Law in Theory and History

New Essays on a Neglected Dialogue

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Legal Theory and Legal History: Prospects for Dialogue

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There are very many theoretical questions which may be asked of law. Law can be studied as an instrument of power, as a vehicle of economic opportunity, or as a tool of oppression. It can be studied as a means of setting rules to guide conduct, or as a method of resolving disputes. It can be studied as a structure of empowerment, or as a coercive mechanism of social discipline. Given these multiple ways in which we may think of law, it seems odd at first glance to suggest that one might study law theoretically without drawing on history, or to hold that theory and history have been ships passing each other in the night, with barely a light to signal each other's presence. Is it not self-evident that anyone interested in sociological questions about law, or economic questions, or questions about the interaction of law and society in general, cannot do it in ignorance of history, even if their main concerns are with the present? Is it not obvious that the theorist who wishes to understand how any particular law or legal system came about, how it operates, what effect it has, will need to look empirically, and so will need to engage with history? At the same time, is it not clear that what distinguishes historians from antiquarians is that they seek explanations, and patterns of change, which requires them to think theoretically? The very discipline of legal history has been shaped by much theoretical reflection on the methodology of the subject, and by theoretical influences from other disciplines.[1] Does this not prove that history and theory are in a constant dialogue?

If one focuses on theorists who are interested in what law *does*, then it does seem evident that history and theory have long been bedfellows. By contrast, if one turns to theorists interested in what law *is*, there has been rather less dialogue. The attitude which prevails among many legal philosophers is that perhaps most

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[1] See, for instance, the essays in A Lewis and M Lobban (eds), *Law and History* (Oxford University Press, 2004); A Musson and C Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2012); M Lobban, 'The Varieties of Legal History' *clio@themis* 5 (www.cliothemis.com/The–Varieties–of–Legal–History).

clearly expressed by Hans Kelsen. In his view, the 'jurist, as the theoretical expo-
nent of the law' and the sociologist or historian (who consider 'the causes of the
coming into existence of the law in general or of a particular legal order') deal with
'completely different problems'. For such thinkers, the juristic enterprise is also an
essential preliminary: as Kelsen put it, '[t]he sociology of law cannot draw a line
between its subject—law—and the other social phenomena; it cannot define its
special object as distinct from the object of general sociology—society—without
in so doing presupposing the concept of law as defined by normative jurispru-
dence.'[2] According to this view, the jurist is engaged in the philosophical task of
clarifying concepts abstracted from all context which the sociologist, comparatist,
anthropologist or historian can then use in their distinct work.

   If we focus on jurisprudence as the theoretical study of the nature of law—
what law *is*—then this view of the subject does pose a major challenge for those
interested in a dialogue. Insofar as much of jurisprudence, as taught in university
law schools, omits historical perspectives, it is a challenge worth taking up, and it
is one taken up by the chapters collected in this volume. In what follows in this
introduction, we will therefore concentrate on those theories that discuss what
law is, rather than what law does, and ask how far there can be a fruitful dialogue
between this arena of legal theory and legal history.

I

Legal philosophers who confine themselves to the analytical discussion of legal
concepts are sometimes criticised for defining the 'province of jurisprudence' too
narrowly, making it entirely analytical by excluding questions of moral, political
and social theory, as if they had nothing to do with the object in hand. Further-
more, it is sometimes argued that this very move is a modern turn, taken by jurists
like John Austin, who departed from the more holistic philosophies of Thomas
Hobbes and Jeremy Bentham.[3] By narrowing the province of jurisprudence—and
by implication suggesting that it is only formal, analytical questions about the
nature of law, rights, duties and so on, which should be of interest to the lawyer—
they have been accused of confining the field much too narrowly.[4] In answering
this criticism, analytical jurists can say perfectly convincingly that they are not
seeking to say everything that can theoretically be said about law: they are simply
trying to clear the ground for further study by helping us understand what we
mean by certain key concepts, whose meaning we need to be clear on before we

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   [2] H Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review*
44, 52–53. For Kelsen 'a normative theory of the law', which analyses law as a system of norms, is a
'specifically "juristic" view of the law'.
   [3] See MJ Horwitz, 'Why is Anglo–American Jurisprudence Unhistorical?' (1997) 17 *OJLS* 551;
GJ Postema, 'Jurisprudence, the Sociable Science' (2015) 101 *Virginia Law Review* 869.
   [4] See in general R Cotterrell, 'Why Jurisprudence is not Legal Philosophy' (2014) 5 *Jurisprudence* 41.

can go on to ask other kinds of theoretical questions. Thus, one cannot properly understand the question of the impact of law on society unless we first have an idea of what we mean by 'law';[5] we cannot understand the relationship between law and morality unless we have some kind of idea of what distinguishes them as concepts. Analytical jurists can therefore finesse the criticism that they are jurisprudential imperialists by the modest retort that they have no gripe about others asking their own theoretical questions. As Kelsen put it, '[l]ike any science, the science of law must first of all define its object by differentiating it from other similar objects, in answering the question: what is the law as object of a particular science'.[6]

Analytical jurisprudence therefore seeks (in Kelsen's words) 'to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples'.[7] By elucidating the meaning of 'law' and other legal concepts, analytical jurisprudence aims to provide the conceptual tools for making sense of the data of experience. According to its defenders, one needs to have categories and classifications into which to place data in order to make sense of it. What makes this a *philosophical* question is that it is not dependent on empirical observation or context. One cannot simply use the categories and classifications made by the people under study. To begin with, the people who are being studied may not articulate concepts which explain their behaviour: they may be speaking 'law' (as we understand it) without knowing it. Furthermore, even if they do articulate concepts in their own language, these will need to be translated into a conceptual language which the observer can understand. All this suggests that without a clear toolbox of concepts to begin with, the scholar cannot know what she is looking for, and cannot understand what she finds. To make sense of experience, it is argued, we need concepts or categories which are not dependent on experience.

Philosophical reflection has certainly generated useful insights, as one philosopher engaging with the ideas of another has refined definitions. Bentham and Austin's insistence against the natural lawyers that the positive law enforced by a sovereign ruler (law 'as it is') is a distinct system from the rules of morality (law as it 'ought to be'), and that the province of the expositor is not the same as that of the censor helped clarify the thinking of nineteenth century jurists. Equally, the criticisms made by Kelsen and Hart of Austin's notion of law as the command of a sovereign habitually obeyed by the bulk of the people were seen to reveal flaws in the theory, by showing that a conception of law as command explained neither the (continuing) normativity of a law nor the existence of power-conferring rules: the theory needed to be modified to account for factors unexplained by its

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[5] As John Gardner has put it, 'one must already know what counts as law before one can make either empirical or evaluative observations about it *qua* law': *Law as a Leap of Faith, and other essays on Law in General* (Oxford University Press, 2012) 273–74.

[6] H Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1947–48) 57 *Yale Law Journal* 377.

[7] Kelsen (n 2) 55.

original formulation. As philosophers reflect on the flaws in preceding definitions of law, they elaborate a more nuanced view, which is intended better to capture what is understood by the concept of 'law'. Nor can it be denied that the theories elaborated by modern analytical jurists—Kelsen's and Hart's views of law as a system of norms or rules, united in a hierarchy validated by a *Grundnorm* or a rule of recognition—are conceptually useful in helping us to identify what law is. As Jean–Louis Halpérin and Pierre Brunet argue in their contribution to this volume, a theory such as Kelsen's can usefully provide 'neutral (or formal) criteria for identifying legal systems and for distinguishing these systems from other forms of normativity'. They find particular utility in Kelsen's definition of the state as a legal order, as a tool to help the historian track the evolution of the modern state.

At the same time, there are limits to the analytical empire. As Halpérin and Brunet observe, Kelsen's legal definition is not (as he thought) 'a pre–condition of all research about the state, but is one of the possible tools for studying and understanding the state, a tool that legal historians and legal theorists can use with profit'.[8] We might add that analytical philosophy itself has not given a definitive answer to the core question of what is law: there is a multiplicity of positions. For Kelsen, the notion of coercion is central to the existence of law. For Hart, it is the presence of a set of officials: in his view, 'law' is always to be associated with the pronouncements of a special cadre, which has authority in any given society to pronounce it. Where such a cadre exists, one has 'law'; if there is no such cadre, there is no 'law', though there might be other forms of normative conduct. Analytical jurisprudence therefore offers not one but a number of different conceptual tools for the historian to choose from. If she is looking for the history of 'law', should she search for Hartian institutions or Kelsenian norms?

Questions may also be asked about the 'purity' of these philosophical concepts. Neither Kelsen nor Hart were defining concepts which were entirely abstract, that is, concepts which might have a timeless meaning. Kelsen himself spoke of determining the nature of law itself '[f]rom a comparison of all the phenomena which go under the name of law.'[9] Elsewhere, he explained why coercion was such a central element to his theory:

> If the Pure Theory of Law assumes that coercion is an essential element of law, it does so because a careful examination of the social orders termed 'law' in the history of mankind shows that these social orders in spite of their great differences present one common element, an element of great importance in social life: they all prescribe coercive acts as sanctions.[10]

Thus far, Kelsen was conceding that his theory was not abstract Kantian philosophy, but premised on being an accurate reflection of historical experience. Hart's philosophy was one which even more explicitly aimed to explain human practices

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[8] Chapter 13 of this volume, p 238.
[9] Kelsen (n 2) 44.
[10] Kelsen (n 6) 378.

and understandings,[11] which suggested that even the most abstract of legal theory would need some empirical foundation. Hence his notorious remark that his work was not simply one of 'analytical jurisprudence' but also of 'descriptive sociology'. His theory was consequently premised on the existence of a certain structure of society, with certain patterns of behaviour, and certain internal attitudes to law. In his view, law only came into being at a particular stage of development—when the system was institutionalised, with the emergence of secondary rules and a set of officials. A customary system without such a set of secondary rules and institutions was for Hart 'pre-legal': while this may have been a normative order, it was distinct in kind.

Kelsen's and Hart's theories might therefore be regarded as stipulative, rather than descriptive. For Hart, we should only describe as 'legal' those systems in which there is some form of officials, for Kelsen, we need a system of coercion. We should use a different name for normative orders which do not have this form. As stipulative definitions, they may be of great use to the historian, in identifying and classifying what is found, to be able to compare and contrast different examples of the same thing. They allow us to identify a particular class of human activity to study. However, these theories only give the most general and provisional of indications even of that activity, and are therefore only a start. They invite us to look at this object of study, and then reflect further on it, in a way which may test and refine their theories. For instance, Hart did not explain in any detail what 'officials' were, beyond making it clear that the only necessary officials were those who articulated (or 'applied') the rules, rather than those who enforced them.[12] It was clear that he did not think these officials had to be part of a state, for his theory also sought to explain non-state systems of law.[13] Nor did he explain how it came to pass that they had obtained their authority.[14] All one needed for a legal system to exist (in Hart's theory) was for officials to have their own customary system *in foro*. Rather than telling us all we need to know theoretically about law, a theory such as Hart's only invites us to go further; and since the theory was at least in part based on assumptions about empirical behaviour, it invites the theorist to look more at empirical—including historical—evidence.

Furthermore, if we see Hart's definition of law as one stipulated for a particular (institutional) understanding of law, rather than being a universally accurate one, then it can consequently be tested by asking how it explains other ideas or behaviours which would commonly be described as law. As Maksymilian Del Mar

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[11] cf Peter Winch, The Idea of a Social Science and its Relation to Philosophy (Routledge and Kegan Paul, 1958).

[12] Gardner (n 5) 286.

[13] Hart noted that not all legal systems have states: *The Concept of Law* 3rd edn (Oxford University Press, 2012) 221–23.

[14] In his view, their authority came from themselves: the rule of recognition which stood at the heart of the system was itself a customary rule, rooted in the practices of the officials themselves. cf Gardner (n 5) 283: 'The relevant officials each follow what they take to be the rule that the others are following. Thereby they contribute to making it the rule, and to making themselves the officials under the rule'.

points out, analytical jurists tend to focus on an unhistoricised single definition (or 'central case') of law or a legal system, and thereby fail to see that there may be a multiplicity of ways to conceptualise law, which may undermine the status of their insights as offering a universal truth. As he puts it, '[t]o think diachronically is … to increase (if not maximise) the amount of variables one indexes to what one claims we can know about law in general'. Many past (and present) societies think of law in customary terms, where the 'law' in question is identified not by its source, or its articulation by particular officials, but from the fact that communities act in accordance with the customary norms, and feel that they are obligatory (rather than being merely habitual). Equally, a system of law may be intellectual, being neither coercively enforced or authoritatively articulated by particular individuals, nor observed by communities: one example would be Roman law, as rediscovered and reformulated in the Middle Ages.

This raises the question of how definitive the 'central case' is. Are these various other kinds of 'law' only to be described (as John Austin put it) as law 'improperly so called', or so called by analogy—that is, as something superficially similar but conceptually distinct? Or are they all species of a single *genus* which we need to redefine? In fact, we have a choice. The historian seeking to identify and explain custom as a form of law may find the Kelsenian model better than Hart's, which might lead her to seek an underlying customary *Grundnorm*.[15] On the other hand, the historian following Hart's distinction between primary and secondary rules might agree that a purely customary system only becomes a system of *law* once there are *jurisperiti* in place to indicate what the custom requires. Custom, it may be argued, only becomes problematic once there are disagreements over what it means, and once you establish officials to determine what should be done, you are moving from custom to law.[16] Turning to the intellectual system, if we regard medieval Roman law as a system of law properly so called, we might need to rethink our theory of law, to stress the notion of law as an identifiable set of norms within a system based on a set of original texts viewed as authoritative—whose *Grundnorm* might be that the *Digest* of Justinian contains all legal truth—rather than as the rules produced by authoritative officials. If it is true that a wholly intellectual system of law is not quite the same as a working, effective, enforced system—and so may not contain *everything* we know of law—it is also true that it does contain *something* of it. Looking at it this way, we may see that there is no definitive answer, but there is plenty of room for dialogue.

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[15] Kelsen spoke of the constitution as a 'complex of norms which … includes also the norm by which custom is recognised as a creator of law. To be included within this complex, a norm need not be found in a written constitution—it may be a part of the unwritten constitution created by custom'. Kelsen (n 2) 62.

[16] If this seems a neat resolution of the problem—and a useful guide for historians—it does not wholly resolve the problem of whether pure custom can be law. After all, Hart's very rule of recognition is a customary rule: and if a conventional rule can be made by the officials through their conduct, why can not other such rules exist in society?

History can test how well the theory explains the subject under study. For instance, while Hart's theory may usefully guide us to the persons who have the authority to speak the law—so that we can see a system of law once there is a specialist cadre pronouncing it—he does not tell us much about how they saw the law. One common criticism made of Hart's theory is that it describes law as a system of rules, whereas for much of its history the common law has been a system of reasoning, by 12 judges seeking to resolve problems put to them through forensic discussion, but without articulating real rules. Critics like Brian Simpson have pointed out that the 12 judges of the common law did not see themselves as making rules, but as working out a customary system they assumed was as coherent as the famed Roman law.[17] If we ask not what is the *source* of law, or where we can find the borderline of what is legal and what is not, but ask what jurists thought the law was, we may then find that custom and knowledge plays a significant part: the real locus of law might be the customary and the intellectual, and not the institutional. Penetrating into the world of pre-modern officials might therefore take us into a world of what the positivist might regard as law by analogy or law improperly so called, or—with Jeremy Bentham—as law by a kind of pernicious fiction. Moreover, insofar as contemporary common law practice shares features with contemporary judging, it might raise questions about how well the theory explains present practice.

As many of the chapters in this collection suggest, analytical jurisprudence can give us theoretical tools in understanding the concept of law, but they are only tools for further work, and are only useful insofar as they help us make sense of our data. As Del Mar suggests, one lesson to draw from this is that rather than seeking final answers, one might rather seek the 'middle ground' of the

> modest generalist: someone who realises their theoretical tools are only ever instantiated in particular descriptions, but one who also realises that it is useful (even if ultimately somewhat fictional) to think that theoretical tools can potentially travel from any one description to another (at least until they prove to no longer be useful).[18]

II

If the concept of law itself is sufficiently fluid and contestable to allow for a fruitful dialogue between theory and history, what of other legal concepts and categories? Sociologists and anthropologists have long recognised that legal concepts can have a life of their own: they shape and constrain the language in which claims can be made or power asserted, they can be constitutive of social relations (as through

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[17] AWB Simpson, 'The Common Law and Legal Theory', in his *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 376.

[18] Chapter 7 of this volume, p 113.

property or marriage), and they can even assume powerful symbolic significance. Just as there is something clearly distinctive about 'law', so there is something distinctive about legal ideas and concepts. In what ways can theory, or history, or a dialogue of the two, help reveal what is distinctive about these concepts and their operation?

There is a long analytical tradition which regards legal concepts as 'pure' classifications. For Austin, concepts such as right, duty, contract, tort and intention were 'necessary principles, notions, and distinctions',[19] found in all (advanced) legal systems. Similarly, Hohfeld argued that the jurist needed 'at the very threshold' of his study of any doctrine to analyse and discriminate 'the various fundamental conceptions that are involved in practically every legal problem'.[20] The idea that the structure of legal relations can be correctly identified and mapped has also been defended in recent years by a number of private law scholars, most notably Peter Birks, who felt that the scholar could better understand the legal issues being dealt with by setting out the correct classifications.[21] Implicit in this view is the notion that legal doctrine is developed by jurists, uncovering timeless truths and facilitating their application to modern problems. It is to argue that legal relations can be classified according to observable differences between them, just as animals and plants can be classified according to observable differences. It might suggest that contract law, tort and unjust enrichment began to be coherent only when jurists at different times began to figure out their underlying concepts.[22] If (following Holmes) we define jurisprudence as 'simply law in its most generalized part', which aims at identifying the 'most fundamental conceptions', then it can promise to elucidate the meaning of legal concepts, by categorising and classifying legal relations at the most general level. This can in turn be serviceable to the jurist when faced with complex combinations of facts.[23] A better understanding of the concepts will lead to a better, more logical, and even more *accurate* development of legal doctrine.

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[19] J Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, 4th edn (John Murray, 1873) 1108.

[20] WN Hohfeld, 'Some Fundamental Legal Conceptions as applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 19.

[21] Building on the civilian model of Gaius, Birks argued that legal rights (which can be vindicated in court) always arise from manifestations of consent (such as contracts or wills) or events which operate independently of consent (such as wrongs or unjust enrichments): Peter Birks, *Unjust Enrichment* (Oxford University Press, 2005) 21.

[22] David Ibbetson has written, 'The Natural lawyers of the seventeenth century played a crucial part in the history of the tort of negligence by articulating a framework within which it could develop in the eighteenth and nineteenth centuries; by providing a skeletal structure that appeared to be both rational and self-consistent, Pothier's version of the Will Theory, itself with roots in the Natural lawyers' writings, played a crucial part in the emergent contract law of the nineteenth century; so too the writings of Birks and others will prove to have been crucial in moulding the law of unjust enrichment in the twentieth and twenty-first centuries': *Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 291–92.

[23] OW Holmes, 'The Path of the Law' (1897)10 *Harvard Law Review* 474–75.

Such a view has many attractions for those seeking to make sense of a mass of legal materials, for it helps to assume that there is an underlying order into which different material can be sorted. However, we must be cautious of a view which implies that pure analysis can tease out timeless legal categories. For while it may be true that there are some core ideas, generalised and abstracted from actual systems, which can provide a theoretical guide to scholars seeking to make sense of experience, these ideas—like Hart's more general concept of law—are only generalisations, whose specific working out may be contingent and variable over time. As Sir Henry Maine taught us a century and a half ago, concepts do not exist in a social or chronological vacuum, but are developed at particular times and places for particular purposes.[24]

This is true even of the area of doctrine which has perhaps attracted more theoretical attention than any other: the law of contract. At first glance, the same questions seem to have occupied the minds of Ulpian, Accursius, Lessius, Pufendorf and Savigny. A philosophically-minded contract jurist might therefore assume that she can engage in debate with Ulpian, and agree with him that a contract is 'the agreement and consent of two or more persons about the same thing'.[25] She may assume that it is a timeless truth that contractual obligations proceed from consent, determined by the mutual exercise of two (or more) free wills imposing obligations on themselves, unvitiated by mistake or fraud. She may point out that jurists who have articulated such a theory have done so by abstract reflection on the nature of contractual relations, rather than by looking at social practice. However, a little historical investigation soon reveals that past thinkers did not necessarily share the same concept of contract that she is using.

It is well known, for instance, that Roman jurists did not have this general conception of contract, which only emerged in the later middle ages as scholars reformulated the material rediscovered in Justinian's *Digest*.[26] Nor was the later elaboration of contract doctrine merely the discovery of underlying principles which had somehow escaped the notice of medieval jurists. Those who sought in later ages to contribute to the elaboration of contract were not simply engaged in an abstract philosophical exercise: they were also seeking to contribute to particular theological and political debates, and shaped their concepts in particular ways to serve those often polemical purposes. Thus, the sixteenth-century Catholic jurists who developed the theory of freedom of contract were interested

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[24] Maine however hedged his bets by acknowledging the importance of Austinian analysis for developed systems, and by hinting that the 'progress of Roman ideas from a gross to a refined conception' may have exemplified 'the necessary progress of human thought'. H Maine, *Ancient Law* 17th edn (John Murray, 1901) 339. He also observed 'how it is that the human mind has never grappled with any subject of thought, unless it has been provided beforehand with a proper store of language and with an apparatus of appropriate logical methods'.

[25] D. 2.14.1.

[26] See R Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (Oxford University Press, 1990) ch 18; J Gordley, The Philosophical Origins of Modern Contract Doctrine (Oxford University Press, 1993) ch 3.

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in developing their theories as part of a dialogue with a hostile, anti-legalistic Protestant theology.[27] The seventeenth century Protestant jurists who developed their natural law theories also had an eye outside the classroom: Grotius and Hobbes were not interested simply in elaborating contract doctrine, but to establish a juristic basis in the one case for an international order and in the other for domestic harmony. The theories of contracting which these writers developed were not necessary ones, the simple working out of scientific truths. The nature of the theories they developed was shaped by the purposes they had in mind, which purposes can only be fully understood by bearing in mind the wider intellectual contexts in which they wrote.[28] Theories are never self-defining: as I suggest in my chapter, there are various ways in which theorists can look at the world, and their different presuppositions of the problem to be solved may impact significantly on the way they order their conceptual views.

   A diachronic approach can also show the rise and fall of different concepts. New legal conceptions may emerge at particular times and in particular contexts. One example might be the concept of 'genocide', articulated by Raphael Lemkin in 1944 to mean 'the destruction of a nation or of an ethnic group'.[29] Although Lemkin used the concept to identify historical examples of genocide, the idea itself was the product of the attempted extermination of the Jews in the Holocaust. The second half of the twentieth century has also seen the development of a new legal notion of discrimination, which has not only developed a large body of case law but also theoretical discussions.[30] Such concepts are not timeless abstractions but arise in particular historical contexts, in which new ideas emerge to deal with newly perceived problems. Furthermore, as John Bell shows in his contribution, concepts may change their meaning not only over time, but in different places. Comparative studies can reveal that what may look like superficially similar conceptual apparatuses may be used in entirely different ways by jurists working in different contexts. Different societies expect law to do different things, and have different institutional structures in which the concepts are deployed. Contextual understandings may complicate our understanding of what might otherwise appear as

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[27] See W Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune, (ca 1500–1650)* (Martinus Nijhoff, 2013).

[28] For the context of Pufendorf's natural law theory, see I Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge University Press, 2001).

[29] R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation—Analysis of Government—Proposals for Redress* (Carnegie Endowment for International Peace, 1944) 79.

[30] See D Hellman and S Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013). Reviewing this work, Andrew Alman notes the importance of examining this concept in its historical context: 'The concept of discrimination does not refer to a natural kind and has no ahistorical essence. It is a construction addressing certain social, political and ethical problems that, though rooted in forms of group disadvantage characterising most of human history, became especially salient with the advent of modern ideas of citizenship and popular sovereignty. Even if not every philosophical discussion of discrimination must explicitly adopt a socio–historical orientation, it seems to me that the power of theorising to illuminate the concept is substantially weakened if the relevant history is set aside': 'Discrimination Debated' (2015) 6 *Jurisprudence* 157.

timeless; but at the same time, it might enrich our understanding of the uses of the concept. Equally, as Joshua Getzler's chapter shows, we can enrich our own conceptual vocabulary by re-examining the use of conceptual formulations made in earlier times.

Concepts can be used, moulded and combined in a variety of ways and for a variety of purposes. As Ian Williams's contribution shows, not all legal concepts are developed by lawyers to be used for the practical purpose of solving legal problems. He argues that early modern lawyers who set out maxims sought to demonstrate that the common law was a science, and aimed to provide a method for learning and understanding the law. They also sought thereby to bolster the status of the common law.

History can also test the accuracy of theoretical formulations, exposing flaws in the theory. For instance, a number of theorists have in recent years sought to explain the concept of tort by explaining tort law as a system of corrective justice. They have done this in particular by analysing the structure of litigation—in which a plaintiff who has been harmed seeks redress from the defendant whose actions have harmed her[31]—and by seeking to construct the best moral theory to justify why redress is due. These theories are both analytical—seeking to explain the underlying logical structure of the system—and normative, for they see tort law as 'a repository of moral reasoning about responsibility for harm.'[32] A historian might not be in a position to dispute that the best way to conceive of a correlative system of tort law would be through a theory of responsibility, and might not be able to challenge the notion that a certain normative practice was 'immanent' in the system. But—as the contributions of Steve Hedley and Stephen Waddams show in this volume—she could question whether the description of the practice of tort law ever was what corrective justice theorists claim, for instance by showing that the structure and practice of tort law in the past (or present) operated in ways not considered by corrective justice theorists, or was undergirded by different—and consciously articulated—presumptions. Insofar as the normative theory of corrective justice seeking 'oughts' which are 'internal to the law'[33] rests on a factual understanding of that law and its past, it might be open to historical challenge, which might call for a reformulation of the theory. Secondly, an historical critique might challenge not only the theorists' interpretation of the doctrine, but their wider claims that this doctrine represents the proper understanding of tort law in general. Thus, a historical critic might argue that the corrective justice theory might claim better to describe the early nineteenth century system of tort law (before the age of regulation, insurance and public law accountability) than

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[31] Corrective justice theorists have long criticised their rival Law & Economics theorists by pointing out that the latter theory is unable to account for the particular structure of tort law.

[32] EJ Weinrib, 'Correlativity, Personality and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law* 3.

[33] A Beever and C Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *MLR* 322n.

the contemporary one. It might therefore be anachronistic for the present to seek to use this theory as exclusively able to account for tort law, since it cannot explain the current world. As Hedley argues, corrective justice theories cannot provide 'an "explanation" of the whole' of tort law, though they can offer useful insights if 'seen as a significant strand within modern thinking about obligations'.[34] This is to suggest that we need to have multiple theoretical perspectives to make full sense of the law: one needs not only to explain the correlativity of tort litigation, but also how tort law relates to public law and to modern collectivism.

   A historical sensitivity to how legal concepts have evolved can therefore be of considerable use to the theorist. The theorist may learn from listening to the historian. But the dialogue is not just one–way. Just as the history of the uses of legal concepts can help the jurist better to understand the contingency of the concepts she is using, so the abstractions made by the theorist may help the historian to find things she might otherwise miss. Past conduct may be explained in terms of concepts which were not articulated by the actors whose conduct is the object of study. For instance, corrective justice theory might be very useful in explaining what an early nineteenth century jurist thought he was doing in an era when jurists and judges were seeking to create a clear unified notion of tort law. Equally, we may find past societies expressing similar ideas to those articulated by modern theory, but in distinct ways or in different contexts. This point may be illustrated (for instance) by considering the history of the notion of criminal responsibility. It is often said that English criminal law knew little of such concepts until the nineteenth century, when jurists began to develop the 'general part' of criminal law.[35] In the middle ages, determining guilt or innocence was simply a matter for the jury; and there was little room for modern ideas of criminal responsibility to evolve until the legal mechanisms for identifying them had emerged[36]—such as lawyer participation in criminal trials, rules of evidence, and means with which to challenge erroneous decisions. This (it is argued) did not occur in England until the dismantling of the blunt but discretionary system of the Bloody Code, when jurists began to elaborate concepts of criminal responsibility for a particular purpose—to allow for the transformation of penal policy. An examination of criminal doctrine alone would suggest that the medieval mind knew nothing of the concept of intent and the guilty mind. However, if we use our models of responsibility and intention and look for parallels elsewhere, we may find insights to help us rethink out presuppositions. Thus, if we look at the writings of medieval philosophers and theologians—Peter Abelard is a notable example—we will find extensive discussion of conscience and intention. Question of intention also loomed large in the penitential literature, which expanded significantly in the

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   [34] Chapter 16 of this volume, p 318.
   [35] See N Lacey, 'Jurisprudence, History and the Institutional Quality of Law' (2015) 101 *Virginia Law Review* 919.
   [36] SFC Milsom, *Historical Foundations of the Common Law* 2nd edn (Butterworths 1981) 8.

twelfth century Gregorian reforms.[37] Although such works had a very wide range of concerns, there was much material of relevance to crime. Thus, Raymond of Peñafort, who wrote both a confessor's manual and a collection of canon laws, spent much time in his *Summa de casibus poenitentiae* discussing such questions as what excused homicide: those who killed from necessity, or in self–defence or by accident did not share the same degree of guilt as those who killed intentionally. If not elaborated in doctrine, such ideas were not unknown to the participants in the English legal system. Raymond's work was drawn on by the author of *Bracton*, who distinguished (for instance) between homicides done 'out of malice or from pleasure', and killing by unavoidable necessity where it was done 'without premeditated hatred'.[38] These distinctions may not have entered the criminal law directly, but they were used to determine whether a pardon should be given for homicide,[39] and such distinctions may have been in the minds of jurors who acquitted felons, in an apparent nullification of the rules of law.[40] The fact that concepts of criminal responsibility were only articulated in legal rules at a later period—and for particular purposes—is significant for our understanding of the contingency of these concepts as tools of formal *law*; but at the same time, the model provided by these concepts may help us make sense of past practices, including the practices of juries.

While much valuable work has been done in recent years in theorising many areas of law, there is much still to be done. Legal theorists have yet to decode an immanent set of structures and principles, whether in tort law, public law, criminal law or even contract law. Concepts remain contested, and contingent. The theorist can therefore benefit from a dialogue with history, both in exploring how past thinkers have developed their concepts, and in testing their theory against past experience. At the same time, it is clear that legal ideas and constructs do shape behaviour and help constitute social relations. There is something distinct about legal concepts, just as there is something distinct about law. Legal concepts also develop and become sharper and more sophisticated as they are elaborated over time. They provide useful tools for the historian visiting the past. The historian will find past concepts and conduct to be different; but he will get a sharper understanding of the past by adapting the concepts developed by theorists. Historians who are engaged in the task of attempting to reconstruct the world view of past lawyers—who may not themselves have overtly articulated that world view—may

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[37] Penitential manuals provided a guide to what penance was suitable: and the nature of the penance was linked to the degree of moral guilt. JF Benton. 'Consciousness of self and perceptions of individuality' in RL Benson and G Constable (eds) *Renaissance and Renewal in the Twelfth Century* (University of Toronto Press 1991) 272–3.

[38] SE Thorne and G Woodbine (eds), *Bracton On the Laws and Customs of England* (Harvard University Press, 1968–77) 2: 340.

[39] Those who killed by accident, out of necessity or in self-defence were pardoned, with judges by the early thirteenth century questioning the jury closely on matters of intent. ND Hurnard, *The King's Pardon for Homicide before AD 1307* (Oxford University Press, 1969) ch 3.

[40] TA Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (University of Chicago Press, 1985) 62–63.

usefully draw on the interpretations and explanations made by current theorists to see if they—or variants of them—help make sense of the practices of past lawyers. We need to bear in mind that the language used by past lawyers was not always the same as that used in later times, but that their actions might be more comprehensible if we examine them through modern conceptual models. For instance, by asking questions of past practices generated by modern theories of unjust enrichment, we might find patterns of thought and behaviour we had not previously found, even if they are different from the modern ones.

III

If theory can provide tools for historians to use, what positive things can history offer to theory? As has been seen, history can provide a repository of examples against which to test current theory: insofar as a theory aims to offer a timeless, universal explanation of legal phenomena, history poses a challenge, to see whether the data it provides can be explained by the model. History may also offer the theorist examples of how other philosophers have treated similar questions in the past. As Jonathan Gorman notes in his contribution, the theories of contemporary jurists and philosophers are generally informed by the history of political thought, insofar as they seek to engage with the articulation of philosophical positions made by past thinkers. Legal and moral philosophy does not exist in a timeless vacuum: thinkers are part of a tradition, contributing to and seeking to advance debates which have a history and a genealogy.[41] Intellectual historians have long stressed the point that there are no essential, timeless ideas—such as liberty, democracy or the state—but that the meaning of these notions must be explored in context.[42] They have shown that in seeking fully to understand the thought of any historical philosopher, one cannot assume that he has understood the concepts under investigation in exactly the same way as the contemporary investigator. Moreover, as Roger Cotterrell's contribution to this collection shows, by re-examining a past thinker in light of the historical context in which he worked, one can obtain new insights about that thinker's work, by revealing features which have been overlooked by scholars looking only for contributions to a timeless debate. In revisiting the contexts in which Karl Llewellyn and Jerome Frank wrote their works, Dan Priel and Charles Barzun also rethink their legacy. Insofar as contemporary philosophy engages with a 'canon', it is useful to revisit and rethink the canon. As these essays show, such reconstructions can be fertile

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[41] A number of modern legal philosophers, including HLA Hart and John Finnis, have indeed written books about thinkers in the history of philosophy. HLA Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press, 1982); J Finnis *Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998).

[42] The classic exposition of this view is Quentin Skinner, 'Meaning and Understanding in the History of Ideas' in his *Visions of Politics I: Regarding Method* (Cambridge University Press, 2002) 57–89.

for the contemporary theorist, in revealing lost insights and ideas which may have contemporary relevance.

At the same time, as Gorman also points out, philosophers do not have to be historians: in developing a theory for the present, they may find it more profitable to generate ideal versions of the thoughts of past thinkers, sketching out a tenable philosophical position with which to engage through their best interpretation of those ideas, rather than seeking to reconstruct the ideas of past thinkers (which when interpreted in a historical way may prove less useful). Nevertheless, even here historical explanations of past thinkers may be of assistance. For instance, they may show that a past thinker could not have held the views attributable to him in this ideal type (perhaps because it would be inconsistent with that thinker's wider thought), or that his views were richer than has been realised. Such a challenge might at the same time open up new theoretical possibilities by revealing hitherto unnoticed theoretical nuances which contemporary theory might wish to take into account. Thus, the work done in recent years by the Bentham Project in editing the unpublished manuscripts of Jeremy Bentham has led some scholars to call into question HLA Hart's interpretation of Bentham's ideas, an interpretation which served as a springboard for much of his own jurisprudential thought. The historiographical task of reconstructing Bentham's ideas may therefore contribute to generating fresh perspectives on modern debates on legal positivism.[43]

Just as history can offer new interpretations of past thinkers' ideas, which may be serviceable to contemporary jurists, so history can provide data on which theorists can draw, insofar as their theory is premised on factual bases. In this way, history can be of use to normative theorists, as well as analytical ones. A theorist seeking to explain why a current state of affairs is unjust, and to construct an alternative, may commence with her own intuitions or personal experience. However, a fuller understanding of the problem to be solved may entail looking historically and comparatively at other experiences in other times. For instance, much recent Feminist and Critical Race theory has been premised on the notion that women and minority groups have suffered disadvantage as a result of discrimination against them on the basis of their gender and race. It is not because the theorist alone has felt and experienced discrimination, but because she perceives a generalised experience of oppression among all women or minority groups in her society, that she seeks to develop a theory, both to explain the oppression, and to describe an alternative. An historical and comparative study can enrich her understanding of the nature of this experience, and its generality, and so inform her as to the problem to be addressed. Indeed, for theorists of gender and race discrimination, history is an essential part of the story: insofar as Feminist theorists and Critical Race theorists explain discrimination as structural, and embedded in society, it must be explained in historical terms. However, if history can help

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[43] See P Schofield, 'Jeremy Bentham, the Principle of Utility and Legal Positivism' (2004) 56 *Current Legal Problems* 1; P Schofield, 'Jeremy Bentham and HLA Hart's Utilitarian Tradition in Jurisprudence' (2010) 1 *Jurisprudence* 147.

explain the problem, it cannot provide a solution: the historian cannot determine whether a Liberal Feminist vision is better than a Radical Feminist or a Cultural Feminist vision. History cannot guide the Feminist in deliberating over whether women and men should be treated exactly the same, since they are equal humans, or whether treating them equally requires the law to take into account differences between men and women; though as John Bell points out, a comparative study (and a fortiori a historical one) may provide examples of where particular social arrangements have operated well or badly.

The above mentioned uses of history are all examples of history as the servant of theory, offering information and insights when required, but taking a backseat when it comes to constructing a positive theory. But can history offer more? In answering this question, it is worth bearing in mind the ways in which history differs from philosophy. Whereas (some) philosophers begin with the assumption that people have the same core ideas, thoughts and motivations, historians (as well as comparatists and anthropologists) look at the environments in which people find themselves. They assume that different environments generate different behaviours, as the impulses to which humans respond will vary. Peoples with different cultures in distinct environments will not see things in the same way. Instead of seeking a universal view, the historian tries to rediscover how past people saw the world, and how they acted on that understanding. At the same time, history also seeks to explain change over time: how one mode of thought influenced or gave way to another. It seeks not only to describe change, but to explain it. These two features are linked: for history does not only show that past societies were in certain respects different from ours, but shows also how they moved from one state of affairs to another.

While much legal philosophy deals with law in a static state, we need to remember that law exists in time, and that time is not static. This insight is useful in helping explain both short term and longer term developments in ways which may generate larger insights about the nature of law. Analytical jurists are often uninterested in explaining how the content of law is developed: the law simply consists of the rules or norms made by those with power in the system to make them. Insofar as analytical jurisprudence seeks to set out a structure of accurate concepts, the presumption may be (as it may have been for John Austin) that judges simply figure out the best logical answer to any problem. However, a number of contributors to this volume argue that we need to pay more attention to how law is made. As Stephen Waddams argues, if one looks at empirical practice, one finds that legal development is not shaped by conceptual reasoning, but by practical considerations, including the judges' own predictions of the impact of their decisions on social behaviour. Judges seek to resolve problems which come before them in the best way for society, in a way often driven by policy considerations. As Waddams explains, law is in a constant state of flux, which is to be better understood if we look at judges' pragmatic reasoning. Priel and Barzun's examination of the work of Llewellyn and Frank shows that these jurists also argued that the judges should develop the law in the way best suited to the community: Karl Llewellyn, they

point out, sought in this process to connect 'three ideas—historical jurisprudence, the common law, and democracy—to the people.'[44] Such visions link law in some sense to the community, and may remind us that the common law, as a system of reasoning, is premised on the notion that judges interpret a body of norms developed over time, resolving disputes generated within the community: to that degree, at least, there is a communitarian basis of law, suggesting that we can never fully understand law floating free of its community. However, as Llewellyn himself noted—in distinguishing the different 'period-styles' in judging, and as Del Mar points out in speaking of the different speed of change—the nature and pace of change is contingent.

Just as history may offer us useful insights into how the content of a legal system changes, and changes in response to the perceived needs of a community, so it can help show that the very way in which law is perceived and acts changes over time, and is in constant motion. A study of medieval Europe, for example, can show us that a number of different conceptions of law—as customary, as 'learned', or as a set of 'rules'—may coexist at the same time, and may interact with each other, with the dialectic between them influencing and motoring change. Thus, in England before the Angevin reforms, a multiplicity of courts existed in which judgment was pronounced by 'suitors' who settled disputes on the basis of customary norms. When Henry II created a new set of remedies, which gave royal justices the role of pronouncing judgment, the new courts enforced existing customary norms (notably of inheritance to land) rather than creating new ones: for his intention was not to create a new system of law, but to ensure that existing custom was properly observed. In fact, the courts continued to apply the 'custom of the realm' in cases where there was 'no firm evidence of any contrary custom'.[45] Northern France also had a multiplicity of customary systems, which were redacted in the twelfth and thirteenth centuries into written custumals which sought to formalise them. On an international level, there was a customary *ius maritimum,* which was also set down in a number of written texts in the later middle ages, including the *Llibre del Consolat de mar*. In each of these areas, we can conclude that there were customary usages which were regarded as being normatively binding and which shaped behaviour. The rules of conduct in question were not created by lawyers or by legislation, but by customary practices which were regarded as binding by those communities as any form of law. At the same time, a new breed of professional jurists was emerging, in response to the recovery of the *Digest* of Justinian by Irnerius and his followers in Bologna. Though Roman law was nowhere in force, the most sophisticated legal learning developed in medieval universities, as generations of jurists sought to tease general principles and clear rules from the fragmentary material of Roman law. If Roman civil law had no courts, and no 'officials' to apply it, it was clearly regarded as a system of law—whose borders

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[44] Chapter 10 of this volume, p 175.
[45] P Brand (ed), *The Earliest English Law Reports* vol ii (Selden Society, 1996) 216.

were determined by the original primary source being glossed and interpreted—
which was interpreted with some degree of authority by the university doctors of
the civil law. Moreover, their intellectual apparatuses influenced the shape of the
redactions of customs which followed.

A historical study can show how medieval law was transformed, as customary
norms came to be enforced in 'official' courts by a cadre of lawyers, whose pro-
fessionalism derived from their specialised technical knowledge. That is, histori-
cal study can show how one form of law can be transformed by interaction with
another. Thus, the customary systems of England and northern France were trans-
formed by being 'officialised'. If Henry II's aim in creating the returnable writ of
right and the possessory assizes was simply to offer new remedies for failure of local
justice, the remedies he created soon generated their own complex learning and
specialised forms. The rise of the common law writs was soon followed by the rise
of professional lawyers, and the custom of the community—the general custom of
the common law—became the custom of the courts, where rules of inheritance or
property ownership depended not on simple custom but on increasingly complex
rules. The rise of these technical forms allowed for the emergence of abstract legal
categories, which might be seen as transforming a 'customary' system into a 'legal'
one, in which the relevant discourse was no longer that of the community but of
lawyers. Similarly, the redaction of French custumals into written texts may be
seen as a way of both deracinating and judicialising them.

At the same time, medieval law was also transformed by being rethought. In
medieval Italy, the local law—the *ius proprium*—which was applied by local offi-
cials, was transformed as jurists in Bologna and elsewhere began to reconstruct
and rethink the newly rediscovered *Digest* of Justinian, developing new ways of
thinking previously unimagined. New juristic techniques generated new distinc-
tions and new questions, which served to complicate the issues before the court.
As in England, law became much more complex; but it was not the result of cus-
tom entering the judicial forum for the first time; but the result of sophisticated
jurisprudential concepts invading. Unless you had your Azo, the saying went, you
should keep clear of the *palazzo*, the courtroom.[46] The new legal learning coming
out of Bologna also had an impact on the writers of the treatise known as *Bracton*
and the redactors of the French custumals.

However, we need to be wary of being too quick to assume a move from
'pre-legal' to a 'legal' world, as custom was judicialised and rethought. For there
remained areas where custom continued to be vibrant: where the 'legal' and the
'customary' continued to interact, without the customary basis of the norms
being suppressed. This can be seen, for instance, with the evolving custom of mer-
chants of the later middle ages, which was enforced in legal tribunals—and often
using procedures modelled on the *ius commune*—but where the substantive rules
enforced were distinctly mercantile ones, produced by the custom of the commu-
nity. If in one sphere we can see a gradual transmutation of 'customary' to 'official'

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[46] M Bellomo, *The Common Legal Past of Europe* (The Catholic University of America Press, 1995) 168.

law, in another we can see the two as acting in a complementary way, complicating our idea of what counts as law.

By looking at the three different conceptions of law—as custom, as idea and as institution—and how they interacted at particular moments in history, we may get a richer understanding not only of the nature of law, but also of how it develops, changes and mutates. It suggests that ideas of law are not static: they can both change, and be the agents of change. The kind of study suggested here shows that the very concept of law is not static, but dynamic, and needs to be studied in the context of its change. Moreover, the kind of study outlined here—an 'internal' or hermeneutic study of the concept of law—is only one aspect of the theoretical possibilities offered by history. It needs to be reiterated that legal theory and legal history are more than the internal study of legal concepts and their ideas—legal change needs to be understood in a much wider social, political and economic set of contexts. To theorise is to simplify, to generalise, to pick out particular aspects to focus on. But the empirical shows that life is always more complex, and that factors omitted from the theory might be more important than one first thought.