provided.

### **A Method for Teacher Self-Assessment**

The intention of any teacher self-assessment is the improvement of practice through the provision of data that will inform future decision-making. Airasian and Gullickson<sup>45</sup> have argued that self-assessment ought to be considered a type of formative assessment, meant to engage a practitioner in the process of reflecting up on and engaging in critical analysis of ones own practice (be it focused around singular elements of teaching like lesson planning, delivery, assessment, or student engagement; or around one’s practice as a whole). While most large-scale assessment regimes are externally driven, it is clear that self-assessment is wholly motivated by the professional’s willingness and interest in the improvement of him- or herself. Further, self-assessment ought be understood to provide one means of assessment of teaching, but not the only one. To this end, it has been argued that self-assessment ought to be employed in concert with other forms of teaching assessment (e.g., peer assessment, student course evaluations, and at the university level benchmarks like tenure and promotion mechanisms). Beyond a collection of rudimentary suggested practices, the teacher will determine the scope and delimitations of the self-assessment.

Airasian and Gullickson have suggested that self-assessment of practice ought to include three key modules that appear to be adaptations of Schön’s<sup>46</sup> more general work: (a) reflection in action, (b) reflection on action, and (c) external reflection. The first of these defines the requirement for *in situ* reflection on actions taken. Reflection in action is arguably more proximal to a particular event or challenge faced by the teacher. It limits, therefore, the assessment to minutia of practice, but also acts as a marker in one’s memory of that particular event. One might think of the second module, reflection on action, as a *semi*-summative assessment — particularly if one accepts the earlier made argument that all self-assessment is formative

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<sup>45</sup>Airasian and Gullickson 2006.

<sup>46</sup>Schön 1987



in nature. A reflection on action assessment would offer the opportunity to investigate more deeply those notable experiences in action from the past, and arrive at more generalized considerations for practice. Finally, the third module is a call to (a) investigate or initiate those other forms of teaching assessment noted earlier (peer, student course evaluations, and others) and then (b) juxtapose these against the results of the reflection on action.

In part III of this paper, I briefly articulated select and key reflections in action taken. Principally, these were manifest in pressing issues in close proximity — and often were constituted in reactions to my need to address particular circumstances like class size and consequential workload. While reflective, to be sure, these reflections did not offer clarity related to broader questions embedded in circumstance: how, for example, would class size affect the nature of the assignment given? These more broad ranging questions, the answers to which suggest generalized claims about practice, are presented as the substance of the remainder of this essay — in essence, reflection on action. Where available, commentary will also highlight and juxtapose external reflections in an attempt to fulfill Airasian and Gullickson’s method.

### **Reflections on Action**

*Groundwork: Scope and Delimitations of Self-Assessment.* In accord with the method outlined above, the first step in self-assessment is to determine its boundaries. These ought to be based on my particular learning objectives for the assignment; I operationally divide these objectives into two types. Type-A objectives are those specific to the assignment. In all three years, the principal objective was to elicit competent understanding of the stakeholders within the education system in Saskatchewan and relationships among these stakeholders. Type-B objectives are those generally promoted within this and other courses I teach, and likely embedded in all courses offered within my university Department. These are themselves divisible into broad objectives (i.e., instilling in all students a love of learning, etc.) and more focused objectives. The generally promoted but focused objectives

include developing professional writing skills; developing an understanding that professional opinion is based on evidence and critical thinking; and developing professional relationships with colleagues that include cooperation, but also tactful dissention and argumentation. I will therefore delimit this self-assessment to both the type-A and the focused type-B objectives noted above.

*Validity and Reliability of the Assignment.* Airasian<sup>47</sup> has argued that an important entry point into the evaluation of an assessment is to pursue questions around validity and reliability. For Airasian, validity of assessment is the utility of the data collected in relation to the purpose for its collection. Furthermore, reliability of assessment is the degree to which the particular assessment would offer results that will be consistent with the same assessment at another time.

Over three years, the form of the representation in the assignment has changed, but it can be said that the purpose underlying the assignment has only partially been altered. In years one and two, no significant alteration was made in the purpose of the assignment, and therefore the purpose of the collection. In this light, I can say that the questions that accompanied the visual representations and demanded response from the students sought in the wording to have attention paid to professional writing skills, and the development of professional opinions in the prescribed format (both are above-noted type-B objectives). While not directly outlined in the questions, the process-rules understood by all students (and in particular the group-work option) spoke directly to the third type-B objective — *viz.*, the development of professional relationships. Additionally, the focus of the assignment content was directly related to pursuing the type-A objective noted above.

In the third year, the form of the visual representation in the assignment changed, but so too did the nature of the question as a product of a reflection in action. The purpose of the change was to mitigate workload issues given the large size of the course section. Two important changes were made, the price of which might have been the validity of the assignment.

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<sup>47</sup>Airasian 2005.

First, no formal writing component was required and thus invalidated the applicable type-B objective. Second, given the first change, no means of meaningfully assessing the professional opinion type-B objective was available. Rather, this was exchanged for simply my own — albeit educated — sense of the accuracy of the account in each student’s response, and the logical connections made from one stakeholder (“piece”) in the visual representation to another. In this way it can be said that the validity of the assignment was potentially compromised.

The reliability of the assignment over the years may well have suffered as a casualty of the changes made in the third year that affected the validity.

*Self-Interest and the Assignment.* Since the self-assessment method places me at the centre of the analysis, it only seems appropriate to explore the degree to which I might not have been purely dedicated to the interests of my students. The mantra of student-focused education is hard to escape when employed within a College of Education. It is an ethic my colleagues, and indeed I, preach with regularity; yet it is an ethic from which we fall when other aspects of our home- and work-lives preoccupy our time. The reconfiguration of the assignment in year three, and here I would emphasize the reconfiguration of those aspects of the assignment that directly related to the nature of the student responses (the absence of formal writing and professional opinion requirements), were intended to reduce workload. However, one quick and poorly thought out response to a question during the class wherein I introduced the assignment to the students — indeed a lack of reflection in action — made for a much increased workload for me. In the exchange with the student, I agreed to accept any answer, so long as it was consistent with the process-rules, and could be traced back to a logical and real relationship between the stakeholders represented by the pieces in question. Unbeknownst to me at the time, there were 11 permutations of answers that at least partially fulfilled these criteria. Suffice it to say, the mental gymnastics involved in sorting through these permutations was immense and consumed much time.

Furthermore, the ethical student-focused imperative frequently dogged my psyche at this time. As a result, in a collection of student responses, I found that by negating two otherwise correct and logical stakeholder/piece

answers when working through the visual representation from the top down, I could give five marks if working through the logic from the bottom up. Needless to say, perhaps it is poetic justice that the process was eminently more stressful than I had intended it to be.

*Unexpected or Surprising Responses.* While the above-mentioned phenomenon of 11 permutations of answers in year three might have been presented with an air of bemoaning, it is contemporaneously cause for much beguile. In fact, in each year multiple permutations of answers could be justified within the respective rules of the assignments. In year one, for example, the following was reported to the students in an evaluation summary paper that accompanied their individual grades:

*An interesting variety of descriptions were provided for the figure. In most cases, the nature of the description focused on a conceptual representation of funding for education within the province of Saskatchewan. In some cases the description argued that the figure represented governance mechanisms for education within the province, and in still other cases the description suggested a more literal articulation of the belief that the figure was a depiction of a school. In a few cases, comment was made that figures are unable to represent the myriad complexities of a school system; in one case, this represented the central crux upon which was based an argument for the abandonment of the figure altogether.*

*Many suggested that the “s” elements represented school systems. Others suggested they were zones of supervision within a school. Some argued that their relative placement (over the T element or in relation to each other) and size was a meaningful representation of population or some additional variable. The shaded nature of s2 was taken as significant, meaning variously “the gray zone of teaching” or “the murk of the relationship between s1 and s2”. “T” was frequently cited as the province of Saskatchewan, and many adjusted its size to extend under at*

*least a few more of the circle components of  $s_0$ . Many similarly added additional circles to  $s_0$ ; typically the argument was made that doing so was necessary to represent types of schools neither public, separate nor band.*

*Several intriguing observations related to the diagrams were presented. At least two described the diagram in terms of its third-dimension or depth, where the placement of certain elements atop others denoted certain priority or foundational or hierarchical relationships.*

In year two, these comments (taken from a similar document) highlight this phenomenon once again:

*An interesting variety of descriptions were provided for the figure. In the vast majority of cases, the diagram was operationally divided into two “jurisdictions” emanating from elements A and B. Very often, A represented the federal government or system, or the Department of Indian and Northern Affairs or the Indian Act. Equally as often, B represented the provincial government or system, or the Ministry of Education or the Education Act. Other options were entertained. In a few cases, A represented the private education system and B the public education system. In fewer cases, A represented a separate school board and B a public school board. In fewer still, A represented variously tuition, post-secondary education, and education in Saskatchewan pre-1905; and B represented provincial funding, policy and procedures, the organization and management of classes, and the contemporary education system in Saskatchewan.*

*Of those who followed the federal and provincial jurisdictional route, there was some variety in the naming of elements 1 through 5 (frequently collectively referred to as the “trapezoids”), along at least two dimensions. First, as a group, it could be said that descriptions of the trapezoids fell into three camps: (a) where*

*they represented “types” of schools, (b) where they represented “school divisions” or “school boards,” and (c) where they represented “schools.” In many cases, scant (as well as overstated) attention seemed paid to the distinctions among these, in particular as arguments developed to include discussions of elements below 1 through 5 in the diagram. This often presented an issue of clarity, fact or logic-imprecision in language (e.g., implying or outright suggesting that home-school boards or divisions exist through an overly broad discussion of trapezoids) was most frequently the culprit. Second, individually, there was general agreement that 4 and/or 5 represented a public or separate entity (depending upon the genre of description chosen in the first part above). Furthermore, independent, home, or Fransaskois entities commonly occupied elements 2 and/or 3. Occasionally a sixth element was added to the diagram; almost invariably, it was argued that 6 represented a Fransaskois entity (and lines would accompany linking 6 to both supra elements A and B, funding arrangements were the most frequent means of justification for this addition).*

*There was almost universal acceptance of the belief that the “dotted arrow” represented property tax. The other arrows (“solid” and “dash-dotted”) represented everything from contracts to student enrollment, from community influence to curriculum; the “dashed” line was very frequently cited as indicative of “associate” relationships between some types of schools. The “solid lines with dots on the end” were frequently seen as funding, authority, power, or responsibility.*

*Following from the choices made in the first and second cases above, the number-letter elements (1a, 2a, and so forth) represented a wider set of possible denotations. Those given in the first case above were frequent contenders for the number-letter elements, but so were “students”, “elected board mem-*

bers”, “school administrators”, “teachers”, and to a lesser extent “publics” — voting or taxpaying. Of those who designated the numbered elements “school” of a particular type, the difference in number of number-letter elements underneath each trapezoid was dealt with in a variety of ways. In some cases the count of number-letter elements was seen as proportionally representative of student enrolments, services and programs of study offered, or board membership.

The lowercase lettered elements (*v* through *z*) were as frequently denoted “funding” as “community”. Occasionally they represented the ministries (Indian Affairs and Education), or boards.

Embedded within these wide varieties of justifiable answers relating to the visual representations employed within the respective assignments is a large measure of creativity and critical thinking. Much of this is indicative of transfer (higher order understanding).

### Juxtaposing External Reflection

*Collegial Reactions.* Particularly in the first year under examination, I was reluctant to actively solicit collegial feedback on this assignment. This was largely due to what I perceived as the oddity of such an assignment within the Department. As a graduate student within the Department of Educational Administration at this same university, I had never come across an assignment in the classes of my professors-cum-colleagues, analogous to the one I would eventually employ in EADM 425. In subsequent years, I have not yet broken free of my apprehensiveness — but working through the analysis embedded in this paper offers me some confidence.

*Student Reactions.* In all forms of assessment, students tend to react in ways that span a spectrum between enjoyment and pain, and furthermore between stimulation and banality. If represented in terms of a Cartesian plane, where the x-axis represents enjoyment and pain, and the y stimulation (atop) and banality, I am satisfied to follow Dewey’s<sup>48</sup> comment below

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<sup>48</sup>Dewey 1938.

and plot student reactions in quadrants I and II (either enjoyment or pain, but only stimulating).

It is [the teacher’s] business to arrange for the kind of experiences which, while they do not repel the student, but rather engage his activities are, nevertheless, more than immediately enjoyable since they promote having desirable future experiences.<sup>49</sup>

Many of my students are initially shocked by the nature of the assignment, and this is a reasonable reaction. Noddings<sup>50</sup> has noted that, among other social considerations, most students who have enjoyed scholastic success are those more adept at traditional means of assessment. Individuals who have continued from secondary to post-secondary education are likely to have met with academic success — or they would not have been able to enter post-secondary institutions, and would not likely be working toward post-graduate degrees. I am overwhelmingly told that this particular assessment is unlike any they have previously encountered, and it therefore presents much consternation and insecurity. I have received many email messages from students, claiming to be academically successful in all other and previous classes, concerned their performance on this single assessment may jeopardize their overall university average (an odd and somewhat self-contradictory comment). On the whole, however, most students find the assignment to be among the most stimulating they have encountered at university. One student recently reported that halfway through the assignment she completely lost interest in the fact that a grade would be reported — she simply wanted to know the answer.

As the process-rules permit, and encourage, cooperation among colleagues, some students have more recently made use of communication technology as a means of engaging their cohort with the assignment. In previous years, Facebook has (as I understand from speaking with students who, though not themselves students in my class section, had friends who

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<sup>49</sup>Dewey 1938, p. 16.

<sup>50</sup>Noddings 2007.



were) offered students at least the option to vent their frustrations in a semi-public forum. It was reported to me that these frustrations tend to erupt over the occasional stumbling blocks or *cul-de-sac* lines of thinking they face as they work their way through the problem. More recently, in year three, the assignment was designed such that students were permitted to vote for a single element in the representation to be revealed in advance of the plenary discussion/question and answer session. Students used the class-based email system to lobby their colleagues into voting for the piece of greatest consequence to their particular answering scheme. I unintentionally seem to have been included in one such email, and in this way became privy to these lobbying attempts. This seems to be a demonstration of deep engagement in the assignment, at least on the part of significant portions of the student body.

I would categorize all of the above reaction as informal evaluative statements. Formal evaluation, alternatively, is a requirement within the University at the conclusion of each term. Students provided this collection of verbatim student comments anonymously. All comments in my possession that related to the assignment (variously referred to as “test,” “midterm,” or “exam”) are provided:

*... The assignments/test were very challenging but did teach me a lot. ...*

*... His assessment methods were not only fair, but actually CREATED learning. WOW. This never happens! EXCELLENT. ...*

*... He also used testing methods that were fair and made me research and use the material we had covered to make inferences and valid arguments. ...*

*... The assignments were some of the best, and most relevant that I've had ...*

*... I felt the midterm was inappropriate. One should not go into an exam not knowing whether they have failed or passed.*

*If an instructor wants us to know something, simply telling us would be appropriate — not having us try to “guess” what was in the instructor’s head when he designed a model out of [internationally known, interlocking, children’s building material]. It was way off the mark and even the instructor himself admitted to not having one student present the model to the exact specifications as it was designed. As a result the midterm was by far my lowest mark ever received in the college of education ...*

*... I also appreciate that the mid term was so creative, tested deeper level thinking, and gave an opportunity to collaborate with peers. ...*

*... The [internationally known, interlocking, children’s building material] midterm was the most frustrating and most thought provoking and interesting midterm I have ever taken. I really learned more from it than I would have learned from any other type of midterm evaluation. I did find it difficult to explain myself in words when doing part B of the midterm. Although I think you evaluated them very fairly. ...*

*... I would recommend that if the “[internationally known, interlocking, children’s building material] midterm” continues next year, that there be a word bank of terms to use rather than students just guessing because no one had the same answers as the professor’s original answer key. ...*

*... The only thing that I would change in this class would be the midterm. I feel that I wrote the midterm and still don’t understand it. It was very creative, but I feel as though I didn’t learn from it. ...*

*... His midterm was not as a usual midterm would be, but adequately assessed knowledge. ...*

It is clear that most of the commentary provided by students with relevance for the present discussion was positive in nature. Interesting is the suggestion for a word bank. In the report returned to students along with their grade, a comprehensive list of accepted terms (and all viable synonyms) was provided.

### **Challenges for Future Use of Visual Representations**

In the remaining paragraphs below, I wish to tie-off any loose ends related to the more specific of my original purposes in this paper. That is to say, I want to offer some a collection of challenges for future practice (both my own, as I continue to employ visual representations in legal education, and for those similarly engaged). Since the basis for these comments is rooted in the experience of one individual, I am reluctant to suggest that these provide recommendations for practice. Recommendations, it would seem, might require greater meta-analyses. I have identified five issues that have emerged from this self-assessment; I present them in no particular order.

- *Visual representations are abstractions and are therefore models of a phenomenon.*

As was briefly discussed earlier, and as I have investigated with colleagues elsewhere,<sup>51</sup> models typically highlight or simplify particular aspects of a phenomenon and students ought to be made aware of these. This issue in particular addresses the comment earlier attributed to Hayakawa. As a teacher, I must impart a critical understanding of phenomena that exposes for my students the purposive abstractions required for learning. Furthermore, this seems widely consistent with an underlying premise of the philosophical project of the Frankfurt School, wherein, it is argued, critical awareness has rather extensive implications for healthy democratic societies.

- *Unconventional assignments require unconventional evaluation techniques.*

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<sup>51</sup>Newton, Burgess and Burns 2010.

Given the inherent abstractness of representations, these types of assignments will not easily provide opportunities for straightforward evaluation. Much attention has been required to live up to the challenge interwoven in a personal philosophy of education that accepts (if sufficiently justified) individuals may claim diverse views of particular abstracted phenomena. Pragmatically, this flexibility may have workload consequences and one ought to seriously consider the implications of time constraints, available assistance with the grading of student work, general stress level, and other environmental or social constraints on ones ability to do justice to an assessment regime that seems to frequently involve much rereading and mental gymnastics. To the extent permitted through the analysis within this paper, straightforward, perhaps even computer-marked, assessments do not appear viable strategies when visual representations are involved.

- *Build multiple opportunities for investment and engagement in the assignment.*

While the use of visual representations in assessment may invoke curiosity on the part of the students, consider increasing student buy-in to the assignment through the use of cooperative or constraint-based techniques. For all of the challenges I faced in year three, I was delighted to witness incarnations of student buy-in through the lobbying efforts surrounding the voting scheme. These afforded me formative feedback on the viability of the assignment among the cohort. My only regret was that I had little ability to monitor these formative statements.

- *Transcoding visual representations into textual language appears to be particularly challenging for some students.*

This point emerges from a comment made by a student within the summative feedback following year three. The point is well taken, and indeed encapsulates the intricacy of Paivio’s assertion that we all, to varying degrees, translate text into nonlinguistic imagery, and the reverse (explored in part II). My observation from this comment

is that the variability among a population of 90 students might merit specialized training or skill development. One ought not to expect all students will enter the classroom on a level playing field when it comes to operational expectations of a given assignment; this seems particularly true if the assignment differs significantly from students’ past experiences. The student who made the comment suggested that the use of word lists — a commonly employed strategy elsewhere in assessment<sup>52</sup> — might offer a means of supporting this, but it may also place further limitations on the students’ ability to engage with the abstract nature of the visual representation.

### General Musings

The following are a list of four general observations and musings emerging from the self-assessment. Because they are not directly traceable to a practice cited earlier, they should not be understood as recommendations for practice. Rather, they are offered as statements that require future research.

- *Reflection on action, by definition, requires distance from the event or experience*

I feel I would have been unable to analyze with depth had I done so with greater immediacy following my experience. Further, it seems that reflection on action benefits from multiple iterations of the same or similar events or experiences. Comparison, juxtaposition, and trending all have helped as modes of reasoning aimed at deeper understanding of my practice.

- *Students will not, and ought not, tolerate substantial deviations in an assignment or process-rule.*

This seems particularly true when the assignment is of a design that rests beyond their past experience. It is doubtful that mere student curiosity will sustain a poorly devised assessment — indeed the stakes

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<sup>52</sup>Airasian 2005.

seem higher when the ambiguity is introduced into the path leading a student to academic success. In my experience, students do not want to perform poorly, and need reassurance that the ambiguity embedded is surrounded by structure. Dedicating much time to thinking through the assignment in advance may offer security in this respect. Demonstrating the boundaries of the ambiguity will facilitate the student's comfort with engaging in Dewey's educational *play*.

- *Discuss the results with your students in a meaningful way.*  
Students want to understand their performance on assignments.<sup>53</sup> This seems particularly true when the assignment is different from those they have encountered previously. It appears even more true when such assignments are employed in colleges of education where students are actively seeking strategies they may use in their own classrooms — the same might be true for doctoral students who may be teaching in university settings, or who may be seeking an academic appointment as a career goal.
- *Collegial advice ought to be solicited despite reluctances.*  
The literature drawn out of the work of Paivio, Meyer, Marzano et al., and others seems to support the use of visual representations in educational endeavours and ought to provide weight behind the advancement of assignments such as the ones described in this paper. Furthermore, it is a central function of the academy to challenge traditions, and our thinking about assessment practices in universities seems ripe for experimentation.

For educative reasons, I have sought in this paper to develop guidance for my own future practices related to visual representations in legal education. In doing so, the process requires humility and a critical *eye* — I have here borne the foibles of my practice, and fully expect to reap the reward through the knowledge that my strategies for the incorporation of visual representation are based in research, and guided with the interests of my future students at the forefront.

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<sup>53</sup>Airasian 2005.

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# Paternalistic Regulations Expressed through Means of Visual Communication of Law? Contribution to Another Distinction of Paternalistic Legal Regulations

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**Abstract.** The aim of this article is to outline the issue of paternalistic legal regulations being expressed through means of visual communication of law, such as often used in legal realm “optical signs, which are not expressions of ethnic written language”, that is, through traffic signs. Main focus is placed on one particular prohibitory traffic sign, “no entry” sign, which often is placed at the exit ends of one-way streets to determine traffic direction. On the one hand, this analysis can be treated as a specific attempt to supplement the debate on legal paternalism. Namely, it stresses the issue of characteristic fea-

tures of danger, risk of harm justifying given legal regulation, which restricts its addressees’ liberty, whether to “protect (...) from self-inflicted harm or (...) to guide them (...) toward their own good”. It is proposed to distinguish two kinds of danger underlying paternalistic regulations: so-called “natural” danger and so-called “conventionally-made” danger. Apart from this, the problem of visual communication through traffic signs is outlined.

**Keywords:** visual communication of law, traffic signs, legal paternalism.

## 1 Introduction

Anyone familiar with both issues indicated in the title of this article can ask a question: what legal paternalism and visual communication of law have in common? They seem to be completely separate fields of contemporary legal thought. The aim of this article is to outline the issue of paternalistic legal regulations being expressed through means of visual communication of law, such as often used in legal realm “optical signs, which are not expressions of ethnic written language”<sup>1</sup> that is, through traffic signs. Main focus is placed on one particular prohibitory traffic sign, “no entry” sign, which often is placed at the exit ends of one-way streets to determine traffic direction<sup>2</sup>. On the one hand, this analysis can be treated as a specific attempt to supplement the debate on legal paternalism. Namely, it stresses the issue of characteristic features of danger, risk of harm justifying given legal regulation, which restricts its addressees’ liberty, whether to “protect (...) from self-inflicted harm or (...) to guide them (...) toward their own good”<sup>3</sup>. It is proposed to distinguish two kinds of danger underlying paternalistic reg-

<sup>1</sup>See Studnicki 1968, p. 177.

<sup>2</sup>In the Vienna Convention on Road Signs and Signals (1968) “no entry” sign is known as C, 1 and there are two models of it: C, 1a (red circle with white horizontal rectangle in the middle) and C, 1b (vertical black arrow on white background overlaid with red circle with a diagonal line crossing it). In Polish legal system “no entry” sign is known as B-2 (see Fig. 1) and is very similar to sign C, 1a.

<sup>3</sup>Feinberg 1983, p. 3.

ulations: so-called “natural” danger and so-called “conventionally-made” danger. Apart from this, the problem of visual communication through traffic signs is outlined.

## 2 Legal Paternalism and “Assumption of Text”

The issue of legal paternalism, broadly understood as a view “according to which sufficient justification for introduction of specified legal regulations is striving for the good of the person whose behavior is regulated”<sup>4</sup>, sparked off heated debate, which lasts till today. Although one could think that this subject has been thoroughly discussed, it still rouses interest of many scholars<sup>5</sup>. However, the mere idea of restricting liberty of law’s addressees due to their own interests can be both fiercely criticized and defended, one can venture an assertion, that in contemporary states legal paternalism, and consequently paternalistic regulations<sup>6</sup>, will be, to certain extent, still present. It is partially due to the fact that there are many motives leading to enactment of given laws, some of which can be regarded as, for example, economic ones, some others as paternalistic. G. Dworkin rightly notices, that it is difficult to identify purely paternalistic regulation, such specific one which would not be justified by anything else than “the welfare, good, happiness, needs, interests, or values of the person being coerced”<sup>7</sup>.

It appears that paternalistic regulations have common grounds for their enactment (broad concepts of self-inflicted harm prevention or providing good), but their entire range is very complex and internally divided. First of all, one can speak of coercive paternalism (regulations which are backed up by official sanctions for not abiding by them) and noncoercive paternal-

<sup>4</sup>Pietrzykowski 2005, p. 117.

<sup>5</sup>See, for example, the issue of “libertarian paternalism” developed by C.R. Sunstein and R. Thaler in Sunstein 2005, pp. 175–203.

<sup>6</sup>Referring to T. Pietrzykowski’s distinction between law’s paternalism (simply paternalistic legal regulations) and legal paternalism (view which justifies such interferences with law’s addressees’ broadly understood liberty), see Pietrzykowski 2005, pp. 116–117.

<sup>7</sup>Dworkin 1983, p. 20.

ism (e.g., social assistance programs)<sup>8</sup>. Focusing on coercive paternalism, J. Feinberg suggests a further distinction of paternalistic regulations, including, amongst others<sup>9</sup>: active (laws which require given action, e.g., wearing safety helmets by motorcyclists or construction workers) and passive (laws which forbid given action, e.g., prohibition of swimming in specific water reservoirs); mixed (justified by many motives, some of which may be regarded as paternalistic, while others refer to, e.g., protection of property) and unmixed (justified only by paternalistic motive)<sup>10</sup>; harm-preventing (protecting from harm) and benefit-promoting (guiding toward good of the addressees themselves); direct (those who are given regulation’s addressees are those whose good is justification for paternalistic law, e.g., drivers and passengers are obliged to wear seat belts for their own good) and indirect (those who are given regulation’s addressees are not those whose good is justification for paternalistic law, e.g., manufacturers are obliged to put information about harmfulness of smoking tobacco on packs of cigarettes, not for their own good, but for the good of the potential consumers)<sup>11</sup>.

Without going into details of these and other possible distinctions based on different criteria, it seems that generally paternalistic regulations are uncomplicated. They simply prescribe and proscribe given kinds of behavior<sup>12</sup>. These prescriptions and proscriptions are justified by, amongst other possible rationales, the ideas of harm prevention or providing good. Additionally, it seems that the debate on legal paternalism is based on one particular implicit assumption. Paternalistic regulations are treated, in the

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<sup>8</sup>Feinberg 1986, pp. 7–8.

<sup>9</sup>Feinberg 1986, pp. 8–9.

<sup>10</sup>Though, as mentioned above, it seems to be very difficult to “find” pure, unmixed paternalistic regulation.

<sup>11</sup>Pietrzykowski 2005, p. 119; It is also worth to notice, that direct-indirect distinction is to certain extent overlapping with another paternalism’s distinction: single-party (e.g., laws prohibiting alcohol or drug use) and two-party (e.g., law prohibiting euthanasia, or sale of alcohol and drugs) paternalistic regulations (Feinberg 1986, pp. 9–10). Extensively discussed are also differences between hard and soft paternalism (Feinberg 1986, p. 12 and Pietrzykowski 2005, p. 118; see also Pope 2004, 2005a and 2005b).

<sup>12</sup>For “classic” examples of paternalistic regulations, see Dworkin 1983, p. 20. Some of them are extensively discussed by Feinberg 1986, pp. 17–19.

vast extent, as being communicated mainly, or even only by expressions of ethnic written language constituting legal texts. There is nothing surprising about this “assumption of text”. One of the most important instruments of broadly understood social control is language and text<sup>13</sup>. It generally allows to express even the most complicated and abstract concepts and categories aiming to influence human behavior. Law is predominantly text-based<sup>14</sup>. Nevertheless, in certain instances, it can be expressed in strictly visual manner. But, is it justified to speak of paternalistic regulations expressed through similar, non-text media? If this kind of communication is possible, could it be, in any manner, basis for specific additions to the debate on legal paternalism? To answer these questions, one should focus on the means of visual communication of law.

### 3 Visual communication of law and traffic signs

First of all, it should be stressed, that communication of normative, legal contents to their addressees through visual means appears to be very limited. Contemporary legal systems are made of enormous amount of highly complex and nuanced regulations. While the written language can, as already indicated, accurately reflect these norms, visual, non-text media are barely suitable for this<sup>15</sup>. It is even difficult to imagine how (for example) some of the more “subtle” company law’s norms could be expressed visually<sup>16</sup>. Considering three basic modalities of law, at first glance it seems that prescriptions and proscriptions<sup>17</sup> can be successfully communicated through visual media, while it is very difficult, if not even impossible, to

<sup>13</sup>Boehme-Neßler 2011, p. 88.

<sup>14</sup>Boehme-Neßler 2011, pp. 101 and 105.

<sup>15</sup>Boehme-Neßler 2011, pp. 76, 218 and 219.

<sup>16</sup>However, additional visual representation of some of the legal concepts and categories seems to be possible and even desirable from the standpoint of legal education’s needs, see Boehme-Neßler 2011, pp. 218 and 219.

<sup>17</sup>Given that traffic signs often express proscriptions, through, for example, diagonal lines crossing symbolic representation of specific action, the thesis that “images have far more trouble with negatives than words do” (Boehme-Neßler 2011, p. 77) is questionable in discussed matter.

present permissions in this manner. On the other hand, one can think of proscriptions which also cannot be expressed visually. Possible visualizations of pornography prohibition could paradoxically lead to clear violation of law they are meant to communicate. Thus, one can agree with statement that visual communication of law is possible when expressed normative contents are concrete and in a way “down-to-earth”. It does not mean, that such regulations are insignificant. Traffic — as one particular area affecting almost all people and being regulated almost exclusively by relatively simple positive law<sup>18</sup> — is in fact dominated by means of visual communication, like traffic signals and signs<sup>19</sup>.

Traffic signs’ proper influence on participants in traffic depends upon their physical placement in a particular geographic position<sup>20</sup>. In other words, traffic signs’ meaningfulness and efficacy depends on context in which given sign is placed<sup>21</sup>. This “occasionality” is connected with another feature of discussed signs, their “deicticity”<sup>22</sup>. They visually convey a message about particular part of the road and also point this part of the road, they are referring to.

According to F. Studnicki’s highly meticulous analysis, traffic signs, and consequently messages communicated by them, can be divided into two categories: normative and non-normative (descriptive) signs<sup>23</sup>, depending on whether they express specific norms of conduct, or inform only about facts relevant for participants in traffic. However, one can agree that both kinds of traffic signs inform about “possible actions and their consequences”<sup>24</sup>. Obviously, “stop” sign primarily notifies drivers to stop before proceeding,

<sup>18</sup>Studnicki 1968, p. 182.

<sup>19</sup>Although discussed concepts are being related to traffic signs, it seems they are also, to certain extent, adequate to other signs used in legal realm, those which are not included in Road Traffic Law, for example, “no swimming” sign (see Fig. 1).

<sup>20</sup>Beck 1988, pp. 11 and 13.

<sup>21</sup>Beck 1988, p. 14.

<sup>22</sup>Studnicki 1968, p. 182. See also Beck 1988, p. 10 where it is stated that “deictic sign is one that points to or indicates something in its physical vicinity”.

<sup>23</sup>Studnicki 1968, pp. 182 and 184. On normative and informative signs see also Beck 1988, p. 13.

<sup>24</sup>Beck 1988, p. 13.



but it also implicitly informs about specific features of traffic on given road and possible consequences of not abiding by the norm expressed visually through this sign. On the other hand, accident blackspots can be treated mainly as non-normative signs. Their presence signals particularly dangerous part of the road, with “history” of accidents, but this information can clearly influence drivers’ behavior in a manner similar to normative signs<sup>25</sup>. Although discussed distinction seems to correspond to initial intuition, it should be stressed that normativity and descriptivity of signs used in legal realm seem to be in fact gradual features. Given sign can be simply more or less normative or more or less descriptive.

Because of traffic conditions, especially relatively high speed movement of participants in traffic, messages conveyed by discussed signs should be easily receivable and interpretable<sup>26</sup>. One can speak of reception, when participants in traffic simply spot given sign. According to F. Studnicki, interpretation is an accurate or inaccurate assignment of meaning to the spotted sign. One can limit interpretation to mere reconstruction of visually communicated norm of conduct or relevant information. Although traffic signs may be regarded as highly formal, it seems that they can and should be analyzed not only at the level of instruction and information they are meant to express<sup>27</sup>. Their interpretation and analysis should also aim at “revealing” their “deeper meaning”<sup>28</sup>.

<sup>25</sup>Similarly on warning signs, but not referring specifically to accident blackspots see Studnicki 1968, p. 186.

<sup>26</sup>Studnicki 1968, p. 180.

<sup>27</sup>Similarly Boehme-Neßler 2011, p. 183 who argues that “visual legal communication (...) will need to be analysed from historical, subjective, system and teleological points of view. Because one can only insufficiently grasp the specific layers of meaning and effects of images using traditional methods of interpretation, the range of interpretation options needs to be extended”.

<sup>28</sup>It can be, for example, teleological aspect (Boehme-Neßler 2011, p. 186) or “ideological message”, see Jackson 1999, pp. 7 and 18 quoting Hodge & Kress 1988, pp. 19 and 39. However, “ideological message” is discussed by them in regard to traffic signals, one can venture an assertion that traffic signs also “transmit an ideological message as well as particular instructions (...) present a version of society, an image of impersonal rationality operating impartially on behalf of all” and their “ideological meaning is not a gratuitous addition but part of (their – M.D.) effectivity”.

## 4 Outline of distinction between so-called “natural” danger and so-called “conventionally-made” danger

But what have traffic signs to do with legal paternalism? Answering this question, first of all, one can agree that participation in traffic is considerably dangerous activity. Many traffic regulations require or forbid given behavior because, amongst others, abiding by their provisions could minimize the risk of being harmed, although they rarely “explicitly” express such rationale for their enactment. Sticking to speed limits, wearing seat belts, not using cell phone while driving, wearing safety helmets by motorcyclists and other easily coming to mind examples of traffic laws can be regarded as paternalistic. Moreover, they can be, and in practice most of them are, expressed visually through appropriate signs. Many other legal regulations — this time not referring to traffic — can be widely treated as paternalistic, and at the same time can also be communicated through non-text media — like prohibition of smoking tobacco or swimming in given water reservoirs (see Fig. 1). Interpretation of signs which aims only at reconstruction of visually communicated norm of conduct or relevant information seems to be insufficient to “reveal” their paternalistic grounds. Traffic signs and other signs used in legal realm can express normative contents to their addressees, but they alone do not seem to convey any clear message about their justification. Simplifying, when one attempts to identify whether given legal regulation communicated through a particular sign is paternalistic, one should ask and try to answer questions like these: “what are the reasons for enactment of analyzed regulation?” or “why it is required from me to behave in legally projected precise manner?”.

It is worth to notice that in the debate on legal paternalism, both kinds of regulations (traffic and non-traffic related) are being discussed “together”<sup>29</sup>. Such alignment can be regarded as justified, but it seems that

<sup>29</sup>See, for example, Feinberg 1986, p. 101 where it is stated that “(...) to smoke cigarettes or to drive at excessive speeds is not directly to harm oneself, but rather to increase beyond a normal level the probability that harm to oneself will result”.

in many instances paternalistic regulations, which at first sight are very similar to each other (for example, they can be characterized as coercive, passive, harm preventing and direct), are in fact significantly different. Difference between them rests upon “deep” characteristic features of danger, risk of harm they are meant to minimize. On the one hand, one can speak of so-called “natural” danger. Given behavior is dangerous independently of enactment of laws relating to this behavior. On the other hand, it is possible to distinguish so-called “conventionally-made” danger. Given behavior can be “made” dangerous just because of enactment of laws relating to this behavior. To illustrate and to develop this distinction, one can focus on one particular example of prohibitory traffic sign, “no entry” sign.



**Figure 1.** “No entry” sign, “No swimming” sign, “No smoking” sign — examples of signs used in legal realm.

“No entry” signs placed at the exit ends of one way streets, due to their actual, “physical juxtaposition”<sup>30</sup> are definitely fulfilling their deictic function. Additionally, their placement results in appropriate organization of traffic. Undoubtedly, they can be regarded as normative signs. They communicate that it is forbidden to drive through given part of the road, beginning from the spot, where particular “no entry” sign was placed. Not abiding by this proscription, for whatever reason, may result in consequences other than legal. Driving against traffic flow can pose a serious

<sup>30</sup>Term “physical juxtaposition” is used after Beck 1988, p. 11.

threat to health and even life of other participants in traffic<sup>31</sup>, such as the violators of this regulation themselves. When one notices and adequately interprets “no entry” sign, one receives a number of different messages. One knows how to act in given situation (normative aspect of a sign), but also knows, to certain extent, what to expect on a given road (non-normative aspect of a sign). Moreover, one becomes aware of the risk. One can in a way “predict” possible danger to oneself of not abiding by the norm of conduct expressed through sign.

The question one can ask is whether this danger is similar to danger posed by, for example, smoking tobacco or swimming in water reservoir where there are strong whirlpools? One can venture an assertion that danger underlying regulation expressed through “no entry” sign is significantly different than dangers, which justify regulations communicated by “no smoking” or “no swimming” signs (see Fig. 1). It is widely known and confirmed fact that smoking tobacco can increase probability of developing cardiovascular or respiratory diseases. It is definitely one of the reasons for enactment of laws which prohibit smoking, e.g., at a workplace. Although such an assertion may seem trivial it is worth to stress out, that these possible dangers are completely independent of laws relating to smoking tobacco. This activity is harmful regardless of any regulations which in a specific way underscore this fact of harmfulness by prohibition of smoking. It is similar in the case of “no swimming” sign. It is often placed nearby water reservoirs, which for various reasons (*inter alia* contamination or strong whirlpools<sup>32</sup>) are regarded as dangerous and health and life threatening. Swimming in contaminated water reservoir is dangerous regardless

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<sup>31</sup>Therefore, one can argue that classifying discussed regulation expressed through “no entry” sign as paternalistic is very doubtful. Responding to this possible objection, it is worth to notice, that most of traffic laws appear to be examples of mixed paternalism. They are meant to, amongst other rationales for their enactment, provide safety to “all” participants in traffic. For instance, sticking to speed limits or not using cell phone while driving can minimize both risk of being harmed and harming other people.

<sup>32</sup>Pietrzykowski 2005, p. 117 referring to § 10 of Regulation of the Council of Ministers of 6th May 1997 concerning the safety conditions of persons residing in the mountains, swimming, and practicing water sports (Journal of Laws of 1997, No 57, section 358). Appendix no 5 includes “no swimming” sign (see Fig. 1) with its variations.

of whether appropriate prohibitory sign is placed nearby. Supposedly, if there would be no “no smoking” or “no swimming” signs, activities those signs (and adequate regulations) are referring to, would be still health and life threatening. Thus, one can argue that risk of harm underlying these proscriptions can be characterized as so-called “natural” danger. On the other hand, although it may contradict initial intuition, it seems that potential danger related to not abiding by proscription expressed through “no entry” sign is, to a large extent, “caused” by the effective organization of traffic on given road. Driving against traffic flow is dangerous not only because the mere, “formal” placement of “no entry” sign, but also because other participants in traffic drive in the determined direction. Thus, the discussed danger is not independent of law and its efficacy, like mentioned examples of “natural” danger. On the contrary — it is in a way “initiated” through appropriate regulation. To put it differently, potential threats to health and life which are reasons for restriction of law’s addressees’ liberty to protect them from harm, can be regarded, in some measure, as consequences of those laws’ enactment and their social efficacy. Thus, positive law through its regulations can paradoxically “create” potentially dangerous conditions for human activity. Simultaneously the same regulations are intended to make those conditions safer. In turn, one can say, that so-called “natural” dangers “exist long before” the enactment of law, regardless of it. Therefore, it appears that distinction of so-called “conventionally-made” danger is justified.

## 5 Conclusion

Many paternalistic legal regulations can be expressed visually. There is nothing surprising about this statement, due to their relative simplicity, which enables their communication through non-text media. At first glance, one could even argue, that deliberation on visual communication of paternalistic laws cannot bring any additions or clarifications to the debate on paternalism. However, remarks made above may suggest the opposite. A closer examination of something so seemingly trivial like various prohibitory

signs used in legal realm allows to outline another distinction of paternalistic legal regulations. One can speak of two diametrically different kinds of danger, which can be regarded as justifications for enactment of paternalistic laws suitable for visualization. Obviously, outlined distinction for so-called “natural” dangers and so-called “conventionally-made” dangers (and consequently paternalistic regulations based on “natural” and “conventionally-made” dangers) is far from being unequivocal and not burdened with doubts. But it can be treated as another suggestion in the debate on legal paternalism, because it seems to reveal part of “deep structure” of paternalistic laws. Moreover, this short analysis indicates that inquiries focusing on mundane and in fact easy to overlook subjects such as traffic signs can lead to conclusions, which can be relevant to many fields of legal thought, even those very distant from studies on visual communication of law. Thus, one can say, that there is much more to the signs used in legal realm, than meets the eye.

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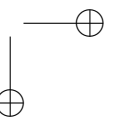
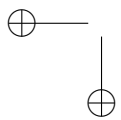
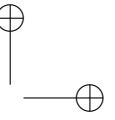
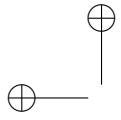
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# Description of Contemporary Law in Dostoyevsky’s Work

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**Abstract.** This paper is focused on one area of art, which Wigmore ignored and Weisberg finally added to the list, even though it’s a type of art with a history far longer than novels have. It is drama. The strength of the plays is often related to the turmoil between an individual and law, which is mostly the main axis of the whole play. Many plays have a close relation to law and the current social situation. The ‘Husa na provázku’ theatre performed the project called ‘Sto rokøu kobry’, a tetralogy of plays written by Dostoyevsky, which is a perfect example of this. The aim of this paper is to explain the relationship between Dostoyevsky’s plays as they are performed in the “Husa na provázku” theatre and contemporary law.

**Keywords:** Dostoyevsky, Brothers Karamazov, Husa na provázku, Crime and Punishment, Idiot, Demons.

The Law and literature movement is well established in anglo-american environment, with J.H. Wigmore’s List of legal novels being written more than a century ago.<sup>1</sup> Nevertheless, this way of insight into the law problem-

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<sup>1</sup>Wigmore 1907–1908.

atic actually isn't commonly used, with the Middle Eastern knowledge of it being even lesser. Even though European lawyers hardly acknowledged the movement, its main ideas and principles went through several changes during past years with some of them being quite turbulent. Already in the 20's, Wigmore published his List of Legal novels, where he updated and edited his earlier work. As we can see today, he wilfully stated, albeit wrongly, that only novels are suited for law purposes and no other directions are capable of such a feat. This point has been proven erroneous quite early by incoming events. 50 years after Wigmore, R.H. Weisberg issued his own list, this time adding other literary works to the novels included.<sup>2</sup>

Next author highly important for the Law and Literature movement is James Boyd White. His concept of Legal Imagination is absolutely essential for understanding how to use literature in the law. White added some new works to the List but it's not his main contribution to the relationship between art and the law. White was probably a first great supporter of the role of art and especially literature in teaching law.<sup>3</sup>

After that, several opinions surfaced, dismissing the union of law and literature or criticizing its results. On the other hand, the amount of art having an impact on law also increased.

Today's list would be far more colourful, with the addition of movies, music or comics all being relevant. We could also discuss the addition of computer games and other products of pop culture but that depends on the definition of art in relation to law and that would be a whole other topic.

There is one area of art, which Wigmore, in my opinion, incomprehensibly ignored and Weisberg finally added to the list, even though it is a type of art with a history far longer than novels have. It is actually far older than any other literary genre. That area is drama as a peculiar art form, with its roots being ingrained already in prehistoric rituals. The art of performance is just as close to humanity as reflexes are, it has always been of human nature to act and present. It is an indispensable part of the history of our society, because of the ability of drama to move and affect it.

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<sup>2</sup>Weisberg 1976

<sup>3</sup>White 1973.

It was no coincidence that Caesar’s motto was ‘Bread and games’ (although this proverb is not about the art of drama in the classical sense, of course).

But let’s go back to theatre in its purest form. In my opinion, a high quality drama can withstand a comparison with any other piece of literature, even if it’s mainly written in the form of dialogue. Such means can, at first, probably confuse the consumer, but they often assure a much more immersive and authentic experience than a regular situation description. Antic drama is, in many ways, actual and unsurpassed even today. It would be a great mistake to not mention Antigone, with her still actual dilemma between the laws of gods and mortals. This fact is supported even more by the newer adaptation of this topic from the first half of 20<sup>th</sup> century by Jean Anouilh, which is, by many lawyers, seen as being better than the original.<sup>4</sup> Antigone’s choice is surely something that awaits every lawyer, who doesn’t take his job as a mere obligation. It’s not a coincidence that it is mentioned in the book *Právo a dobro* (The Law and the Good), which was made as a reaction to the polemic of Jiří Přibáň and Pavel Holländer about the election of a new ombudsman. It’s not an uninteresting fact, that Holländer is a keen supporter of the Law and literature movement<sup>5</sup>, whereas Přibáň sees the only sense of the latter research in comparative theory of interpretation.<sup>6</sup>

Antic plays are being performed all around the world because of their strong themes even today. The strength of the plays is often related to the turmoil between an individual and law, which is mostly the main axis of the whole play. Obviously, it is a vulnerable spot for every society throughout our history regardless of time and space. The same stands for the plays of William Shakespeare. They are timeless because of their feature of asking questions still unanswered by humanity. Usually, they are related to law, for which we owe our gratitude to Shakespeare’s law education and the religious and legal conflicts of Shakespeare’s times. Due to this, plays like

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<sup>4</sup>Molek 2011.

<sup>5</sup>Přibáň and Holländer 2011.

<sup>6</sup>Přibáň 2011.

The Merchant of Venice, or Hamlet are often given nowadays more praise than the plays of today.

With this, we come to a problem that is common for law and for literature too. Can we interpret historical plays with the optic and standards used for current production? It is impossible to gain accurate insight into the time when the plays were made and to interpret them only from our modern point of view is also a mistake. Barthes speaks of the death of the author.<sup>7</sup> Kundera is upset with kafkologists and reader who, with their unnatural interpretation and biased insight, distorted Kafka’s work completely.<sup>8</sup> In contrast to this, Hawes objects that even though the author’s personality and privacy are not substantial for author’s works, we need to know his cultural environment.<sup>9</sup> Barthes contradicts this and states that a piece of art is existent on its own and we should perceive it without the knowledge of outer circumstances. In law, for a change, can we think about theological interpretations and we meet the same problematic moments. In a situation like ours, where the most performed drama plays about law are hundreds or thousand years old, can we only use our modern point of view and try to achieve an acceptable consensus.

Theatre always played a pivotal role in our society. Simply said, it affected and in fact created public opinion. The situation changed since ancient times and since the end of 19<sup>th</sup> century, many have tried to re-establish its influence with new forms and ways with the goal of impressing and influencing audiences. In the beginning of the 21<sup>st</sup> century, these efforts seem to fail.

The theatre Husa na provázku (Goose on the String) was founded in Brno, in the sixties of 20<sup>th</sup> century as an amateur group of professional actors, students of art and other young creators from different professions.<sup>10</sup> It was created as a reaction to insufficient space for alternative performances in old fashioned theatres. At its prime, the theatre’s comments about the social situation were so loud that it resulted in problems with the gov-

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<sup>7</sup>Barthes 1977.

<sup>8</sup>Kundera 2006.

<sup>9</sup>Hawes 2011.

<sup>10</sup>Husa na provázku 2010.

ernment. As law is an essential part of politics, it also has not escaped criticism. 20 years after the Velvet revolution, the situation is completely different, social satire is only a marginal genre in theatre and Husa na provázku is not an exception. Although, some pieces in its repertoire are quite noteworthy. Even if they aren’t satires, they have a close relation to law and the current social situation. The first of them being the project called Sto roku kobry (The One Hundred Years of the Cobra), a tetralogy of plays written by Dostoyevsky. It took place in the years 2006–2009 and included the adaptations of Zločin a trest (Crime and Punishment), Idiot (The Idiot), Běsi (The Demons) and Bratři Karamazovi (The Brothers Karamazov). The director of all parts included in the cycle was Vladimír Morávek who began his career at Husa na provázku with this project after spending several years as the art director of Klicperovo divadlo (The Klicpera’s theatre) in Hradec Králové. It might be because of this fact that he chose novels discussing so significant issues of humanity and law. Every story has a crime involved, though these are no meagre offenses, but crimes featuring prominent moral questions. It is not a coincidence that the whole work of Dostoyevsky is included in every list of the Law and literature movement since its beginning.

As it is common with Morávek’s production, the stories are given new, unique forms which are often rather confusing. Nevertheless, the whole project was a great success, received critical acclaim and was being played for several years. It was played individually part by part or together in a 12 hour lasting opus called Svlékání z kuže (The Taking off from the skin). From such a fact can we deduce that the themes of law, good and justice are still attractive for the eyes of current viewers.

The first inscenation of the circle, in the production of Husa na provázku called Raskolnikov: Jeho zločin a jeho trest (Raskolnikov: His crime and his punishment) is already linked to law through its name. The adaptation leaves only small room for the development of the relationship between Raskolnikov and Sonya; it actually focuses on his moral dilemma about having the right to kill another person. I won’t go into the details here, as the story is probably well-known to wide society, but I would like to point out one large difference between the original and this adaptation.

In the end, Sonya convinces Raskolnikov to go plead guilty. Raskolnikov is so burdened by remorse and a strange neural fever that he really goes to the police to admit to his crimes. In the original however, Raskolnikov, out of love for the morally pure Sonya, goes to a crossroad plead guilty in front of everyone to finally redeem himself in the eyes of humanity and God. That gives quite a different tone to the story, I think. Now it would be appropriate to mention Antigone again. She was choosing between two laws: the law of mortals and the law of gods. Raskolnikov chooses between the human law which he despises and the law of his own judgement, his own vision of justice. In Dostoyevsky’s conception his judgement betrays him, his mind construction crumbles and the murderer remains the murderer. The idea of a single individual being superior to others, for whatever reason, is ruined by the impact of the unbreakable norm on human psychics. According to Morávek, God isn’t someone to fear. There is actually no prominent place reserved for God in Raskolnikov’s tragedy. The murder is banned by human society and human nature presented by conscience. It’s actually a not so well explain feeling of shame that brings Raskolnikov to his confession, no law or police (he goes to the police only for his final confession). He also doesn’t have the need to redeem himself in front of everyone. This conception of guilt and punishment is probably already too unfamiliar for today’s viewers.

From our modern point of view, Raskolnikov’s story is an interesting counterweight to reflections on the death penalty, euthanasia and punishment in general. His first thought that a person of specific qualities does have a right to decide about the fates of others is dangerously similar to the attitude of Nuremberg Laws to a murder of a Jew by an Aryan. But that has been already discussed and solved within the settlement of nazi crimes. Even so, a similar principle is the subject of a discussion dealing with death penalty and euthanasia. Of course, a proper lawsuit gives the decision about death a whole different nature than in a regular murder and euthanasia is commonly linked with mercy, not superiority. Even though, what gives someone with a jurisdiction the right to decide whether someone lives or dies? What gives him the proper authority? The answer to what

happens if someone claims such authority for himself is provided by this performance.

The second part of *Sto roku Kobry* is called *Kníže Myškin je idiot* (The Prince Myshkin is an idiot). The original novel should be easily recognizable by the title. This story is the least connected with out of the four, but still offers an interesting look into one legal issue. The term ‘idiot’ is commonly understood as an insult, which doesn’t differ since the time of the creation of the novel. We only use it more often and with more obviousness nowadays. Idiocy itself is a medical term for insufficient intelligence. In such a situation, restriction of legal capacity could be allowed as stated by civil code. The question remains, what is commonly considered as striking imbecility responsible for a person’s incapability of taking care of himself. In this case, the change of legal capability is not discussed, but every action of the protagonist is dismissed because of his supposed idiocy. As if a good heart had to be a proof of mental inferiority. And so the story continues and we are witnesses of a variety of situations where Myshkin’s ‘idiocy’ poses as a hindrance. Can he deal with his money? But everyone wants to steal from him ... Can he get married? He can, in a theatre, but he can’t find one that does not run away from the altar. Does he need supervision? And should be the supervision continuous? The secondary characters all support its necessity. After all, Prince Myshkin is ill ...

The viewer doesn’t have to be a genius to understand that the prince is not a wreck incapable of handling himself. He is actually strictly following the legal and religious norms. He is truthful, helpful and chaste. He does not want to hurt anyone and he does not yearn for glory, power or riches. Yet is he a target of ridicule. He does not fit in his time nor does he fit in ours. An unambitious individual who is following the rules even at the expense of his own fortune is considered a fool, an idiot even today. All theoretical reasoning about cultivating legal consciousness is groundless in such a situation.

But even in this story does the viewer get his amount of crime per play. In the end is Myshkin’s former fiancée killed by Myshkin’s friend. It is a natural and logical conclusion of the whole story, with Myshkin being the centrepiece of all events that are fuelled by the passions of all characters.

And law works with passion.<sup>11</sup> If law does not manage to deal with passion in its prevention stage, it must apply repressions. In this case, we deal with a classic crime out of passion, but we could argue about it being a crime out of affection. If affection is a sudden and unexpected state of mind, this is not the case. What about the unexpected reaction of a man who is being stressed for a long time? If the victim consciously engaged in a long term psychological torture of her future murderer, we can actually understand the killer’s situation. The other side of the coin is the victim herself was a disturbed individual, plagued with her own inner demons and tormenting the murderer unwittingly. Should we pass judgement on him? Is not he punished enough by losing his beloved? But a crime must not remain unpunished. In what state would our society be, if it would remain so?

The ending scene of Myshkin meeting with Rogozin with the corpse Nasstasya Filippovna being in the next room sets the viewer in the role of the judge, even though the actual trial never takes place. It forces us to think about what kind of verdict should and had to be passed. The crime was not done by an ‘idiot’, but by a common human individual. Passions are known even to judges, but how to deal with them appropriately? Even the ruling is more of an act of intuition than an application of legal norms.<sup>12</sup> But if we apply the strictest sentence in this case, our feelings of justice and injustice will probably suffer. On the other hand if we use only our intuition, our law will come up short too. The worst decision, not only for judges, is probably not thinking about this issue. Legal consciousness is created by many factors and not all of them have the same amount of persuasive power. This performance has it, thanks to the ensemble, the director, the minimalistic scene and mainly thanks to the well done adaptation. Therefore it is vital to utilize its potential for human and law purposes.

The next part of the cycle is called *Stavrogin je ďábel* (Stavrogin is a devil), an adaptation of *Běsi*. The main emphasis is again placed on the

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<sup>11</sup>Škop 2011, pp. 9–11.

<sup>12</sup>Polčák 2011.



main protagonist and his motives, all other storylines are reduced to a minimum. Dostoyevsky's novel is supposed to be a critique of the political situation in Russia in the 19<sup>th</sup> century, but we rarely find traces of this motive in this adaptation. Nevertheless, it still shows that even unwritten social norms are necessary for the well-going of society and that the absence of any moral barriers manifested even in only one individual can lead into societal devastation. This fact is nowadays often underestimated. The legislators try to create more and more laws in order to adjust every area of human life, but forget that it is not possible to do. There are many normative systems with each of them having its role and weight in society. And this organization has its meaning. Single systems can overlap themselves, but never substitute for each other. On the other hand are they often so closely connected that if one fails, the second cannot undo the problem. This initial situation is so suggestively utilized that it literally sends chills down our spines. In adaptation in *Husa na provázku* theatre, this feeling is even furthered by the performance of Jan Budař in the role of Stavrogin. Stylised make-up gives him the appearance of a vampire with chalk white skin and so symbolizes his attitude towards other characters. Crime does not have a major role in this play, but in the end the viewer understands that the previously unknown evil is the main mover of the whole story. Unlike in *Kníže Myškin je idiot* and not unlike in *Raskolnikov: Jeho zločin a jeho trest*, the protagonist is an above-average intelligent individual. Stavrogin is also similar to Raskolnikov because of his moral imbalance. Dostoyevsky obviously had a weakness for such types of characters due to their obvious moral and legal conflicts. While Raskolnikov's guilt is apparent from the very beginning, Stavrogin leaves the viewer in uncertainty for quite a long time. The fact that even an anti-hero can win the sympathy of an audience is widely applied here as Stavrogin is full of charm. He's fascinating the characters on stage as much as the whole audience. The reason of this might be the terrifying secret which is only hinted at throughout the play. Nevertheless has Stavrogin, without any effort, more and more followers fascinated by his disobedience of laws of any kind. That's hardly a surprise, as they are mostly secret revolutionaries grouping with Verkhovensky, another character in the story. The whole play culminates at a charity ball which

Stavrogin uses as means of demonstration of his sins. He does not repent, he does not have the need to redeem himself as in Raskolnikov’s case, nor is he burdened by conscience. If he had not been so indifferent, we could say he actually boasts of his deeds with the worst of them being child rape. The opinion on such an act has not changed through time, society still considers child molestation as one of the worst crimes, with the proceeding with the pedophile Dutroux and the Kuřim incident in our very republic being proof to this fact. When Ivan states, ‘Why do children have to suffer?’, he’s voicing the opinion of most people even today. Stavrogin’s cynicism during his description of the rape is like a slap to the face of this rule. A rule must be accepted universally and without question to be considered a real rule. The ban of child rape fulfils both of the demands, but Stavrogin blatantly disobeys it. The two more murders of his then do not surprise the viewer at all. Much more surprising is Stavrogin’s illogical suicide in the end. But that is Dostoyevsky’s fault, as an adaptation probably can not change the ending of the original screenplay. Despite this am I confident that remorse does not fit in Morávek’s adaptation, Stavrogin’s departure would have sufficed entirely and the statement that tells us the differences between murders and crimes would stand out much better. Not only the judges, but also the legislator should have this fact on his mind and should be reminded of it, maybe conveniently in theatre.

The final part of the circle is *Bratři Karamazovi* (The Brothers Karamazov) with the subtitle *Vzkříšení* (The Resurrection). It is probably unnecessary to explain this story from the legal perspective, as it is a classic with new book editions still resurfacing. New adaptations are being performed all around the world and recently even a Czech film adaptation was made by Petr Zelenka. In all Law and literature classes are *Bratři Karamazovi* (The Brothers Karamazov) discussed, as we rarely see such an unprecedented study of human guilt in literature.

The other reason for every lawyer to see the play is the display of the investigation and the following trial with Dimitri. In Morávek’s adaptation the inquiries made by the judge are stretched through the whole play like a narrow red line. The story is told chronologically, all descriptions are given enough space and the main emphasis is placed on the characteristics

of every singular character. A large part of the story takes place during the life of Old Karamazov and another large part is devoted reflections on faith. Neither of these applies to Morávek’s adaptation. At the beginning the whole cast, one after another, tells the audience that they did not kill Old Karamazov and the trial begins. The individual images serve as proof for the judge who has to determine who the murderer is. An idea does not mean a finished act. Loathing is not a crime. What about the preparation? But the preparation must be deliberate. What about an unaware instruction? The story revolves around four brothers. Their father treated them all rather outrageously and did not care about them at all. So the oldest son, Dimitri, hates him and when competition for love comes to play, a tragedy is going to happen. The younger son, Ivan, is neutral. He became independent of his father psychically and financially, so he can afford the role of an observer in family affairs. The youngest, Alyosha, lives in a monastery and behaves like a saint, surprisingly even to his father. And let’s not forget Karamazov’s illegitimate son Smerdyakov who stays at their house as a servant and suffers from numerous epileptic fits. So much for the reminder of the story.

As I have written above, *Bratři Karamazovi* is a prominent work for lawyers. The first reason of this being Dostoyevsky’s reflections on faith, which forms the attitude of humankind towards the world. Dostoyevsky put these reflections in the mouth of Zosimo, the spiritual guide of Alyosha. Alyosha, as a more or less positive character following Christian doctrine and spreading love and mercy through the whole story, probably interests the reader the least out of all Karamazovs as he is the least believable in his perfection. This state has not changed much since the introduction of Dostoyevsky’s novel. As an excuse for this rather unreal character can we say that Dostoyevsky probably planned a sequel to the novel and Alyosha was supposed to be the main character with bigger development. Dostoyevsky unfortunately prematurely died and could not finish his plan therefore is Alyosha known as a being of pure character with strong religious ideals and a minimum of flaws. It is not a coincidence that when we hear the statement about human equality, it is coming from the mouth of Alyosha, the pupil of Zosima. He further states that it is our obligation to love all

living beings and never deem ourselves superior to anyone. That we should never serve someone else and that no one has the right to decide on anyone. But that brings our legal system in disarray. Courts cannot judge without judges, but from Dostoyevsky’s perspective no one has the right to be one. Reflections on power and authority are therefore the first and probably most important pillar of the whole story.

It is sad, that in Husa na provázku’s adaptation this storyline has been given only minimal space and I think it deprived Morávek’s version a lot. It should be noted that adding the Elder Zosima’s speech would probably slow down the gradation of the story, but it would enhance the whole play with another, philosophical and for law interesting dimension and with that, maybe even the character of Alyosha would not be so incomprehensible.

Let’s go back to the remaining brothers. The second reason for reading the novel or seeing the play is trial dealing with the murder of Old Karamazov. The opposites of the brother Ivan and Dimitri are further potentiated with the contrast of passion and reason as motives for their actions. That is unfortunately revealed during the trial, as Ivan is quite logically accused of the murder due to his past statements about killing his father. It does not last a day until investigators come and arrest him. He endures the whole process and is actually content with a possible conviction, but does not cease to claim innocence for his father’s murder. Society does not doubt his guilt, it actually look like it understands his reasons and wants him reprieved as Old Karamazov was a monster after all. Ivan, in contrast, applies rational reasoning. He does not believe in God and respects only the voice of reason, so he does not acknowledge any God’s laws and despises the ones of humanity. But he never crosses the line, which is a huge difference in comparison to Zločin a trest and Běsi. Ivan blessed with high intelligence, as the other two protagonists do, but he is continuously suffering from the fact that he cannot believe in God or justice. His dialogue with Alyosha about the suffering of children and the rejection of the world is a pivotal moment not only in the novel, but also in this particular adaptation. Ivan would never really think of killing his own father. In the moment when he discovers that he might be catalyst to the murder, albeit unknowingly, the burden of remorse causes his descent into madness. Smerdyakov, the

true killer, does not have a moral dilemma at all, as Ivan strengthened his confidence by instilling the belief that in a world without God ‘everything is permitted’. Dimitri does deserve his sentence as he wanted his father’s death. Smerdyakov sees himself only as a tool, not as a culprit. That is a highly non-standard way perception of guilt and punishment, as it was during the time of the novel and even now.

The Brothers Karamazovs idea that everything is permitted is very interesting for every lawyer. In this story, it is only some kind of anarchistic cry. Ivan constructed his mind construction after on hours of thoughts about human society. He came to the conclusion that God does not exist. And since God does not exist, there are no rules set by God. And rules, which are not supported by a higher authority do not have to be followed. After Ivan summarized all of this, he must have come to the conclusion that everything is permitted. Despite this fact, he lives on as if nothing has changed, but he has not acknowledged what impact his theory might have on someone with lesser moral barriers against evil and crime.

Unfortunately, this omission of Ivan becomes fatal. When Smerdyakov murdered the old Karamazov, it was result of Ivan’s theory in practice. When Ivan found it out, he went mad.

The greatest paradox of this whole situation was the decision of the court. For the murder of old Karamazov was sentenced the oldest brother Karamazov, Dimitri. I mean that the absurdity of this whole story was showed even better in the theatre than in the novel. The unnamed horror was better displayed in the theatre concept too. Maybe it was caused by the fact that director Morávek added to his play a role of demon, who served as a reminder of evil in all the key moments of the story.

Despite of the novel *Bratři Karamazovi* is more than hundred years old, it is closer to the current law than one might have expected. In principle, alienation of law from religion and morality is not a problem. But as professor Holländer said in his polemic with professor Příbáň, law has to have some value base. Dostoyevsky would agree with him. It can be clearly recognized in his novel about one special patricide, its causes and its consequences.

It would seem that Dostoevsky’s tetralogy has nothing in common with the current law. The opposite is true. Current law does not mean just newly made laws. For example already mentioned book *Pravo a dobro* is dealing with purely contemporary legal issues too. And when some literal masterpiece is mentioned there, it is not a contemporary work or a work directly describing some actual legal phenomenon. On the contrary, authors of *Pravo a dobro* refer to the timeless works, whose value and wisdom are still valid.<sup>13</sup>

And so it is in a cycle *Sto roku kobry in Husa na provázku*.

I do not know the long-term intentions of the editors of this theater and I doubt that they consciously chose pieces with legal themes. After *The One Hundred Years of Cobra* a new special project began: *Perverze v Čechách* (The Perversion in Bohemia). This time it was a trilogy with an ambitious aim to describe the Czech society since the 60<sup>th</sup> years until the present. The first volume, *Lásky jedné plavovlásky* (The Loves of a Blonde), gave to the Forman’s film new parallels with the Russian occupation of Czechoslovakia in August 1968. Rather than legal topics this production actually discussed the inability to accept and take responsibility for ourselves. First volume was followed by the second one: *Cirkus Havel* (The Circus Havel). It was a collage of Havel’s texts depicting the moral decline of the Czech Society during the normalization and partly during the velvet revolution too. Rather than a direct representation of legal defects viewer sees the results of their distortions: the imprisonment of dissidents, disqualification, and the emergence of *Charta 77* and *Anti-Charta*, or practices of *StB*. The last part of *Perverze v Čechách*, *České moře* (The Czech Sea), was a collage of texts by David Drabek, one of the most successful Czech playwrights nowadays. On the stage the legal issues are reflected as an absolute lack of binding rules and social lostness of most of characters. Not by accident the major figure in the play is a confused terrorist. From a legal perspective the most interesting project that was created in connection with *Perverze v Čechách* *Kabinet Havel* (The Cabinet Havel). It means a series of moderated discussions on the status and

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<sup>13</sup>Přibáň, and Holländer 2011.

future of the Czech society. These meetings were held under the auspices of Vaclav Havel. His guests were outstanding personalities of Czech culture, science or politics. The most important result of these discussions was the publication named *Česká vize* (The Czech vision) subtitled *Hledání identity 21. století* (Searching for identity of the 21<sup>st</sup> century] where these persons have tried to formulate ten principles necessary for the prosperity of the Czech society.<sup>14</sup> And almost all of them mentioned the requirement for a fairer and more stable law. So it seems that *Husa na provázku* is to the law even closer than it seems at first sight. In this way most of the premieres of *Goose on the string* of recent years were chosen too: Bulgakov’s *Maestro a Markétka* (The Master and Margarita), Havel’s *Prase* (The Pig) and Čapek’s *Hordubal and Trapná muka* (The Embarrassing ordeals). But I insist that from the standpoint of the best testimony about justice, guilt, punishment and the power of law *Sto roku kobry* was the best and it said about the contemporary law more than any other theatre project of today.

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<sup>14</sup>Mozga 2011.

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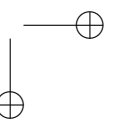
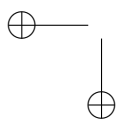
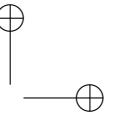
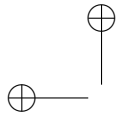
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## ARGUMENTATION 2011

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