The Legal Fact as a Work of Art: Artificial Intelligence and the Pragmatics of Legal Interpretation

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Abstract

Modern legal theory rests on a premise that in revealing a legal concept we are revealing reality. This traditional (Kantian) approach is reflected most acutely in legal positivism. The position of the legal positivist is that of law as constitutive of facts. The fact is our description of relations in the world. We should see immediately that in understanding the fact we should understand how this fact is presented to us. To comprehend the meaning of a fact we must understand the relation of language and reality.

The question concerning the legal fact is the question of origin. It comes in response to the question "Why?" For there to be a legal fact there must already be an issue. It is understanding what is an issue and how we express this issue that is the mark of an "expert."

An example of the positivist approach to legal reasoning is Ann Gardner [1987]. Gardner is confronted by Hart's positivism that we verify legal norms through legal language. That is to say, that the descriptions found in legal text are what verify our apperceptions of the legal real. She concludes that hard cases cannot be resolved in expert systems. If we accept Hart's premise then Gardner's conclusions are correct.

This paper is to reject the positivist premise. This paper sets out legal language as an artifact of the legal institution. If language is an artifact, we must recognize that language is a product of the social world and not a means of representing the social world. From this, it is apparent that we must go beyond the language of the discourse not only to uncover the basis of legal norms but most especially to uncover a basis for building expert systems. This requires that we move from an epistemological basis for knowledge to an ontology of law.

The thesis rests on two premises: first that we cannot represent knowledge in computerized legal databases useful for legal reasoning without a practical rationality, and secondly that modern legal jurisprudence, inter alia legal positivism and legal realism, has been unable to explain contradictions within the doctrinal discourse thus it is unable to provide a practical structure of rationality. We conclude that legal positivism cannot be the basis for expert systems in law.

The paper is divided into two sections. The first section sets out a philosophical basis for legal understanding. This thinking will draw heavily on Wittgenstein, Heidegger and Merleau-Ponty. It is to put into perspective the conditions necessary for understanding to exist. We examine the social construction of reality. This will lead to a critique of the current mode of representational thinking
and the reasoning within institutional practice. In the second section, we will consider the actual computational application of legal knowledge in connection with a "deep structured" approach to legal reasoning.

Legal action brings to attention the transparency of human involvement with the world. It is then that we become aware of what we do. Our involvement is an issue. This "shock of recognition" is when meaning is revealed. This enables the Kantian concepts of intentionality and freedom which presuppose our involvement in the world.

We will conclude that knowledge representation and expert systems require a sound practical foundation. Positivism proves an inadequate foundation in its attempts to capture the reality of the legal situation. We argue that if an expert system in law is to be of practical value, it must be based on a practical rationality. A theory of actions provides such a coherent basis upon which to develop models of reasoning within computer based systems.
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The paper owes much to the thinking of Ludwig Wittgenstein. It is his mind I have most of all tried to comprehend. What he shows me is that above all, life is the attitude we bring to the world. It is through this attitude our lives make sense. Understanding is tied to a certain clarity and sincerity that we bring with us in everything we do, and to everyone we meet. What we mean by knowledge is the pursuit of what is before our eyes.

\(^1\) Faculty of Law, Artificial Intelligence Research at U.B.C.
Introduction

Modern legal theory rests on a premise that in revealing a legal concept we are revealing reality. This traditional (Kantian) approach is reflected most acutely in legal positivism. The position of the legal positivist, articulating the scientific method, is that of law as constitutive of facts.

What is a fact? The fact is the relation between things in the world. As Russell tells us, no fact is in the world. The fact is our description of relations in the world. From this we should see immediately that in understanding the fact we should first understand how this fact is presented to us. To comprehend the meaning of a fact we must understand the relation of language and reality.

Legal positivism does not yet appear to have this understanding. We still see contemporary legal writers taking the traditional position that language is a mirror of reality.¹ Works by Shiner [1992], Skubik [1990], and Lee [1989] and [1990] among others attest that legal theorists continue to hold to the philosophical premise that reality corresponds to the truth value of its prop-

¹ This phrase is taken from the title of a text by Richard Rorty; see the bibliography.
ositions.² What can be represented in language is reality and is thereby perceptible to the reasoning mind.

For Wittgenstein, we resolve the confusion of analytic thinking by condensing "a whole cloud of philosophy into a drop of grammar."³ Positivism seeks to show us that because we can speak of laws and norms as something separate from the human being, then they must be. For them, a law is a property of the social world, it is an entity spoken of as an existent.⁴ What we will during the course of this paper challenge this premise.

Having said this, however, we will see that this paper does not set about as having legal theory or jurisprudence as its main concern. This paper is a reflection on the relation of language, law and artificial intelligence. Specifically it attempts to place a perspective within "legal thinking" for the possibilities and

² See for example Shiner, Norm and Nature [1992] at 7. There he argues, using Moore's "Common Sense" argument that he is speaking about the obvious. As we shall see, the transcendental argument (inter alia, positivism), as Merleau-Ponty tells us, always presupposes the reality of its descriptions.

³ Ludwig Wittgenstein, Philosophical Investigations [1957] (hereafter PI) at 222.

⁴ For example Shiner, supra note 2 in his introduction: "The fact of the existence of law is a reason for action." at 6. He infers there that "law" has causality and imposes limits on how we act. "Law" comes into being through the formality of the legal institution. Law then is always something "out there" which is comprehended through the transcendental faculties of reason. Its force lies in our moral freedom. (see footnotes infra 95 and 120). While we cannot doubt that the force of law limits our freedom of action, we must doubt that it guides us.
utility of a methodology to automate legal text interpretation. This Automation is to more readily facilitate the construction of legal domain databases used by expert systems in law. To do this we will develop a philosophical understanding which puts thinking back into the world.

The confusion of contemporary jurisprudence does not leave us as we enter into the world of boolean logic. Current approaches to law and artificial intelligence (inter alia, Expert Systems) continue to proceed under the notion that an expert system is to capture reality. To do this, they are to incorporate the descriptions of the world in terms of legal facts. Again by legal facts this refers to the relation of legal norms and legal agents.

Positivism finds itself as the premise in the artificial intelligence research work of Ashley [1990], Susskind [1987] and Walhgren [1992]. Perhaps the most notable example of the positivist approach to legal reasoning is Ann Gardner [1987]. Her theoretical basis lies with the work of Hart and Dworkin. Gardner is confronted by Hart's positivism that we verify legal norms through legal lang-

5 By the term "Expert System" we refer to the process of knowledge representation using computer technology. What this concept incorporates is that we can create a database which represents a structure of legal knowledge within a specific domain. Through the skill of an "expert" advisor inter alia, the lawyer, in the area, we can then develop computer programs which will manipulate the information within the domain in accordance with a set of facts provided by the user of the system. The system then merges the facts with the knowledge domain to create a "legal" response, or legal conclusion, which characterizes the given situation. See Carnera and Edwards [1992], Gelbart and Smith [1990].
uage. That is to say, that the descriptions found in legal text are what verify our apperceptions of the legal real. She concludes that hard cases cannot be resolved in expert systems. If we accept Hart's premise then Gardner's conclusions are correct.

This paper is to reject the positivist premise. This paper sets out legal language as an artifact of the legal institution. If language is an artifact, then we must recognize that language is a product of the social world and not a means of representing the social world. From this, it is apparent that we must go beyond the language of the discourse not only to uncover the basis of legal norms but most especially to uncover a basis for building expert systems. To do this we adopt a methodology we will call a "Deep structure" approach. This requires that we move from an epistemological basis for knowledge to an ontology of law.

As we shall show through the work of Wittgenstein (and we also note Godel), we cannot justify a system within its own logic. This is true of law. This will also apply to our own logic. The study of legal doctrine is one of reformation and contradiction. We will require a theory which goes outside of the doctrinal language of law to better reflect the workings of legal practice. A rational approach is offered by Smith and Coval [1986]. What is sought here is a more appropriate methodology for integrating rationality into

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6 Smith and Deedman, "The Application of Expert Systems Technology to Case-Based Law" [1987].
expert systems.

Thesis:
Premise 1: We cannot represent knowledge in computerized legal databases useful for legal reasoning without a practical structure of rationality.
Premise 2: Modern legal jurisprudence, inter alia legal positivism and legal realism, has been unable to explain contradictions within the doctrinal discourse thus it is unable to provide a practical structure of rationality.
Conclusion: Modern legal jurisprudence, inter alia legal positivism and legal realism, cannot be the basis for expert systems in law.

I will adopt a premise that legal reasoning is about acting within Legal institutions to actualize social objectives.\(^7\) It is a thinking about the language in which legal meaning and legal concepts are expressed. It is to understand the relationship between how we find the world in itself and how Legal institutions see the world.

\(^7\) The "Mystical Foundation" of law, where from law's force is derived, is captured by Montaigne:

"And so laws keep their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other.... Anyone who obeys them because they are just is not obeying them the way he ought to."

Derrida points this out. "The justice of law, justice as law is not justice. Laws are not just as laws. One obeys them not because they are just but because they have authority." See 'Force of Law ' in Cardozo Law Review Vol 11 [1990] at 939.
Mary Hesse provides a warning about attempts to apply scientific methodology to social domains:

"...there will be some environments and some types of data which do not permit learning by any computer of limited capacity... The social environment may, wholly or partly, be such an environment... Satisfaction of the pragmatic criterion by particular social science theories needs to be argued case by case." [Italics mine]

In constructing an expert system in law, we are confronted with the question of what constitutes a pragmatic criteria, à raison d'être, for undertaking such a project. Effort requires a justification. Scientific progress has been seen to be tied to instrumentalism. Typically predictive success—the ability to correspond formed legal opinions with legal outcomes—is one criteria.

Lawyers must be able grasp the legal significance of a social act and bring it forward. That is to say, lawyers construct the legal world by providing a description of a situation in legal terms. This construction of legal understanding is to be the focus of our investigation.

8 Hesse, Revolutions and Reconstruction in the Philosophy of Science [1980] at 194.

9 While the history of the western scientific revolution appears to be concerned with instrumentalism, others have argued, for example Popper, that pragmatism has nothing to do with the logic of science (as purely the pursuit of knowledge).

10 For a review of literature on the role of science, see for example Mary Hesse [1980], Kuhn [1962]. Much of the literature is concerned with the proposition that science can no longer offer a grounding for belief in the external world. This scepticism has much to do with both the underdetermination of scientific theory as well as the theory-laden content of the 'objective' language used to articulate scientific knowledge. The instrumental mode of thinking is also examined by Heidegger [1977].
This paper adheres to the notion that understanding is tied to what Wittgenstein calls "following a rule." This paper will explore the rudiments of rule governedness and its relation to legal reasoning." By this we are to come to better understand the relation between the legal institution and the social world. The intention here is that this will better define the task ahead for those who wish to construct artificial legal reasoning. It is hoped that through this we can better understand how to develop a tool by which lawyers can construct proper legal argument.

A prominent "Rule" sceptic of the law, the late Fred Rodell of Yale, as a starting point for this paper. Rodell took the position that the legal discourse, with its abstract concepts, is tied to the predisposition of the judge rather than to any systematic rationality;

"Legal words and concepts and principles float in a purgatory of their own, halfway between the heaven of abstract ideals and the hell of plain facts and completely out of touch with both of them. And that is why, in the last analysis, the


12 In his inaugural major work, The Tractatus Logic-Philosophicus [1918], (Hereafter TLP) Wittgenstein sets out in the preface to define the limits of language, to "draw a limit to thought, or rather-not to thought, but to the expression of thoughts." In limiting the expression of thoughts, Wittgenstein attempts to distinguish between what can be said from that which can only be shown. It is because we cannot justify or explain our world that we are driven many times to silence. The point of this thesis then is not to explain legal reasoning but rather to show or describe how we can set about the task of constructing a process in order that we do legal reasoning.
language of The Law is inherently meaningless."¹³

This is again echoed more recently in the scepticism put forward by the Critical legal scholar Hutchinson. For these sceptics language is radically indeterminate and unstable, rendering objectivity in interpretative argument illusory. Knowledge, rationality, and language are merely the expression of a subjective preference; a legal solipsism.¹⁴ If this should prove to be the case, in what lies a hope for legal meaning at all?

The paper is divided into two sections.

The first section sets out a philosophy of legal understanding. It draws heavily on the thinking of Wittgenstein, Heidegger and Merleau-Ponty. It is to put into perspective the conditions necessary for understanding to exist. We set this out in four chapters.

1. An examination of the social construction of reality;
2. the methodological dependence on a jurisprudential theory of actions and establishing the rationality of the agent;
3. Explanation and the metaphorical aspect of understanding, and;
4. The limits to representational thinking and a critique of reasoning within institutional practice.


In the second section, we will consider the actual computational application of legal knowledge in connection with a "deep structured" approach to legal reasoning. In doing so, we will apply the methodology developed in the first section to a construct of legal knowledge within an expert system. This section will focus on an innovative methodology of legal text analysis to extract facts from legal text.

We will emphasize knowledge construction in a philosophical and jurisprudential context. We do not wish to confound the reader with technical concepts and jargon. Instead we will outline an approach which will justify our thinking that through building expert systems we—practitioners, theorists and students—can come to a better understanding of legal reality.

We will conclude that knowledge representation and expert systems require a sound practical foundation. Positivism proves an inadequate foundation in its attempts to capture the reality of the legal situation. We argue that if an expert system in law is to be of practical value, it must be based on a practical rationality. This requires a "deep structure" approach. An action theory provides such a coherent basis upon which to develop models of reasoning within computer based systems. These models are based on a teleological approach which fuses creative understanding with the social and legal discourse.
The title of this paper questions the nature of the legal fact. Let me suggest that law, like any human activity, is a manifestation of an expression of being. The phenomenon of our perceptions of the world are implicitly tied to this humanness. To speak of art is to raise ourselves above purely rational considerations and to recognize that understanding possesses an essential involved aspect. Within a world of images we must grapple with the perception of what lies before us. The act of perception embodies us in the world.
Chapter One  The Law As World

1.1 The Methodology: Theorizing about Theory

When we read modern legal criticism put forward by scholars such as Rodell and Hutchinson, *Supra*, our attention is drawn to the presuppositions about what understanding means in Law. The question of "What is Justice" has been with us since the days of Plato.

Platonism sought to answer by definition of a concept, an *Idea*. The method to grasp understanding was to provide a definition of the term. An inability to define a term constituted proof of a failure to understand the concept. Within this manner of comprehension lies the Platonic notion of form (*eidos*). Knowledge is the relation between the sense of words (the form of the *Logos*) to thing named (the form of the *ousia*). The form explicates the desire to establish a standard of correctness for applying an evaluation between the description and the object. In this, the description of Justice becomes the measure of what is just.

The form then is to be the representation of the entity. It is the self-evident knowledge which delineates the object to that which it

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15 Baker and Hacker, *Understanding and Meaning* [1984], at 668
is if it is to be. It names what the thing is and therein what it is not. The interpretation of reality through a form requires that that which names the form must likewise invoke a unity and self-identity within thought. By this it is meant that what is singular and presented (through form) in nature, must be also presented so in the human mind.\textsuperscript{16} The form then is that which delimits the object as knowable to the knower. By this we are able to speak of "truth" in knowledge in so far as the form of the object corresponds to the form of the thought. Without form then, matter is to be incomprehensible in human thought.\textsuperscript{17}

The Platonic error (if we choose to reject this way of seeing the

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\textsuperscript{16} This connection between words to things, and then things to thought perhaps culminates in Wittgenstein's *Tractatus*. There is explicated the one to one connection of the reality through its logical form right to the word, such that the word is said to stand in place of the form. For a discussion of this and the Aristotelian eidos, see Henry Staten, *Wittgenstein and Derrida* [1989], introduction. In order for a thing to be knowable, it can be so only in so far as we are able to conceptualize it—that is to unify both the individual with the universal apperception of the thing itself. This is in effect the Kantian problematic.

\textsuperscript{17} The question for Kant is what enables this understanding between the perception or experience of an individual with the form in thought necessary for comprehension. Kant expresses this as through an a priori; the transcendentual unity of apperception. The pure apperception is the possibility of the relation of the \textit{I} (who thinks) and the \textit{it} (the matter of thought). It is the element in self-consciousness which synthesises into unity presentations into a connected whole, necessary for objective experience to make such experience thinkable. The product is the transcendentual object. It is an understanding which is available to the conscious being at all times. It enables us, for example, to conceive of objects as being in a space and over time. It is in this that we may speak of a "rule" as entity which is moments in temporal sequence possessing of a unity intelligible in thought. As we shall argue, Later Wittgenstein is attempting to show that rules are not transcendental objects. Körner, *Kant* [1966], at 60-62.
world) is to presuppose that a proposition must possess a particular form, that is to say, that every genuine rule must have a specific representation which can be formally expressed.\textsuperscript{18} This way of seeing the world continued into the present through Kant and the positivists. This is the fascination with Theory. It is the belief that we can understand world in a detached way using language if we can explain the principles which underlie the phenomena.\textsuperscript{19} This is said because language is held to possess the same unifying form as reality. In constructing knowledge this way however, we see that theory does not include fundamental ontology.\textsuperscript{20}

This fascination with theory has, in modernity, come to be applied to human beings and their actions. For example we are developing theories of mind to account for the way we think, and about the human causation in events. Theorizing about human beings and how

\textsuperscript{18} Ibid, supra note 15, at 669.

\textsuperscript{19} Heidegger, \textit{On the Way to Language} [1982] at 38, tells us that the early (pre-Socratic) Greeks saw phenomena as a revealing-a radiance by which things appear. This is unlike the Kantian notion of things as objects of a self-consciousness-things represented and thereby posited in the world by reason.

\textsuperscript{20} That the Greeks forgot the being is the starting point for Heidegger's philosophical investigations. This realization also permeates Wittgenstein's critique of the philosophy of language. It the understanding that knowledge is a practical matter. It is this practical aspect, its fundamental ontology, which is unsayable. What we see when we move away from an idealized form is that form is subject to contingency and variation-that nothing is immutable. Staten (supra note 16 at 18-19) argues, in deconstructionist jargon, that form constitutes pure self-identity from which it is discernable from that which it is not, and is thereby constitutive by "otherness". It is in the "essential law of impurity", the variance from the rule, that the rule can be asserted.
they relate to the world has, however, proved to be inadequate.\textsuperscript{21} It would appear that we may be mistaken in our underlying assumptions that we actually can derive a theory about how human beings relate to themselves and world.\textsuperscript{22} We must question whether it is possible to construct formal theories about the ordinariness of everyday experience.

An example of the difficulty in developing a theoretical account of everyday life has been illustrated by the work of Edmund Husserl. Husserl attempted to construct a theoretical model, his \textit{transcendental phenomenology}, for the act of consciousness.\textsuperscript{23} On the premise

\begin{quotation}
\textsuperscript{21} There are numerous works about the failure to construct scientific models of human rationality. Perhaps the most notable failure of applying theory to human practices is the social determinist models of Marxist philosophy. For a general discussion on this and the theory of social scientific methods see Mary Hesse's work, \textit{supra} note 8. Also Hubert Dreyfus, \textit{What Computers Can't Do} [1986].

\textsuperscript{22} For a philosophical consideration of the break from the traditional assumptions about understanding, see Hubert Dreyfus, \textit{Being-in-the-World} [1991], Introduction. There Dreyfus points out that questioning this assumption questions much contemporary work in philosophy and humanitarian science. It particularly poignant in the current debates about artificial intelligence and models of the mind.

\textsuperscript{23} For an understanding of Husserl's work I have relied primarily on the work of Hubert Dreyfus. He has edited an anthology \textit{Husserl: Intentionality and Cognitive Science} [1982], and contributed to several publications including an Oxford reading in Philosophy \textit{The Philosophy of Artificial Intelligence}, ed Margaret Boden [1990] and \textit{The Foundations of Artificial Intelligence}. In his article "Making a Mind versus Modelling the Brain" (in the Oxford reader), Dreyfus describes Husserl as the 'Grandfather' of Artificial Intelligence [hereafter 'AI'].

Husserl's project was to explain how consciousness grasped an object. He constructed the \textit{noema} as the quality of intentionality possessed by the consciousness (\textit{noesis}; the atomic elements Minsky
that descriptions are composed of atomic elements he envisioned that meaning could be determined by defining all that thought consisted of in representing an object. Husserl's pupil Heidegger was to argue against him, as corroborated by the later Wittgenstein, that not all meaning is contained in thought, but rather we must also consider the *ontology*, what it means to be.

Husserl's task has been taken up in Artificial Intelligence. Marvin Minsky has attempted to design a methodology for representing human *knowledge*. Minsky proposes a frame data-structure to capture an anticipated situation. The basics of the design is for a network of

and Papert are to call "structural primitives"). Husserl argued that the noesis itself was unable to provide meaning but required a *noema* for each act. This construct was a necessity because of a belief that the elements themselves must be in some sense context-free for there to be objective knowledge. It is the *noema* which imparts "sense" into the noesis by which meaning (symbolic representation) is directed towards an object. These combine into complex delineations of complex objects. In this sense intelligence is seen as the complex combination of facts which are goal-orientated, directed by the matrix hierarchy of the noema. The hierarchy comprise a set of rules which direct conscious apperception into a predisposition objective type which combine with "frames of empty sense"-possible meanings, each object might possess. These frames can be said to correspond to what we call "common sense", atypical meanings which we possess in situations. The noema can be said then to possess a causal relation between mind and world which combines with noesis to create the intentional object of consciousness.

The task of AI might be seen as an attempt to combine the definitive situation (the noesis) with this complex hierarchy which corresponds to the capacity we possess to comprehend contingencies; our common sense which apprehends ordinary situations which we encounter in our everyday experiences. (see Dreyfuss and Dreyfuss at 320-323).

24 Marvin Minsky, "A Framework for Representing Knowledge", and see also *Society of Mind* [1986].
nodes and relations consisting of necessary defaults which are always true of a situation. These defaults are then augmented by contingent facts which are to be situation dependent. It is the predetermination of these contingent terminals which is the challenge to constructing a program capable of dealing with "normal" situations.

Natural science (as characterized by the laws of Newtonian physics) attributes a determinism to the objects of its concern. If these objects are free, that is to say indeterminate and subject to no law, they can not be the object of science. It is that "theoretical constrain" is part of rationality itself. We impose, as Kant would have it, determinism on the world rather than allow it to discover us. As Arbib and Hesse relate, our scientific presentation of the world depicts a natural space-time reality that is revealed to us through the methodology of the natural sciences. This is a world of "objective" scientific knowledge. Human beings however come together to form societies which create a humanist reality of social rules, roles, norms and institutions.

We can speak of the reality of Law—that which exists within the institutional; we speak of criteria associated with what we

25 McGill, Prophets of Extremity [1985], at 10ff
26 Putnam, Reason, Truth and History [1982] at 31
27 Hesse and Arbib, The Construction of Reality [1986], see generally, introduction.
characterize as law. Yet law appears not to submit itself to any ready measurement. The qualia of the law is intangible. This query arises out of the difficulty in applying scientific methodology to the concept of law itself. It is not a reality to which we can apply exact measurement in the way we can discover the physical properties of say kinetic energy. Our culture tends to make "reality" dependent upon methodology—that is verification within the methodology of the discourse.

What we are confronted with then, in constructing "law", is verification as it applies to a reality which is a human "construct" and not "natural" or "given". We can create a model or schema, for example a theory of physics of structures, and then test to see if the theory conforms with reality (perhaps the question becomes better put if we ask does reality conform with the theory). What we are to see is that such a model provides feedback in a spatio-temporal reality. It is a reality which tends to exist independent of human activity.

In determining the validity of the projection or model, we can think in terms of both "idealism" that the model is pure projection (a mental form accessible through experience) and "realism" that the model of nature "impressing" the mind via the senses (experience through the form of that experienced). In feedback then, to explain this, we see that the "ideal" is the model which we create

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28 Ibid at 2
to explain the world which confronts us, and naïve "realism" reflected by the process of feedback of the model-its empirical validity. It is in this respect within the domain of cognitive science.

To construct models about the law in a scientific modality, we create representations about how we theorize about the world, and then see how they correspond to what it is we experience.29 The model of law then is a "social schema"; it arises in a social world where meaning is derived through interaction and language. Social models are necessarily to transcend the capabilities of the isolated individual. They cannot be limited to purely discrete observations which may or may not be "true" of the whole.30

Durkheim's sociological positivism and the neo-Kantian rationalist both claim that there are "social facts"-just as there are

29 [this doesn't explain the world, rather the model-but for the limited purpose we create the model, this is enough. For example models of the mind which are popular now-ie Minsky, make no sense in terms of reflecting what a mind is, yet in a limited sense, for a limited purpose, they are useful constructs for designing processes we wish to create-It is the process we wish to create which gives birth to the model rather than the thing-ie the brain-giving rise to the process]

30 In the current swing away from empirical science comes the notion that natural science is not to be privilege over other cognitive systems-science becomes an imaginative schema like other social myth (ie the "strong" program of Bloor, 1976, Barnes, 1977, Collins and Pinch "Frames of Meaning, 1982). Arbib relates that this rejection of theory can be traced to where there is an overt reliance on instrumental representation-removed from its empirical base. Hesse and Arbib supra note 27 at 7.
"natural" or "individual" facts. These social facts correspond to a belief that societies can be understood applying scientific methodologies—such as economic models—and that behaviour has a determinate predictability. Descombes posits the Durkheim position "that mankind, from its distant origins onward has not ceased to progress towards the agreement of all human beings upon certain reasonable principles." Thus we see the social sciences attempt to embrace the presumption of positivist theory of science; that science aims towards greater prediction and control of the world and that the relative value of a theory can be measured by its value to that goal.

A point of emphasis for modern science has been that different theories can be used to describe the same phenomena in completely different methods. For example the motion of planets has given rise to a whole series of paradigms; from Ptolemy—epicycles with the earth as centre, Copernicus—with the sun centred epicycles through

31 Descombes, Modern French Philosophy [1979] at 6

32 Durkheim claimed in The Elementary forms of the Religious Life [1896] at 225 that "society is God"—that the individual projects their idea of society beyond space-time to construct god and religious symbolisms. What Kant had argued, to reconcile rationalism and empiricism, is that the mind imposes organization upon the data of experience. Both Spengler and Durkheim melded the a priori structure into a historical and cultural variable. What this structure does is to shape how we see the world—the scientist therefore must explain this structure and explain its effect on experience. See Bloor, [1983] at 174–175.

33 These principles being identified with those of the French third Republic. Descombes, supra note 31 at 6.

34 Steve Fuller, Social Epistemology [1991] at 68
to Newton's inverse square and Einstein's relativity theory. Kuhn has shown us that language is deeply tied to how we view world. In his *Scientific Revolution*, he shows how observation language adapts to explain empirical observations. As language proves inadequate, new language evolves to reconstitute the description of reality, creating a paradigm shift.

We see then that there is no ultimate knowledge of a thing, no "final" theory.

Theories typically possess a *pragmatic criterion* (Hesse 1980) where the truth or acceptability of a theory relates to its practical application. It can thereby be said that the pragmatic criterion demarcates what we call knowledge and thereby how we construct the scientific, objective natural world. Theory then becomes a matter of what we want to accomplish. What counts as true corresponds to our notion of what is true within the theory.

Science constructs facts and creates new ways of seeing the world. New theories evolve and new instrumentation is utilized to extend the range of phenomena which was previously described.\(^\text{35}\) The new observations are thereby contained within the limits of theory and instrumentation. These facts are also described in a language which is theory laden. Arbib has argued that despite the apparent limits of direct empirical experience, observational language is however

\(^{35}\) *Ibid*
rich enough to respond to feedback, even where the language is not especially well developed for the particular observation.\textsuperscript{36}

Two of the greatest philosophers of the twentieth century, Ludwig Wittgenstein and Martin Heidegger, call into question the epistemological problem posed by Descartes and continued into the present. What is shown by these thinkers is that the background of everyday practice is part of our understanding of reality—that the world cannot be represented by a set of context-free elements.\textsuperscript{37}

The context...can be taken formally in the sense of a system of relations, But,...[t]he phenomenal content of these 'relations' and 'relata'...is such that they resist any sort of mathematical functionalization; nor are they merely something thought, first posited in an 'act of thinking'. They are rather relationships in which concernful circumspection already dwells.\textsuperscript{36}

Following this recognition we become concerned, not with the traditional epistemological relation between subject and object (that the truth or falsity of sentences are obtained), but rather we must concern ourselves with the ontological question; what we are and how we are bound up in the world.

What we shall do in the rest of this paper then, as much as poss-

\textsuperscript{36} Hesse and Arbib, \textit{supra} note 27

\textsuperscript{37} See for example, Dreyfus, "Making a Mind versus Modelling a Brain" at 321ff, Baker and Haker, \textit{Meaning and Mind} [1984], the Preface. Gadamer continues with this project in his \textit{Truth and Method} [1966] which seeks to outline the necessity of a hermeneutical methodology for understanding.

\textsuperscript{38} Martin Heidegger, \textit{Sein und Zeit} [\textit{Being and Time}] [1962] at 121-2, as quoted by Dreyfus, \textit{supra} at 322.
ible, is to break away from what traditionally underlies our approach to human knowledge—the premise that there is implicit a theoretical basis for knowledge in human action. Instead then we will attempt to draw attention to human understanding as the means by which we know our world. By understanding we will refer to the ability of human beings in the course of their everydayness to deal with situations.

1.2 The Theory of Law as a Self-Conscious Act

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all." 39

An artifact is the exercise of human productivity, the output of human efforts. Given this, we may argue that law can be viewed as a cultural artifact, the product of cultural action. Broekman has described law as "an expression of the being or existence of man." 40 Following Foucault, it has become a familiar method in legal theory today to speak of particular human activities in terms of a Discourse.

39 Lewis Carroll - Through the Looking Glass

40 Jan Broekman, 'Law, Anthropology and Epistemology', in Man, Law and Modern Forms of Life, Law and Philosophy series, Bulygin (Ed) [1985] at 15.
Discourse is to converse, it is the actions, thoughts and speech in which we engage.\textsuperscript{41} In order to recognize discourse, we must be able to recognize the legal speech act.\textsuperscript{42} These acts comprise a unity of difference—a system alienated by its method and performance from that which it is not—law as a separation from other realities. Discourse becomes a descriptive attempt to make experience intelligible.

By way of illustration, we can contrast the way of seeing legal discourse with how we view literature. For the Russian Formalists in the beginning of this century, "literariness" was a function of the differential relations between one form of discourse and another.\textsuperscript{43} The context tells me it is literary: but the language itself has no inherent properties or qualities which might

\textsuperscript{41} The term "discourse" has been developed throughout the writings of Michel Foucault and now appears to be widely used in description of cultural phenomena. Of particular interest to those with an interest in law would be Discipline and Punish, which outlines the social dimensions of the birth of the Prison. My own readings are from The Archaeology of Knowledge [1972] as well as a selection of excellent secondary sources, such as Dreyfus, Flight from Freedom [1990].

\textsuperscript{42} "Speech Acts" has gained wide usage since John Searle's seminal work of the same name. A speech act suggests a situation within which meaning is communicated through the act of the utterance. Searle's concept is tied to his thesis of "intentional states" which he more fully develops in a later work Intentionality. For Searle a Speech Act is one where the speaker uses language intentionally to communicate her intentional state; i.e. it is an intentional act which must satisfy the necessary conditions to fulfil the intentional state. This suggests that meaning is a self-conscious act. We will move against this thesis as the paper progresses.

\textsuperscript{43} Terry Eagleton, Literary Theory [1983] at 4
distinguish it from other kinds of discourse. This is to see literature as poetry (that is to say, it is linguistically self-conscious in a striking way). By applying certain conventions of reading to words, the words are pried from their immediate pragmatic meaning into something deeper. A self-referential nature of language is revealed where it is the way of speaking, rather than the reality of what is talked about that is most significant—"as though we might say that the language of poetry speaks us.

This is not to say that what is said is unimportant, but only that what is described cannot, in a self-referential form of language, be defined objectively. Law then can be said to set itself apart as a meta-language. The meaning is determined by how it is to be read—law is read within a context of pre-understanding. It is to be read pragmatically. This referentiality then is connected to the internal objectives of the discourse—the law's rationality.

We find in law, for example when we speak of insanity, that there medicine is explained through law. If viewed in this anthropological sense, where we uncover law, its subject can be viewed as a being in and of the law; the subject made object within a unity of speech acts. It is the speech performance, the manner of speech, which transforms the situation or subject into a legal construct.

\[44\] *Ibid*, at 8

\[45\] *Supra* note 40 at 15ff.
This performance ostensibly demonstrates law. To see law qua law there must be the appearance of an explicitly legal situation. Law accomplishes this by demonstrating the individual, the relationship between the individual and state, and by formal analysis of that relationship.46 What Foucault brings to our attention is the separation of experience and world, the point where the thing is named. It is in the name—the sign—that experience becomes differentiated and thereby alienated from its signified.47 For Foucault then, the world is viewed through its historicity.

We can contrast this approach with the scientific or analytic perspective. Analytical theories have incorporated a search for the "higher" truth, the a priori knowledge within which to (objectively) ground our beliefs. This search is for an objective reality, that is knowledge which somehow is untainted by any subjectivity, culminated this century with the logical positivism of the early Wittgenstein, Russell and Carnap.48 As a legal theory, positivism

46 Ibid at 20

47 Foucault shows in this sentiment his adherence to the writings of Martin Heidegger. It is this, the desire to return to an originary experience, that we see the nostalgia so prevalent in Heidegger's thinking.

48 Philosophy sought to ground beliefs in Science and so sought to justify certainty in external reality through an objective, scientific approach to revealing truth about the world. This instrumental view 'objectifies' the world in that it sees the 'knowing' human being as something separate from world, that is the world as object. The human being, the positivist argues, can 'picture' reality (to use Wittgenstein's metaphor from the Tractatus logico-philosophicus) and so capture reality in thought. It is supposed that if we can understand the structure of language, then we understand the structure of reality. This belief arises out of
is to be found in the writings of H.L.A. Hart, Kelsen and Bentham.

As with all sociological constructs, law is conceptualized as being comprised of a set of rules and norms which can be said to be the order of the world. These rules are set out such as to harmonize Being and world.49 Positivistic legal theory sets out to define the entity, the core meaning of these legal rules as they are, which make up the legal world. This necessitates a distinction between

the notion that language is the expression of thought, and that thought reflects reality. The work of Gottlob Frege conceptualized the logical form of language wherein logic, a priori, is held to exist independently of experience. He stresses that a perfect language might describe the world objectively. Russell, in The Problems of Philosophy [1919], builds upon Frege. His approach attempts to establish specific and verifiable connections between the objects through logical relations. Logic is the vehicle by which all a priori propositions could be established as analytic. It is this logic through which propositions, reduced to their 'atomic' elements, are rendered as being either true or false. Truth then is the correspondence between thought (that is to say, language) and the external world. Twentieth century philosophy has moved to reject the correspondence theory.

Needless to say, modern philosophy, which we can for convenience trace back to Descartes, evolves from the Copernican and Newton revolutions. It is the search for foundations. Kant's Copernican revolution saw the severing of mind and the natural or cosmic order. Cognition was directed towards rationality and the construction of knowledge, with its emphasis on critique. Contemplative or 'metaphysical' ontology was thereby displaced. [Dallmayr, Between Freiburg and Frankfurt, Chapter 1]

Please see the bibliography for some general texts on this subject, for example, Russell [1919], Rorty [1979], and Ricoeur, [1992].

49 "Agency and law ought to relate in such harmonies that the limits of which agency places upon law would be the limits which law places upon itself.... Conversely the limits which law places upon agency would be the limits which agency would place upon itself." Smith and Coval, Law and its Presuppositions [1986] at 100.
subject and world (as object for observation). With the realization that the world becomes world only through a human interpretation, contemporary philosophy is seeking to rediscover an understanding of the relationship between subject and object, a relationship in which subjectivity is embodied and thereby beyond observation.

Statements of fact are in the end *Statements*. As such they presuppose many value judgements. Questions of fact are contingent upon belief. For example, whether an injury is debilitating as claimed in a case of whiplash injury is invariably a question of credibility, as well as empirical evidence. Such evidence will be weighed in light of the judge's assessment of both the medical reports and the demur of the witness. These value judgments become tied to a history, a way of seeing the world. In case law, and the oral testimony upon which it is based, we can say there is no truly irrelevant statement. All fall into the system and structure of evidence upon which we base value.

We argue, perhaps a given, that a notion of value-free judgments is untenable. All statements, and the judgments we make about state-

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50 Positivism is concerned with the world as it is, legal positivism is the attempt to see law as-it-is for itself, separate from the subject. The positivist therefore must attempt to separate the moral from the practical reason. Law is concerned with what is rather than what ought to be.

51 For an excellent introduction to the nature of language (statements) and its relation to how we inject meaning to the world, see Terry Eagleton supra note 43.
ments are tied to a set of value-judgments, a context which injects the sense for an utterance to have any meaning at all. We must formally reject the notion of objective thinking, the idea that "truth" can exist independent of human judgment. We experience and reflect values because language cannot exist outside of a culture, a form-of-life.

The dimension of law as discourse, as a unity of speech acts, envelopes this set of value-judgments. In light of this, we must give some consideration to the image of Being in law, the individualization of the legal subject. Law cannot be adequately comprehended from the perspective of "subjects of action" (individualism, class, gender) or from the structures through which everyday life is produced and experienced. The law cannot allow for individual self-reference—a reference outside of its language. If each of us are free to define what is reasonable, proper or "the Rule", there would be no law as law, only a state of anarchy and conjecture. Power then becomes diffused and disseminated. Accordingly legal discourse defines the Being, the "reasonable man" of the law who is to symbolize how Being is to be. This presupposes a rationality

52 Gerald Turkel, 'Foucault: Law, Power and Knowledge' in Law and Society, 1990 at 170.

53 For a discussion on the reasonable man which brings out this point, see for example Flemming On Torts, or any standard Criminal Text book.
in both the actions of the individual, and the rule of law.\textsuperscript{54} Broekman has set this out to be a quest for equilibrium between Law and the image of Being.\textsuperscript{55}

The Law's subjective perspective attempts to formulate law and power in individuals (as agents) and as being centralized in core structures (institutions) such as the "state". Individuality is the means by which law confers and defines the dimension of Being and

\textsuperscript{54} Foucault holds that power is as it is exercised; multiple and decentralized, and productive of social structures and knowledge. Turkel sets Foucault against structuralism claims of universal categories and its incapacity to analysis social change and transformation in organization. Power and knowledge—which he argues are a reflection of contingency rather than universality of knowledge, law and morality. Foucault's historical studies illustrate the transformation in organization to highlight this contingency. Drawing upon Nietzsche, he formulated power as the core relation from which morality emerges, rather than structuralism's universal principles or transcendental values. The truth of morality is to be found in the particular conditions that give rise to it. Turkel, supra note 52 at 173. In the Archaeology of Knowledge, Foucault seeks that in our studies we demonstrate the contingency of power and claims to truth by transgressing that which we take for granted.

\textsuperscript{55} \textit{Supra,} note 40 at 18ff. Rilke gives us a description of Cézanne's sense of colour and the harmony to be found in the whole of the image of a face:

In the brightness of the face, the proximity of all these colours has been exploited for a simple modelling of form and features: even the brown of the hair roundly pinned up above the temples and the smooth brown in the eyes has to express itself against its surroundings. It's as if every place were aware of all the other places—it participates that much, that much adjustment and rejection is happening; that's how each daub plays its part in maintaining equilibrium and in producing: just as the whole picture finally keeps reality in equilibrium.

is legitimated and lived through by the terms of the social "contract". It establishes a sense of one's own autonomy and authority. Rights and duties are assigned by Law's criteria which are ostensibly to free the individual from the state, but in so imparting rights and abilities, both the legal individual is created and Law's power is established. The legal individual comes before the law with this set of rights within a situation. The situation is one which necessarily contains a legal meaning because it pertains to the legal individual.

Legal discourse then appears to concern itself with discovering the legal nature of a given situation. Foucault points out the capacity for philosophical reason and science to exclude experience, practice and languages that fall outside their logic. It is through re-definement and classification that these experiences are "forced to be silent" within the discourse—they are created in a language

56 Broekman, supra note 40 at 20. We see in such descriptions as "social contract" the play of meaning which in the end is self-referential. To be a contract is to be binding, an obligation between two autonomous entities. The notion of the initial contract then relies on a law of nature—that contract is to be found in nature and is therein the natural state of human relations to world.

57 Ibid, at 16.

58 The significance of a framework logic will, hopeful, become more concrete as this paper develops. At the present, we would suggest that it is adherence to what makes sense (that which fits with how we come to perceive the world) that places objects within our world. Our ability to perceive is contingent on how we look at what lies before us. If we don't look in the right way, we deny experience. Such thinking corresponds to Kuhn's paradigm conceptualizations.
consistent with science and "reason". Law must redefine reality to be consistent within the legal discourse—to attach legal meaning within the legal domain.

Foucault's classic example of redefinition is "madness".59 Medicine is transformed from a holistic methodology to a science as anatomo-clinical analysis—with hospitals given the legal sanction as the place of medical practice. The institutionalization of medicine located the patient in a quasi-scientific juridical space similar to an asylum. In The Order of Things Foucault sets out to illustrate the transformation of knowledge. From pre-18th century order—where elements are located in spatial relationship with one another—the fostering of resemblances, to the modern organic relationships, processes, functional relationships, temporal relationships, the sublime and, most importantly, the historical ordering of reality.

Knowledge is constructed through discourses which define and envelop those aspects of experience which are initially excluded from reason and science. The formation of knowledge itself can become an object of knowledge. Once knowledge forms humanity as both subject and object, the discourse itself can become an object of enquiry.

59 See Turkel, supra note 52, at 174ff.
Foucault does this by outlining the genealogy.\textsuperscript{60} Within the genealogy there are "procedures of exclusion" which limit and control discourse through its internal relations-isolating them from the general discourse, removing topics to the periphery. By marginalization, its object becomes excluded from determining what is true and false.\textsuperscript{61} The location of this determination shifts from where it is formed and the power relations within which they are embedded. We see that when we define insanity, we define what it is to be sane. Each discourse, Law for one, seeks to establish its own rationality and range of empirical validation.

There are also procedures within the discourse which impose limits and controls. In Law we refer to the primary text, the constitution and the rulings of the court. Law is thus expressed as language, but in a particular kind of language. It becomes isolated-disassociated-from the practices it seeks to regulate. Terms and interpretations about what the law is fall to those trained to express law. The discourse limits itself to that text. The boundaries of law are expressed and thereby law becomes an entity. Law becomes knowable through the discourse, and thereby becomes limited to it. Knowledge is compartmentalized as the world is disassociated.\textsuperscript{62}

Access to communication within the discourse is restricted. Speak-

\textsuperscript{60} Ibid at 176ff.

\textsuperscript{61} Ibid

\textsuperscript{62} Ibid at 177.
ers are "qualified". Discourse is thereby exclusive communication and interaction. To overcome this we are to criticize discourse as an "imposition of knowledge practices on things".\textsuperscript{63} Meaning flows from the effects of the discursive practice (i.e. how we use language). Language shapes power and vice versa. Foucault then is concerned with the transformation of relations between power and knowledge.

Knowledge cannot be represented purely as an expression of power, or as an instrument of power. Knowledge must be classifiable, structural, but it must also be useful. The exercise of power requires the formation of useful information:

We should admit...that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. These 'power-knowledge' relationships are to be analyzed therefore, not on the basis of a subject of knowledge who is or is not free in relation to the power system, but, on the contrary, the subject who knows, the objects to be known, and the modalities of knowledge must be regarded as so many effects of these fundamental implications of power-knowledge and their historical transformation.\textsuperscript{64}

It is within the network of social relations that law is formed. Law is reified within these relations through the construction of rights and duties. These constructs do not stand over any social

\textsuperscript{63} Ibid at 177, quoting Shirden

\textsuperscript{64} Michel Foucault, Discipline and Punish [1977] at 27ff, see Turkel at 179 for a presentation and discussion of this quote.
actuality, as positivists would infer. What they represent is not an "objective" reality, but rather they are a thing in-them-selves represented by legal language. As a discourse, we are confined to its dimension. There is to be no question of law itself, as law. We, as lawyers, must construct and argue upon the basis of the already existent legal reality.

The network of social relations within which law was formed has been structurally altered by law's discourse. To accomplish this, there must be interactive connection between discourses. Analogy is the traditional means by which the gap between "reality" and the legal situation is closed. Analogy constructs legal knowledge through the legal qualification of an event. Analogy can be considered in two senses. It is said by Cornu to be the 'resemblance or conformity of several things among themselves'. In this sense analogy is rational interpretation within the exegetic method. Gény, in the other sense, invokes analogy to be the very heart of a true science of Law.

65 See Broekman supra note 40 at 25.

66 This is in contrast with the work of Jaques Verges, a French Jurist, who would take on the most despicable cause. The purpose of his efforts are not to seek redemption for the client but to bring into question the very right of the state to bring violence down upon them. This point was perhaps nowhere so clear as in the Nuremburg trials. See Derrida, supra note 7 at 987. See also Walter Benjamin; "Critique of Violence" in Reflections.

67 For an excellent discussion on analogy, see ; Jan Broekman 'Analogy in the Law' in Legal Knowledge and Analogy, Law and Philosophy, Volume 13 at 217

68 Ibid, See Patrick Nerhot, 'Introduction' at 1.
It is the "factual" elements of legal reasoning which are stressed by making them more general, abstract, which constitutes the perception of legal reality. This is to say that through the process of analogy we transpose an event in the non-legal reality into a legal fact and give it form within the legal discourse. This transposition derives its force from being part of an accepted social practice.

Analogy then acts to stipulate what is, and what is not, within the legal discourse—it names the thing itself. In doing so it defines the legal discourse. Analogy can be inferred to be not merely a description of the legal rule, but it is the rule itself. It is the recognition of the analogy as a convention, that is to say the way language is used, which separates the institution from the subject. Where the institution appears to be acting upon the predicate of reality, but in fact it is the institution itself which defines the meaning and context of the social form. As Broekman states:

"Law is not only the work of man but the man of today is the work of law! Whoever fails to comprehend this will similarly fail to make a good jurist. Every speech made by the jurist affirms a specific image of man, sustains it and even delineates it more closely."70

69 Ibid

70 Broekman, supra note 40 at 22. Following the Kantian interpretation of "man" as the knowing subject, man itself becomes an object which for Foucault is that "strange empirico-transcendental doublet" which serves as a conceptual determination of human being for study of philosophical anthropology. See Schrift; Nietzsche, at 79, and Dreyfus and Rabinow, Foucault at xv. In The Order of Things Foucault states from this that as
The lawyer operates on the basis that behind the image of this legal person lies a "natural" human being.\textsuperscript{71} While philosophy since the time of Plato admits to universals, anthropology does not.\textsuperscript{72} By acquiescing to the fiction of the legal self, the lawyer participates in constituting even the human being as a legal construct. This construct in turn implies that every natural person is a legal subject derived from a belief in the social being. Smith describes this concept of the self as fundamental to Western law, and political and moral theory.\textsuperscript{73}

\textsuperscript{71} \textit{Ibid.} As with most modern writers, I am confounded with the obligation to use non-sexist terminology. I use the word 'confounded' because we do not have ready language which fits the sense of what we wish to express in all cases. Perhaps this is because I, like others, do not know what it is I am trying to express. We are saddled with an unsatisfactory etymology. The modern trend in legal literature appears to use the word "she" whenever possible. While this is no doubt acts as an improvement over "he", it should be recognized that this does not make that to which it refers obtain—that language does not 'mirror' reality or have a necessary causal relation to that reality. To correct this now recognized injustice requires changing our form-of-life, our experience in the world. We can perhaps see the very problem of representational thinking by this one dilemma. In keeping with the philosophical premise of the paper the practice I choose to adopt throughout this paper is to use the word "they." This may prove to be grammatically incorrect.

\textsuperscript{72} \textit{Ibid} at 25.

\textsuperscript{73} See Smith, \textit{Neurotic Foundations of Social Order} [1990] at 313. He cites Derham "For the logic of the system it [the legal person] is just as much pure 'concept' as 'one' is in arithmetic. It is just as independent from a human being is as one is from an 'apple'" ["theories of legal personality" at 5]. In turning humans into concepts (that is to say, universals) legal relations can be applied to anyone under conditions of the rules.
Lawyers premise arguments on the universal. Universals are concepts derived from such empirical observation as like causes have like effects.\textsuperscript{74} By this even for human actions, what is true for one, becomes true for all. Universality is applied to law by the doctrine of precedents whereby like cases \textit{ought} to be decided alike (to have the same legal effect). This is the fundamental tenet of the Rule of Law.\textsuperscript{75}

We shall move on in the following chapters to re-examine theoretical presuppositions of law. We will begin by focusing on human activity within a theory of actions for our understanding of how law operates as an institution. We will then move toward a deeper consideration of the role language plays in orientating our conceptualization of human activity.

\textsuperscript{74} \textit{Ibid}, at 308

\textsuperscript{75} See J.C. Smith \textit{Legal Obligation} [1976] Chapter 6, 7, 12 and supra, note \textit{,} chapter 15, fn 63.

The assumption of the uniformity of cause is that for a particular state \textit{X} under condition \textit{S} the consequences will be \textit{Y}, then for all other members of class \textit{X}, under similar conditions \textit{S}, the result will be \textit{Y}.

The principle of ought judgments is \textit{If} it is the case that a particular person under condition \textit{S} \textit{ought} to do \textit{X}, then any similarly situated person under similar condition \textit{S} \textit{ought} to do \textit{X}.  

Chapter Two  The Social Construction of Reality

2.1 Intelligible Acts and Social Realities

We have considered the nature of Platonic thinking and its adherence to eidos. We have suggested that this has directed our thinking to an objectification of the world. The subject, with its detached consciousness, objectifies knowledge into relations between entities. It is this detached consciousness—our reasoning faculties—which directs our understanding of the world. This understanding culminates, so Foucault tells us, into a rationality of the discourse.

The paradox to this intelligibility is that it is constituted through concepts which are themselves a rational construct. In the legal discourse we see that in order to understand the legal world as law, we set out a priori that by which we are able to see the reality of law. It is a reality which concerns itself with necessary conditions and sufficient cause which constitute action and events for human beings.

To speak of an act is to suppose both the act and the actor are
intelligible. What do we mean by intelligible? The proposition here is that intelligibility rests within the rationality of the discourse. By this an agent exists within a space defined by distinctions of worth and that the agent has incorporated the values within this space. Let us examine this proposition with some of the considerations Taylor sets out in *Human Agency and Language*.

We begin with the premise of an existent legal system which functions to integrate social relations. We shall set out that agents act—they do things with a purposive—and what they do consists of making choices to which we attribute responsibility. In a liberal democracy it is responsibility which is the grounding upon which the law is applied.

We recognize the "agent" as a construct. The very concept of person is necessary only after we presuppose personal intentionality and rationality. To be an agent is to make choices purposively—to reflect and evaluate situations—and apply one's own set of values against this situation. As Taylor suggests, we tend to think of the agent not only as partly responsible for their own actions in the degree that they act (that they make a choice) in accord with this evaluation, but also as responsible in some sense for the  

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This is the sense that our values are in some way our own creation—an act of "my" will. But to say that our values exist in and from our own will would be to say that they flow from our own being, ungrounded in reasons external to our own radical choice. While it appears simple to "give reasons"—to rationalize—our choices between alternatives, we have no ready language for the radical choice of the alternatives.

We can understand this conundrum within the legal context through parallel between easy cases and hard cases. To illustrate the point we can consider Taylor's Sartrean example of a hard case from *L'existentialism est un Humanisme*. A young man is torn between serving his country by joining the resistance, and staying home to look after his ailing mother. He is confronted here by two moral possibilities. Are these situations a matter of choice? Is it possible that the young man simply render one choice inoperative?

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78 *Ibid* at 29. Paul Holmer notes in "Wittgenstein and the Self" of the necessity for a self. This is a philosophical necessity, not a part of the world but a presuppositions of its existence. The self acts as a surrogate for all the properties we attribute to this self; a body, a mind, a soul, a pain. It is this self which acts as the metaphysical limit to the world making both it and the language which creates it logical. For example, if I say that "I have a pain in my ear", we must presuppose the "I" before either the ear or the pain. Essays on Kierkagaard and Wittgenstein [1978], at 18. What we can recognize is that self-consciousness is not the consciousness of a self but of an experience.

79 *Ibid* at 29
In our everyday experience most evaluations we make are straightforward 'easy' cases. The decision between paying the rent or buying a new set of shoes is in the main directed by a sense of what is necessary or proper. While it cannot be said that I will always pay the rent, one choice speaks. The decisions judges make in determining between crime and social order are similarly driven by an underlying rationality. In what sense then do we "assent to the judgment?."\(^{80}\)

Dworkin phrase's this in terms of a "balancing of the interests"; the weighing of one choice over the other. The choice is straightforward where one choice speaks—where reasons present themselves. But in what way does the law speak? To speak of evaluation and choice is to speak to the necessity of decision between the incommensurable. In this sense we speak of preferences. A choice must relate to a preference because a choice unrelated to the desirability of the alternatives would not be intelligible as a choice.\(^{81}\)

The point here then is that there are a variety of moral perspectives which are open to us. To understand how and why we make choices is tied to the concept of a self.

This identity has a perspective which stands within a background of experience. The identity is in a \textit{situation}. It is this situation

\(^{80}\) \textit{Ibid} at 31

\(^{81}\) \textit{Ibid} at 32
which gives the possibility for the self to have an identity.\(^{82}\) It is because identity is expressed by this perspective that evaluations become inseparable from the agent—it is the situation which allows us to see agent as choice-maker. It is the agent making choices within a background or context which defines the intelligibility of that agent.

An evaluation then is not chosen, rather it is an articulation of what constitutes "worthy", "meaningful" within the context of the situation of the agent. The content of experiences are themselves inchoate but are clarified by the actions of the agent.\(^{83}\) Language is used to express the aspect of a perception that is significant in its relation to other human beings.

Experience is itself incommensurable; we can only express a sense of a situation. Sense is the human experience of value. Language is used in our experiences to convey the sense in which this situation is valued. The given is the familiarity of experience and that we learn language through which this familiarity can be conveyed. In this conveyance is the familiarity of experience before any articulation of its sense.

We are thrown into a world where "language already speaks."\(^{84}\) What

\(^{82}\) Ibid at 34

\(^{83}\) Ibid at 36

\(^{84}\) Martin Heidegger, *Poetry, Language and Thought* [1975] at 190.
language speaks is that which is about our experience with the world. It is therefore that language is formed and re-formed to convey the sense of our experience. Our sense of identity is constituted by our experience into a space of meaning. To articulate is to attempt to show what it is we experience. The sense of that situation arises from our form-of-life within which we experience the world of meaning. It is in this that the sense of the world can never be said to be wholly mine.\(^{85}\)

An action, and the situation within which it is constituted, has a normative origin which determines, qualifies, and impregnates value to that event. It is in the formulation of the purposiveness to which our behaviour is directed that value is assessed. What we will now consider is the composition of the action; the "facts" which are said to exist by which the action is made manifest.

\[2.2\] The Fact as a Representation

Heidegger suggests that "truth" means the agreement or conformity of knowledge with fact.\(^{86}\) A fact is that which shows itself to be

\(^{85}\) For a Heideggerian consideration of "sense" see Heidegger *Being and Time* [1962] §150-166. Also for an interpretation of Telling and Sense see Dreyfus *Being-in-the-world* [1991]; Chapter 12. For Heidegger, it is this sense which gives us the ground upon which the incommensurable of the world is made intelligible for beings-in-the-world. It is for Wittgenstein the certainty without which our language-games would cease to be.

\(^{86}\) *Ibid* at 51-52
the case—it is that which must be if knowledge [and propositions] are to be able to conform to fact; otherwise the fact is not binding on the proposition. The fact then is something which is revealed, rendered unconcealed. The true proposition is that which conforms to the unconcealed fact—the correct representation.

The critical concept of truth which, since Descartes, starts out from truth as certainty, is according to Heidegger merely a variation of truth as correctness; truth is that which is correct in representation of the unconcealed fact. Underlying this notion of certainty and correctness is something already evident. What Critical Theory [Horkheimer and Adorno] shows is that meaning is tied to our way of life. In this view, reality depends "not only on nature but also on the control the human agent can exercise over it".87 What counts as real becomes that which lies within the horizon of our activities within the language-game.88 In our everyday activities we are already instilled with being "attendant" to this manner of discovery—of seeing the world as how we speak it. By

87 Dallmayr, Between Freiburg and Frankfurt [1991] at 33 I was referred by Mr. Carnera to a quote in a text of Von Wright, Ecological Revolutions. There Lyne White writes in the essay "Machina Economicus" at 93, that;

We shall continue to have a worsening ecological crisis unless we reject the christian axiom that nature has no reason for existence save to serve man.

88 A language-game is an expression Wittgenstein develops in the Philosophical Investigations to show language use within a practice. For example there is the language-game of Chess which speaks about "mate" within which the term has a special significance.
this we mean that there exists a pre-understanding, an orientation, constituent upon praxis which will facilitate our use of language.

Traditional empirical knowledge is understood to provide us with a knowledge of facts. To uncover these facts we incorporate language for both empirical observation and explanation of the object. The more important assumptions of the traditional account include that the world exists independent of subjectivity, that language is itself objective, and a correspondence theory of truth.

From those assumptions there exists a natural world which can be exhaustively represented. In science this world is expressed through scientific language; in law, it is expressed in legal language. The expert, both as observer and language user, can capture this reality through propositions which are either true or false depending on their correspondence to the domain of the discourse. Law can capture linguistically its explanadum either with propositions which have a relation to empirical experience or else

89 Calvin Schrag, Radical Reflection and the Origin of the Human Sciences [1980], at 79. Schrag goes on to point out that "If facts and values are defined within an objectivist perspective, of controlling knowledge, then the 'problem of value' becomes that of determining the function of facts and values within a logic of scientific methodology" at 83. What we now recognize in the natural science domain is that facts are never value-free—they are always constrained within theory—as shown by Kuhn and others.

90 Hesse, supra note 8, Introduction

91 Ibid, at i-xi
through concepts which capture the unobserved.\textsuperscript{92} Quine and Kuhn among others have pointed out constraints on this representation in that many theories can fit observed facts; the so-called underdetermination of theory problem of empirical data.

Every observation must be expressed in language containing general descriptive predicates. Every set of predicates in a natural language implies a classification of the contents of the world. This essentialism is based upon discovering the essence of the object of investigation.\textsuperscript{93} The discovery of this self-evident natural order however is revealed upon a hermeneutical foundation as we come to rely on science to describe what the natural order is; the law to describe the true social order. In this way we see that we observe data as an element progressing towards a true theory which we must express in the form of a language we have presupposed to be objective, which can only be identified as objective ("true") if we know the true theory.\textsuperscript{94}

A further problem is the necessary acceptance of coherence cond-

\textsuperscript{92} Schrag note 89, supra, at 86 points out that the conceptual framework which occasioned the abstract empiricism of positivism was one where facts were viewed as discrete, atomistic, and non-intentional. The model of perception (for example Husserl's phenomenology) was understood as the reception of discrete, isolated and contingent physical properties structured within the form of truth-function logic. Facts thereby become similarly discrete entities, isolated from the originary matrix of world experience.

\textsuperscript{93} Hesse, supra note 8, Introduction

\textsuperscript{94} Ibid
Kant attempts to show that there are necessary categorial properties of space, time, matter and causality which must be true for any claim to knowledge of the world. These have in subsequent scientific thinking been shown to be questionable.

In the wake of Kuhn's *Structure of Scientific Revolution*, we see that in science, as history, no single convergence occurs. The emphasis is that of revolutionary conceptual changes that occur within the sequence of theories to explain a given domain of

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95 See Roger Scruton Kant [1982]; Kant was particularly 'roused' by Hume's theory of causality which rejected knowledge of necessary connections in nature. Hume discovered that many a priori beliefs previously thought to be analytic where in fact synthetic, notably cause and effect, and arithmetic. Hume argued that there was no rational basis for the belief that the sun will rise tomorrow. This belief rests only on an 'association of ideas', we cannot prove that any factual event will occur. This scepticism threatened to undermine the "logic" of science, that consequences necessarily follow from their causes.

Knowledge begins, according to Kant, with experience, but it does not follow that all knowledge must necessarily arise from experience. Kant identifies a priori knowledge; knowledge about the world independent of actual experience. Objectivity can be said to exist in the world through analytic a priori knowledge. Here the predicate is contained within the definition of the subject—such as "All bachelors are unmarried". This appears logically true but provides us with knowledge of little value. Synthetic a priori knowledge on the other hand is such that the predicate is not contained in the subject, but rather it is dependent upon experience. Kant used mathematics to illustrate this form of knowledge. For example; $7 + 5 = 12$ does not contain the result in the predicate, but we are certain of the result. Reason gives content to experience. Knowledge may be said to exist within the subjective I—but we may have knowledge of the world in experience. We experience the world with a reference to space, time and causality. These references are all a priori notions independent of experience, by which we structure experience says Kant. It is a rational (conceptual) perspective of an independent world.
phenomena.\textsuperscript{96} We do see however within this theory that while concepts do not converge, that science is instrumentally progressive. This comes about because successive theories interpret predecessors in terms of an approximation of itself. Science can only progress using the concepts and methodology of science. Hesse describes this as an increase in the \textit{pragmatic} possibilities of predicting and controlling empirical events through experiment and theory construction. This pragmatic progress is relative to a phenomena which is particular to our objectives.

What we are confronted with then is knowledge for a purpose. Knowledge which is constructed for a purpose should force us to question the objectivity of derived data. Quine, emphasising theory under-determination illustrates\textsuperscript{97} that scientific theories are never logically determined by data—they can always be justified or rejected by appeals to contradictory data. No theory can therefore adequately capture the "fact". Kuhn (Scientific Revolution) and Feyerbend (Problems of Empiricism) have gone on further to argue that what stands as theory is itself a point of conflicting inter-

\textsuperscript{96} Hesse, \textit{supra} note 8 at x.

\textsuperscript{97} See Quine, \textit{Two Dogmas of Empiricism}, and in a less radical position in the more recent \textit{Ontological Relativity} ch 2,3,5. Quine points out the a \textit{priori} that two parallel lines will never intersect appears not to hold in all cases. This refutation arises as light passes by very large objects and encounters gravitational forces. This concept is explained under Einstein's special theory.
pretation and therefore a product of social beliefs.\textsuperscript{98}

2.3 The Metaphysics of the Legal Fact

The "epistemological obstacle" is the belief that language is a mirror of reality.\textsuperscript{99} We are tempted by the notion that a legal concept can be measured by a capacity to reflect reality.\textsuperscript{100} This is manifested by the positivist position of law as constitutive of

\textsuperscript{98} Hesse \textit{supra} note 8, in section "Theory and Value"; From the crisis in scientific methodology, we may begin to see the hermeneutical interpretation of human science revealed more as a continuum of natural science rather than a dichotomy. Hesse argues from this that the distinction between natural and social science is more to do with pragmatic or instrumental predictive success than the absence or presence of evaluative techniques.

\textsuperscript{99} The mirroring of reality has come to refer to the 'picture theory' of meaning (See Rorty on this in \textit{Philosophy and the Mirror of Nature} [1979]). Empiricists see reality of that which is external to the speaker, and language acts to represent the relationships among the elements of sensory experience, they 'speak' world. Rationalists see the picture as that which make our private thoughts public. Reality is to be found within the mind of the believer. It is that language represents reality that it is seen as a barrier between us and the world, our objects of knowledge. The "problem" is that the word does not completely "capture" the reality. We shall see later on how this is premise appears to be implicit even in modern writers such as H.L.A. Hart. Opposition for this notion is now endemic in contemporary philosophy. For Merleau-Ponty, like Wittgenstein, language has no claim to represent reality. Not only is speech not a mirror, but he also claims that thought itself can make no such claim; "We must recognize first of all that thought, in the speaking subject, is not a representation, that is that it does not expressly posit objects or relations. The Orator does not think before speaking, nor even while speaking; his speech is his thought." (\textit{Phenomenology of Perception} [1962] at 180). For a consideration of Merleau-Ponty's philosophy, particularly with respect to language and metaphor, see Jerry Gill, \textit{Merleau-Ponty and Metaphor} [1990] here at Chapter 4, "Language as Gesture" at 82ff.

\textsuperscript{100} Patrick Nerhot, "The Law and its Reality" at 52.
facts, and so in making law, we reveal reality. In this perspective, facts are representative of social relations and norms. Legal rationality then is premised on an objectivity based upon a method of scientific reflection in which there is a logical relationship between language and reality. This rationality is possible only if that which is represented, the natural, is a rational order.

Central in the exposition of law has been the relation of fact to legal rules. The distinction between fact and law permits the abstract arrangement of actions. This arrangement is set out to identify law as an object, to arrange this object within a legal rationality, and to set out the exercise of power. This is possible only because facts themselves, which are removed or alienated from the world, are abstractions. This rationalization of facts is the product of the scientific method. The fact then is not external to legal rationality, but internal to it.

When we wish to describe what we mean by knowledge within the parameters of the legal world, we view facts within the context of legal concepts. The lawyer is obliged to show how a particular

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101 Ibid at 53
102 Patrick Nerhot, Law, Interpretation and Reality at 2ff
103 Ibid at 56
104 The correspondence theory of truth holds (See Russell (1917) Chapter one), that what is significant for knowledge is not the object itself but rather the relations between objects. All objects
fact has a relation to a legal concept so as to infuse it with legal meaning, to impart its relevance. By this, once this fusion is made the fact becomes a particular perception of reality within the legal process. This prescription is the cognitive art of the lawyer, and forms the basis of legal argument. It represents the lawyers knowledge of the domain of law to which the fact is relevant.

What the proficient lawyer is capable of doing is removing the "noise" of background events and place the locus upon the concepts which are necessary aspects of the client's case. What is relevant is how the lawyer wishes to characterize the events which are the fulcrum of the legal dispute. It is this determination of the "legal" dispute which is the role of the lawyer—what it actually is to be a lawyer. The lawyer accomplishes this by operating within a set of beliefs about how legal argument is conducted and how legal elements are constructed. These beliefs comprise the language or

appear to exist within the world. To explain how they really are, we cannot think of any spatial object apart from its space, or any temporal object apart from time (See Wittgenstein, TLP §2.0121) It is therefore that the objects themselves are not of interest, rather it is their position in time and space which is significant to us. "The cat is on the mat" deals with two objects, the cat and the mat. The elementary fact is the cat being on the mat which is to concern us. If the proposition is true, then we can say there is a positive fact which is the state of affairs. If the cat is not on the mat, it is a negative fact and not the state of affairs. Knowing the proposition enables me to know the reality it represents. This is possible if we hold the belief that "The world is the totality of facts" (TLP 1.1). Wittgenstein stresses (TLP 4.002) that natural languages are logically perfect and capable of expressing every sense. His later investigations thoroughly reject this notion of truth correspondence.
"form of life" of law.\textsuperscript{105}

The relevance of any particular "fact"\textsuperscript{106} or event presupposes knowledge. This is because for an event to be relevant, and the law to be coherent, the significance of an event in relation to a body of beliefs must be presumed to be known prior to its actual

\textsuperscript{105} The idea that linguistic practices are an evolutionary product of social practice—the way we do things—as opposed to a view of language as a "mirror" or "picture" of reality belongs to the philosophy of the later Wittgenstein (Philosophical Investigations). Wittgenstein perceives language as a tool or social artifact with which people do things. Specific uses of language (language games), as for example law, can be said to arise within a particular social practice. We give effect or meaning to words by how we use them. For example, the word "mate" in playing a game of chess gets meaning because we use the word to describe a relation between objects on a board. It means the end of the game, and we agree on this because we observe the rule about check-mate in chess. In summary, when we communicate we must look to the grammar to understand what we mean; the practice of the speaker, the hearer and the attitudes which form the background of what we do.

\textsuperscript{106} It should be apparent here that "fact" relates to the characterization of reality. No fact is in the world. As Russell points out in the preface to the Tractatus, they cannot be defined—they exist only in logical space. What the positivist argues is that they are the relations between entities, which we call true or false. In this, they are constitutive of what we hold as our knowledge of things. Before we can say that the couple are married, the reality of that state is to be interpreted, or characterized, through legal rules. For example, where the couple are both of the same sex; have a consanguineous relationship; are already married to another, the fact of the relationship is in doubt. Yet it is only in the legal world that we can speak of such doubt. It is in this manner that we cannot refer to legal facts as "brute" facts—facts which have not been, in some way, shaped by legal rules which determine their validity. For an interesting discussion on this aspect of validation and self-referentiality in law, see Patrick Nerhot, "The Fact of Law" in Autopoietic Law: A New Approach in Law and Society [1988], Edited by Gunther Teubner. This article highlights the difficulty in distinguishing between a question of fact, and a question of law given that the construction of facts is an interpretive (self-referential) process.
occurrence. That is to say, the legal proposition determines in advance the necessary fact that must be established to make it true, and it is the legal rule which establishes the necessary proposition.107

In this way we are to see that facts are constituted within a doctrinal framework. The "fact" of the man and woman being married is relevant where we undertake to invoke the matrimonial property statutes. Facts in law are characterized by "proof" which is either beyond a reasonable doubt or true on a balance of probabilities. In evidence, facts which may be admissible in court must also be deemed to be sufficiently relevant to the particular legal issue. An event without proof or relevance cannot be constituted within the legal question. There must be a legal "qualification" which governs the transition of an external event into the creation of legal reality.

A fact is the means of constituting the state of the world.108 An

107 See Baker and Hacker, Skeptism, Language and Rules [1984] at 32. This does not imply a metaphysical derivative of reality, only that propositions which we can say are true or false, are grammatical propositions. Grammar does not represent the ultimate link between utterances and reality.


"A name signifies only what is an element of reality. What cannot be destroyed; what remains the same in all changes"—But what is that?... We see component parts of something composite (of a chair, for instance). We say the back is part of the chair, but is in turn itself composed of several bits of wood...We also see a whole which (is destroyed) while its
occupation, a communication, a vehicle, a snail in a bottle, these individual data comprise factual events. Events can then be constituted within a particular context to form legal concepts. That is to say, a fact can be considered to be relevant when it is shown to relate to a particular legal construct within the law. The content of information is that which categorizes facts into a prescribed correlation between elements and how we construct the legal question. It is relations amongst facts-information-which forms the cognitive basis of the legal question.\textsuperscript{109}

A gap here is the criteria for imparting the selection of the relevant rule which the judge is to apply in creating fact and law. This gap is filled by the agent, the lawyer and the goal which the agent seeks. To speak of goals is to speak of actions. It is to give the picture its "sense". It is in this that the law is pragmatic. It must address itself to the preference between actions.\textsuperscript{110} Rules confer meaning on actions and account for the ordered-ness of the social order, rules which make the situations intelligible.\textsuperscript{111}

\begin{itemize}
\item component parts remain unchanged. These are the materials from which we construct that picture of reality.
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\textsuperscript{109} See for example, Michael Buckland, \textit{Information and Information Systems} and Jon Bing, \textit{Handbook of Legal Information Retrieval}.

\textsuperscript{110} "To know the Law then requires a cognitive act for which the Law itself - through the descriptions it supplies - cannot provide closure. The cognitive contribution of the agent is a necessary condition for the completeness for any Law.", Smith and Coval, \textit{supra} note 49 at 106.

\textsuperscript{111} Schrag, \textit{supra} note 89 at 110
In the analytic tradition, to speak of an event as an action we speak of an event as a particular. The fact is an unqualified event which points to a relationship between agents and goals. To establish the relationship between the act and the rule we must particularize the event with a description so as to give it specific reference.\textsuperscript{112} This reference is to that of an action which occurs in a certain way as an already known act.\textsuperscript{113} It is in tying the event to a known act [which is the task of the lawyer] that we tie an action to a rule-governed activity and thereby a concept of truth.\textsuperscript{114} This concept of truth is tied to meaning within the legal discourse itself which is, as we shall consider, tied to practical rationality. It is in this way that being an agent is itself only possible as a rule governed activity.\textsuperscript{115}

Smith and Coval set out the concept of an action by explaining "Law is about actions... [t]he law, in order to operate the way it does,

\textsuperscript{112} Smith and Coval, supra note 49 at 98ff.

\textsuperscript{113} What Smith and Coval, \textit{Ibid}, argue is that an action is comprised of an action instigated intentionally by an agent in the exercise of its agency. The intentionality is the goal-directedness which satisfy an event as being an action. "If goals are events which must satisfy this description then goals are events which depend for their identification upon our ability to produce the relevant beliefs [those which qualify agency] which go into the identifying description." at 99.

\textsuperscript{114} As Nerhot suggests in his reading of Kelsen's \textit{Pure Theory of Law} that no norm can be deduced from a 'raw' fact; "...no fact can be stated without a reference to a rule. The fact, as legal science understands it, is in no way a given that imposes itself by itself, external to legal science." in \textit{The Law and its Reality} at 59.

\textsuperscript{115} Smith and Coval, supra note 49 at 99.
must in an unself-conscious way already work with some concept of action or other." Having given this brief outline of the determination of what constitutes a metaphysics of reality, we should now consider what is necessary to construct the legal domain. What criteria must we set out in order that we can translate legal concepts into computational terms with a utility in legal argument within the goal-matrix of agent action? We will now turn towards the construction of a methodology for a more rational approach to the modelling of legal reasoning. The basis of this rationality will be a theory of actions as outlined by Smith and Coval in *Law and its Presuppositions*.

2.4 Legal Theory for Rational Acts

It is a cliché to say that the law is indeterminate. A modern sceptic might suggest that the task facing the lawyer is analogous to that of the deal of a hand of poker. To develop computer applications we require a sound methodology. We must develop a rational framework within which we create a certainty within the legal domain. Without a basis for certainty, any methodology will prove to be of little value in the construction of a computer expert system. We need a process which will allow us to construct a

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117 See *supra* note 5.
rational approach towards legal determination.\textsuperscript{118}

The purpose of this section is to consider the underlying rationality of the legal discourse necessary in the process of developing an expert system. The approach taken at FLAIR is to apply a "Deep Structure" based on an Action Theory as developed by Professor J.C. Smith for the building of expert systems.\textsuperscript{119} Legal Rationalism must come in the form of a practical understanding of the underlying function of law. We must believe in a concept of true legal knowledge which we can use to make a rational structure upon which to base computer algorithms.

By relying on a rational substratum the expert system will be effective in disclosing the social dimension within Law. We must infer from this that "legal language" is to be seen as a cultural


Ms. Gardner states that it is not possible to build an expert system which deals with "hard" cases. She derives this conclusion from the jurisprudential analysis of the Rules-Principle distinction debated by Dworkin and Hart. She concludes that computer logic is inadequate to resolve the use of legal principles.

We argue that we can go beyond the apparent indeterminacy of law by relying on a rational construction of legal reality. This construction is not an apology to contemporary jurisprudential thinking but rather, we believe it is the recognition of the consensus of action which is the presupposition for legal certainty.

\textsuperscript{119} See Smith and Coval [1986], Smith and Deedman [1987], Smith and Gelbart [1990] and also Carnera and Edwards [1992].
artifact, an abstraction from reality. Expert systems incorporate the dimension of legal language but they are tied to the practical rationality of the agent. Therefore by building an expert system for hard cases, we must try to minimize the products of the social and cultural institutions. To gain a more complete understanding of law, we must reduce the apparent effects of the representational practice. We eliminate this institutional product by reducing our dependence on the traditional legal discourse. Instead we focus on the situation of the agent.

The application of such practical reasoning is the essence of a theory of actions.\textsuperscript{120} The reason for this is that the theory shows

\begin{footnote}
120 Scruton provides a summation of Kants Critiques (Kant, here particularly "The Categorical Imperative" at 58ff). Kant sets out in the Critique of Practical Reason the ancient distinction between theory and praxis; between knowledge of truth and its application. For Kant it is in the application, the decisions we base on truth, that constitute our agency. By the maxim "ought implies can" the agent is posited as always free to act rightly. For the analytic, all effects in nature have a cause. If my free act is one of spontaneous free will, then a contradiction arises in that if the act is part of nature, it can point to no cause, if it is not part of nature, then this will originates nothing in the natural world. This contradiction exists only if there is free will. Such freedom appears essential to the notion of being an agent. We are compelled then by practical reason to accept freedom, and by understanding to deny it.

To escape this dilemma, Kant relates the transcendental self or moral agent, a thing-in-itself not bound by causality (the empirical world) but by practical reason. We are at once free as noumenon and in the world as phenomenon in one's own empirical consciousness. We cannot then use pure reason (theory) to arrive at an explanation for our actions (the noumenon outside of the empirical world), but we can translate knowledge about the nature of our judgments by the exercise of our freedom (how we are able, through this transcendental self, to effect change in the empirical world is not clear). This exercise will adhere to the unity or laws of pure reason. Freedom for the agent is possible only because he
us the ultimate relation between law and practical rationality. Actions lie at the bottom of Law. We must observe therefore that legal knowledge depends upon the action itself. It is for this practical purpose that the legal discourse should also concern itself with the teleology of the law.

The deep structured approach to legal reasoning is that judges decide even hard cases as a rule-following practice. In learning the legal language, lawyers and judges are instilled with how to apply a legal reasoning. It apparent from contemporary approaches to the legal phenomenon that we cannot understand the legal discourse relying on a purely internal perspective. We adheres to the moral law (the new 'law of causality'). This freedom (the exercise of choice) is constitutive of agency which reveals itself through rational action (an intentionality). Thus an action can be explained or justified in reason. What motivates us to exercise our freedom is the categorical imperative which is derived from reason. Freedom is the power to will an end of an action myself-its is not free where the action is not truly mine. (see on this point Smith and Coval p.113). Freedom then is the ability to be governed by reason, defying the causality of nature (i.e. self-interest and desire) where they conflict with reason.

121 This jurisprudential fundament was already established in Legal Obligations. There Smith tries to explore the ontology of legal obligations. He exposes Law as a social discourse based on practical reason. See Legal Obligations [1976], especially Chapter three.

122 J.C. Smith and Cal Deedman, supra note 6. This is in contrast to the doctrinal findings of Ann Gardner, supra note 118.

123 The question whether we can have an external view of the world is an old debate within the philosophy of science. Philosophers like Popper, Feyerbend and Putnam has canvassed whether we can have an objective knowledge of normative phenomenon. See Social Epistemology [1991], Fuller at pp.51-61 concerning a "third" world perspective by Popper. The hermeneutical approach taken by Dworkin, especially stated in Law's Empire at pp.82-89, emphasizes that it
argue that we should not confuse the practice of the law, with the practice of the lawyer within the law. We wish to suggest that an understanding of the legal discourse entails realization of the logical structure of both the process or function of law itself and, the process or function of the lawyer itself. These two processes are entwined but distinct.

The premise: "Before knowledge engineers can model legal reasoning they must first understand legal rules and how lawyers and judges fashion and utilize these rules."\textsuperscript{124}, will lead us to rely on an inherently contradictory legal discourse. In order for the legal institution to function at all, there must be a non-contradictory epistemological fundament which is accepted by the legal profession.\textsuperscript{125} Relying on how lawyers argue leads us only to understand the process through which individuals interact with the legal institution, but not the law itself. As a methodology for developing expert systems, we are left unable to develop useful computational structures which will reveal the rational function of

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\textsuperscript{124} D. Berman and C. Hafner, "Obstacles to the Development of Logic-Based Models of Legal Reasoning", from the anthology Computer Power and Legal Language [1989] at p.183
\end{flushright}

\begin{flushright}
\textsuperscript{125} See Smith and Coval, supra note 110.
\end{flushright}
legal rules. We are left to wonder how such an approach can lead to the development of useful applications of knowledge-based systems.

The second approach rests on the acceptance of a true belief or predictability within the law. It is however, not only that we have true belief but that these beliefs are connected in complex ongoing relations to one another. The relations are observable as a goal-ordering hierarchy which places a rational basis for social interactions. Within the body of Law we can see that this goal-orientation is reflected through a matrix.\footnote{Ibid at 102}

In the exercise of practical purposes, Agents operate to achieve independent goals. In a world of finite resources, these goals will inevitably conflict with the goals of other agents. Law represents the means through which the significance of goal-values are expressed. The law orders goal-values thereby protecting one goal set over another. The rules and principles of the legal institutions reflect this goal ordering. To illustrate this point, we can consider the underlying rationale of defamation. Truth is more important than protection of reputation. The protection of reputation is more important than freedom of communication.\footnote{Ibid at 103}

The matrix then represents the ordering of these goal-values which appears to be the gestalt of law. Our understanding of law rests on

\footnote{\textit{Ibid} at 102}
\footnote{\textit{Ibid} at 103}
seeing a connection between goals and actions. An expert in the particular domain will examine the case law so as to establish what factual determinants are inherent in the domain. This analysis represents the deep-structure of the domain.

To characterize a particular action, Coval and Smith utilize J.L. Austin's linguistic analysis of the modifying effect of various adverbs on an action signifier.\textsuperscript{128} Each action modifier adjusts a feature or set of features of a standard act to result in a redefinition of the action. This redefinition gives effect to the legal possibilities of the act.

The question we face in assigning culpability or guilt on agents becomes a function of what we can know. In establishing such culpability, we look to causation in the act and intention of the actor. Such characterizations are necessarily done in an \textit{ex post facto} analysis. What the agent does is the act itself, what we then do is analyze the situation for intent.\textsuperscript{129} As we have already commented previously, in claiming an intention we are in fact

\textsuperscript{128} \textit{Ibid}, at 2ff. The modifiers include; Accidentally, Mistakenly, Inadvertently, Carelessly, Involuntarily, and Unintentionally. In the way we use these words, as illustrated by Smith's descriptive example of shooting a neighbour's Donkey instead of his own, we come not only to see the meaning a particular modifier effects, but also the reality of the situation, that is to say, the context for its utterance. See J.L. Austin, 'A Plea for excuses', \textit{Proceedings of the Aristotelian Society}, 1956-7, vol. 57, pp. 1-29, and also J.L. Austin, \textit{How to do Things with Words}, 2d Ed.

\textsuperscript{129} See Gilbert Ryle \textit{On Thinking} [1979]; "Adverbial Verbs and Verbs of Thinking" at 17.
claiming that the person and the act are intelligible.

To say an act is intelligible then is to say that it rests upon a rationality. Rationality is the ability to attribute an event to an agent in a causal relation. It is to place the act with an intentionality. Rationality then is about attributing cause to effect. The legal act is attributed to the agent. To attribute the cause to the agent, agents must necessarily be autonomous or the definition will not stay. The act then must be placed within a framework which relates the agent, the act and the legal effect. So while we must speak of autonomous agents, we cannot speak of an independent act. To invoke law—the set of rights and duties—it must relate between agents and by its intelligibility it must in some sense follow a determinate practice. This is to follow a rule.

2.5 Rule-Following: Expressions of Experience

Language rests on consensus, but a consensus of action, not belief. Rule-governedness sits as a premise of modern liberalism. According to Locke lawfulness is a quality of both nature and society: "The state of nature has a law of nature to govern it which obliges everyone; and reason which is this law teaches all mankind (who will but consult it) that, being all equal and

130 Smith and Coval, supra note 49 at 99.
131 Ludwig Wittgenstein.
132 Dallmayr, note 11 supra, at 1452.
independent, no one ought to harm another in his life, health
liberty or possessions." The essential goals of life, liberty
and property then are attained by the laws established in a
commonwealth.

There has in the past decade been a tremendous amount of literature
produced in the philosophical discourse regarding the thinking
within Wittgenstein's later philosophical ideas. Of particular
interest here are his ideas about what it means to follow a
rule. In order to grasp language use and the transmutation of
meaning, it is necessary to be able to follow in the way by which
a particular practice is performed. What Wittgenstein noted is that
the application of rules cannot in themselves be understood as
strictly rule-governed. That is to say, we cannot appeal to a rule
to justify an application without falling into an infinite regress,

133 Ibld, from J. Locke, Of Civil Government: Second Treatise 5-6,
109 (1955)

134 Although there are many articles in the Legal journals which
incorporate, either overtly or implicitly, Wittgenstein's idea's, I
would refer the reader to a recently published text Wittgenstein
and Legal Theory [1992], Dennis Patterson, ed., as the most recent
publication directed entirely to his thoughts. Wittgenstein set out
to clarify the relationship between meaning and language; how we
derive objectivity through social practice.

135 Baker and Hacker, supra note 107 at 56 put it that:

Morality, social life, law, games are run through with rules
and related normative phenomena. If, in reflecting on these
features of our lives, our concepts of a rule and of what it
is to follow a rule are awry, so will much else be too. An
incorrect logical point of view upon rules will guarantee an
incorrect conception of ourselves, our minds and our normative
practices.
an endless loop.\textsuperscript{136} Rule-following also points to the difficulties as to why we cannot readily comprehend between discourses and between paradigms.\textsuperscript{137}

This section is important within the overall theme of the thesis for illustrating the inter-relation between background and experience in enabling understanding and determinacy. By locating an action or utterance within a social construct we enable comprehension, and thereby a rationality which we can attribute to future occurrences of the action or utterance. The element Wittgenstein illustrates—what it means to grasp a rule and its extension—is the point we wish to impart. What is becoming more clearly understood (and argued) is that not only do we derive meaning contextually, but also that in being able to give meaning at all, we do so through ancillary beliefs; the network of background experiences Heidegger attributes to the Being-in-the-world.\textsuperscript{138}

\textsuperscript{136} \textit{Ibid} at 82. As we attempt to justify a rule by another we see that we get no further. If I have run out of justifications it is not that I have no explanation, only that explanations must come to an end.

\textsuperscript{137} For example if we were to come across a tribe which followed different rules (\textit{PI} §207). They appear to do activities with a regularity but their language appears unconnected to what they do. We find we cannot grasp enough to call this a language. We can reverse this example with common words associated with irregular and incomprehensible actions. It too would not make sense.

\textsuperscript{138} The point of Wittgenstein's treatise is to deal with the use of ordinary language. What he wishes to address is the way in which philosophers have come to treat the representational concepts we use to describe the world, as being the world \textit{itself}. This is a confusion between grammar and reality. An illustration of this kind of thinking is how we know pain. We know pain by learning the use of the word—we use the word pain when we see someone in pain. It is
The importance of understanding rule following is ultimately about recognizing how the human being is able to understand and go on; how we can apply and extend actions and judgments of our immediate experience to new and different actions and experiences based on prior knowledge. In this we speak to determinacy, to the boundary of the "form" of a rule. Rule-following is, in short, to understand how actions and language occur. Understanding how a language works is, for Wittgenstein, about how the meaning of a word is to be found in its use. This is a primacy of rule-application over

in this that I do not 'know' I am in pain, I experience pain but learn what we mean by pain. This is Wittgenstein's argument against private language. See, for example, Scruton (1981), Chapter 19, at 279 ff. Heidegger also recognized the problem of the confusion we have between representational grammar and understanding. In his Sein und Zeit, to overcome the problem of misconception brought about through ordinary associations with words, he created his own etymology to force us to go beyond the bewitchment that ordinary language casts over us. We see language as representing the object, and in some sense we attribute this representation as possessing an intentionality which connects the word to the object itself. What Wittgenstein is claiming is that we do not "mentally" attach a name to an object, but rather we are trained to use a word in a social practice within a situation. Wittgenstein calls literal meaning the "bewitchment of our intelligence by language." The project of both these philosophers can be said to refute the Cartesian premise of a primacy of the Cogito, the inner self, through which the world is re-presented to us through our mental faculties. The target therefore of this contemporary Philosophy can be said to be the implicit solipsism of the idealist. Yet when we look at what is hit, it seems to be the very notion of philosophy itself.

For example, in following the rule of word use he emphasizes the unquestionable application of rules in social practice. It is not that these rules are in any sense objective, only that they are incontestable within the language-game. In On Certainty [1972] he responds to G.E. Moore's 'proof' of the external world, proof based on a common sense argument of the certainty that the hand he holds up is his own. Wittgenstein emphasises this would be a nonsense statement in ordinary language unless there was some further point about this fact. At §308 Wittgenstein argues that "knowledge" and "certainty" are not different mental states (in that they represent degrees of awareness about an object), but that they are different
rule-knowledge. In so arguing, Wittgenstein goes against the notion of rules as causal entities, as transcendental objects, categories. By this he is indicating, I believe, the difference between philosophy as epistemology, and philosophy of mind. In considering the use of "I know" what we must be concerned with are questions about empirical judgements about which there is a possibility of doubt. If I should "ordinarily" doubt the hand in front of me, it is not the hand itself we are concerned with, but rather how I should come to believe otherwise—whether I am mad. When there is doubt—and the need for knowledge—then we can give reasons. Were doubt is logically excluded, then so too is knowledge.

It would appear that, within the form of life, there is no room for uncertainty in judgement of the use of a word itself. If I say a thing is 'rose' when it is actually red, it may be because I am uncertain as to the proper use of the word used to describe red (i.e. I am colour blind). On the other hand, I may say 'rose' because the light conditions seem to indicate that the colour looks rose instead of red. In neither case can it be said that the thing is uncertain within the proper use of language, only that I am mistaken. This is a personal mistake about how I use language (following the rule of 'red') and not a mistake as to the nature of the object itself. Language rests on consensus of action (how a word is actually used in a situation) and not personal belief about what a word means.

If we succumb to a doubt such as Moore is attempting to allay (the use of a word), we hit rock bottom in language, we come to doubt the very way we use words. To conclude the nature of the debate, we can refer to §370

The fact that I use the word "hand"... without a second thought... shews that absence of doubt belongs to the essence of the language-game, that the question "How do I know..." drags out the language-game, or else does away with it.

This point is brought out in the philosophy's of both Heidegger and Gadamer. In Truth and Method [1966] Gadamer notes at 274-5 the ascendency of the cognitive grasp of text over practical exegesis, yet both are inextricably entwined: "In the course of our reflections we have come to see that understanding always involves something like the application of the text to be understood to the present situation of the interpreter." We cannot separate our interpretations about the world from how we find ourselves in that world.
which in some sense exist in a predetermined way.\textsuperscript{141}

As well as the \textit{Philosophical Investigations}, this chapter draws upon primarily two sources, Kripke's; \textit{Wittgenstein: On Rules and Private Language},\textsuperscript{142} and Baker and Hacker; \textit{Scepticism, Rules and Language}.\textsuperscript{143} I will recommend these works for the in-depth analysis of rule following. Both these works consider what it means to "act in accord with the rule." The two positions are, stated briefly; "community standard" whereby our performance is judged by

\begin{quote}
\textsuperscript{141} See PI §197

"It's as if we could grasp the whole use of a word in a flash."-And that is just what we say we do. That is to say: we sometimes describe what we do in these words. But there is nothing astonishing, nothing queer about what happens. It becomes queer when we are led to think that the future development must in some way already be present in the act of grasping the use and yet it is not present.

Here Wittgenstein rejects the notion that a rule contains all its occurrences, that it is somehow a complete set of all its occurrences (as Russell might insist). Instead a rule is the ability to apply a procedure.

\begin{quote}
\textsuperscript{142} Saul Kripke, \textit{Wittgenstein: On Rules and Private Language} [1982].
\end{quote}

\begin{quote}
\textsuperscript{143} Baker & Hacker, supra note 107. I should add that my interest in this problem was sparked by Norman Malcolm's Essay.... Having just read Kripke's work, and feeling something amiss, I was quite surprised by Malcolm's intense attack on Hacker and Baker's comments on Kripke's conclusions. Needless to say, I give preference to the position of Professor's Hacker and Baker over Professor Kripke. Not only are Hacker and Baker most likely the Anglo-speaking world's most eminent authorities on Wittgenstein, but they bring an intense sensitivity to their analysis which reflects the Wittgensteinian approach. This is an opinion I also hold for Norman Malcolm. Although the merits of Kripke's arguments about private language and rule following are for themselves to speak, his approach at apprehending the "problem" seems singularly unwittgensteinian.
\end{quote}
competence in accord with a public standard (Kripke), and alternatively that the rule, and only the rule determines the criteria (Hacker and Baker). That argument relies on an explanation of what is meant by understanding the "internal relations" connected with the rule.

Kripke, to summarize his argument, points out the so-called Sceptical Fallacy to be found in Philosophical Investigations\(^\text{144}\). The question about a rule is "How do we go on?". Imagine the rule for a series of even numbers starting at 2; 2,4,6...1000. We now get to 1002 only to be questioned by the sceptic whether the rule should not be 1004, 1008, 1012.

The sceptical doubt then is whether we are using words in the way we have used them in the past. This epistemological problem—that in

\(^{144}\) See Kripke, supra note 142 at chapter One, also note Gene Anne Smith, "Wittgenstein and the Sceptical Fallacy", Canadian Journal of Law and Jurisprudence, Vol. III, No.2 (July 1990) at 155. I believe that the historical significance of the Philosophical Investigations should be emphasized. Hacker and Baker point out very convincingly that one of the concerns of Wittgenstein was to negate the arguments that provide the philosophical basis for solipsism. This was part of the scepticism debate created by the British Idealists, notably by Bradley. I presume this is where Kripke is able to uncover the "sceptic" in the Investigations where neither Malcolm nor Hacker and Baker (all life-long students of Wittgenstein's thinking) could not. The solipsist is one who holds to be the "sole" existent in which the world "outside" exists as an object or content of my consciousness. Wittgenstein's argument against private languages, which follows in the Investigations immediately after his discussion of rules, refutes that the solipsist a language within which to express their world. See footnote 138 supra. Wittgenstein is attempting to refute the mentalist position—that the world is created or understood through "reason".
applying a word to accord with what we mean—gives the sceptic the argument that there can be no certainty of meaning at all, that language is impossible because it can mean anything the sceptic wants it to mean.\textsuperscript{145} Kripke applies the anti-realist (and fundamentally relativist) position that the conditions for use (i.e. the very thing of which I speak) are in themselves meaningless and instead uses the assertion-conditions for meaning; My use is valid in that other members of the community appear to follow this practice. In other words, I am following a rule because I can show the community agrees with my use. Baker and Hacker refer to this not as scepticism but as conceptual nihilism—an absurdity.\textsuperscript{146}

\textsuperscript{145} Kripke's so-called "Wittgenstein's Paradox" is derived from §201 of the \textit{Philosophical Investigations}

This was our paradox: no course of action could be determined by a rule because every course of action can be made out to accord with the rule. The answer was if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.

One of the problems of philosophy has been the problem of temporality. The source of this debate has been that if an object is a representation within the conscious mind (an object of consciousness, sense-data) how can we be sure that the object continues to exist? How can I be sure that the object of consciousness, perhaps a memory, continues to refer to anything in the world? This dilemma applies equally to acts such as rule following practices. Both Wittgenstein and Heidegger have dismissed this problem by detaching the question of personal existence from the empiricist scheme and have given existence as a given phenomenologically. Wittgenstein establishes the "form-of-life, the background of our entire social world within which we interact through language-games which recognize the contingencies of actions within which language is created, and Heidegger's Dasein, the being which questions being, as a point of reference.

\textsuperscript{146} Baker and Hacker, \textit{supra} note 107 at 6.
The question is what do we mean by *acting in accord with the rule* and what is it to *go against* the rule? The position advanced by Kripke's community consensus argument implicitly relies upon the psychological state of the rule-follower. Rule-following is to be seen as the person in some sense trying to follow or obey the rule. This places the rule as a mental act or representation. Hacker and Baker in contrast see rule-following as related to the actual practice of doing; a sense of the activity of the individual embodied in the event by which it is intelligible as an action. This "internal relation" accentuates Wittgenstein's radical move away from "form" where language is seen as a representational object which is in some sense predefined and complete.

A rule can only be discerned at all if we can say there is a regularity of behaviour, a criteria. In other words there must be some customary observable action, a use which creates context for comparison. The key point is that to follow a rule involves *Praxis*. The practical manifestation of rule following need not however be performed by a multiplicity of agents. As long as it is possible to observe a recurrent action, a multiplicity of events, then we may

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147 At PI §201 it is set out that every *interpretation* of a rule can be said to comply with the rule. If this were so, then there would be no sense in speaking of following a rule. From this Wittgenstein concludes there must be something behind the rule which is not what we call an interpretation. This is what he means by the expression "it is what we do". What lies behind the rule is the logical framework within which we act, the form of life which creates language-games, by which things have sense.

148 *Ibid*, at 20
in some sense be able to determine if a rule is being followed.\textsuperscript{149}

Obviously this creates the question as to how the observer is able to evaluate rule following without knowing the rule? The answer is that the mere observer can not.\textsuperscript{150} The radical point here, contra Platonism, is that the rule itself cannot fix the meaning. The very fact of language as a social practice means that language is an

\textsuperscript{149} It should be emphasized here that we cannot "follow a rule" privately. For me, there is no distinction between thinking I am following a rule, and following the rule. It is in this that introspection does not fix meaning. Accord then can only be fixed against a background of social practice. In order to say someone is following a rule is to assert a grasp of something which makes sense. It is this aspect which is the following of the rule. To assert that a rule is followed means that another person must understand the object of the action. The criteria to evaluate what it is that is really going on is the explanation I give for what I do. It is only by doing, and getting an insight of the rule by the act, that I can know the rule. For example an act may have a multiplicity of consequences of which the agent is only partially cognizant. We may act privately, and even consistently, but this cannot be said to fix the meaning of a rule. If we are able to communicate the action and show the Ding-an-sich to another (that is to train another to understand that which is the object or continuum of the act and its application) then it becomes possible to fix meaning to a rule which can then be followed or gone against. Rules arise as relations between agents.

\textsuperscript{150} In trying to imagine interpreting the signs of a solitary cavedweller, In a footnote (fn 29, p20-21) Hacker and Baker note a section from Manuscript 165;

"Provided he uses simple signs which we could interpret, we could come to understand him...[T]o understand a language of a people is to describe a regularity of their behaviour, and to describe a language which someone speaks only to himself is to describe a regularity of his behaviour, and not something which can only happen once"

and further;

"of course, we could not understand another's language unless we could grasp the rules of his language, follow them as he does, agree with him in the manner of applying them"
activity. Where we do not engage in the activity, it becomes questionable that we can understand. In an observation we surmise either a behaviour which is unintelligible, a rationalization of the behaviour based on a theoretical premise rooted in our own experience, or we might guess right. To understand the lion is to be in the lion's world as a lion. It is a question of how the lion understands it's world. Language is a matter of context and background; conditions which come forward and reveal the utterance. This leads us to question how we can ever be certain we have "grasped" the rule.

The representational view of language; that "I" subjectively have the experience such as red-ness and then we all agree on an interpretation of red, is unattainable because there would be no possibility of establishing the internal relations between one's subjective interpretation, and its use as being in accord with the rule. Everyone would hold that they are applying the rule "red" correctly. This is the solipsist's problematic. Wittgenstein's point (PI §198) is that an interpretation is of no value except in the context of its application. Only where there is a rule established by custom, which can be gone for or against, is there room for interpreting its veracity.\(^\text{151}\)

In our comprehension of an expression, we are concerned with the meaning of a statement, the understanding of its use. This is not

\(^{151}\) Baker and Hacker, supra note 107 at 18.
to presuppose that grammar metaphysically connects a mind to a world, rather it is to presuppose that language and experience exist. The meaning of an expression is tied to the explanation we give for its use and the manner it is used.\textsuperscript{152} Understanding is tied to an ability to use the sign in accordance with its rules. This means that as we act, we do so with a sense of understanding. To speak of a rule we must agree both in judgments of our experiences (that red is red and not pink), but also definitions (that "red" signifies red).\textsuperscript{153} For Wittgenstein this is possible because we share a custom or practice which forms the logical framework of what we do. What we mean by a language is a customary behaviour, a form of action not thought.\textsuperscript{154} The foundation of a language is a normative regularity of conduct by the agent.\textsuperscript{155}

\textsuperscript{152} \textit{Ibid} at 43. Wittgenstein says at PI §43

For a large class of cases—though not for all—in which we employ the word "meaning" it can be defined thus: the meaning of a word is its use in the language.

\textsuperscript{153} \textit{Ibid.} What is perhaps the most, for me, perhaps the most profound statement in the PI is at §241

It is what human beings say that is true and false; and they agree in the language they use.
That is not agreement in opinions but in form of life.

\textsuperscript{154} Hacker in \textit{Wittgenstein Meaning & Mind,} An analytical commentary on the \textit{Philosophical Investigations,} Volume 3 writes: .."indeed there is no such thing as justifying grammar by reference to reality on the model of verifying an empirical proposition by reference to what makes it true. Grammar consists of rules for the use of words and has no such justification. It determines what we counts as possible descriptions of how things are in reality, fixing a logical space which the facts, so to speak, may then occupy or fail to occupy.", as quoted by Carena (unpublished), footnote 12.

\textsuperscript{155} Baker and Hacker, \textit{supra} note 107 at 21.
The "internal relations" which connect the agent to the world through action are derivative of the sharing of an experience. The sharing of an experience is that instant of where we attain the same conception about an act. This moment typically occurs at the moment of "naming"-the moment when one person is able to grasp the sense of an unknown reference through "training" by other human beings. It is in this sense that rule-following is the most profound of all human abilities, it is the ability to relate an experience, something that cannot be said but only shown. This union by gesture is the deepest intimacy.\(^{156}\)

Rule-following is embodiment in a practice or situation. It is not only that we each make the rule our own as we comprehend, but that it is our own—it is something we have experienced for ourselves, something singular. This knowledge of the rule is impressed through the application—the actual doing. We cannot fully be said to know the rule without this impression. It is in this that the being is engaged and becomes possessive of insight. By insight we mean that which connects the being with the world and its order. This insight attunes us to the way our world is structured, our way of being in the world.

\(^{156}\) It is in this sense that every word spoken, every act fulfilled affirms or denies the being. This is most true of children. Underneath language lies that which cannot be said. What cannot be said is the whole of experience. As we share the word within the act we affirm the unspoken, we create the world. World is created as we speak and as we act together.
It is because of this intimate nature, this embodiment, Hacker and Baker's version of rule following is more plausible. To rely upon the community consensus view is to resort to the idea of a metaphysic ideal; a rationality existing independent of our personal experience and understanding. It is in our individual grasp of language, established through a "quiet" consensus of shared experience, which proves the objectivity of our world. This is perhaps Wittgenstein's great "philosophical" insight. Agreement arises as we grasp meanings for ourselves acting in a community. This agreement however is not an internal property of the rule itself. Through interaction an understanding is established. It is this that is the wonder; that we experience the world so much the same. For Wittgenstein this arises out of sharing a form-of-life. We live and experience the world together. In this way we create world as a world where "language is the house of being".

157 Scruton [1981] at 284 suggest's that this completes the transcendental deduction. This argument, a conclusion to Kant, explains the natural world. In society we see that this "objectivity" amounts to the experience of the discourse. Derrida has responded to this objectivity with the "corruption" of the word—that no experience is ever identical with itself. There are always margins which constitute the other, another way of experiencing world. To answer this is well beyond me. However we must keep in the back of our minds what is language—what is it to do? Language is there, we must act in the world. Derrida's task is ultimately I believe to remind us about the marginal experience which can never conform to the "community standard" because it can never experience the world with the same "intimacy" of which I speak. It is forever alienated and disassociated by the community. In this, the margins remain outside of language.

158 Baker and Hacker supra note 107 at 75.

159 To use Heidegger's conception of language, see his Language, Poetry and Thought [1975].
The rule then is the ability to understand a practice. It acts as a *signpost* which directs us in future actions. Rules may not be clear but their resolution resides outside of "interpretation" because rules are affirmed in their execution. The internal relations of the rule itself (that is how the agent sees what is to be done and the act itself) establish that the justification of the rule can only be set out by an explanation.\(^{160}\) In other words the rule is constituted by whatever it is that is done as set out against the explanation given by the actor. It is in this that two myths are dispelled.\(^{161}\)

Firstly, the rule is not an objective reality—there is no rule of "red" which exists independent of how "I" grasp its use. We cannot justify grammatical connections by reference to reality.\(^{162}\) The rule of "red" is something learnt by repetition and patience. This is done within the form-of-life in which we live. It is within the form-of-life that red is a significant aspect of what we are. It is this significance that draws us to it and so calls upon us to name it. Without our utilization of colour, there would be no rule of "red". It is in this that the rule of "red" does not contain its own application.\(^{163}\) Under normal circumstances we do not interpret


\(^{161}\) *Ibid*

\(^{162}\) *Ibid* at 83. What justifies calling rubies "red"? That this is the correct application of the rule "red". What makes this correct? Nothing other than that's how we apply the rule "red".

\(^{163}\) *Ibid* at 123.
the sign when we use it. It is simply a signpost which we understand, without need of interpretation. To take a sign and isolate it for interpretation does away with the sign.164

Secondly, there is no "correct" application of a rule which comes from a mental act of meaning alone. The meaning of the rule comes to us by virtue of how we have learned to use "red", not by virtue of recognizing what red is.165 The way I act is part of the criteria for understanding (going in accord with) a rule. I act because it is something I understand how to do. We admit with Malcolm that community consensus is part of why we choose to do what we do.166 There is what Wittgenstein calls "consensus in

164 Philosophical Investigations at §219
"all the steps are already taken" means; I no longer have any choice. The rule, once stamped with a particular meaning, traces the line along the whole of space.—But if something of this sort really were the case, how would it help? No; my description only made sense if it was to be understood symbolically.—I should have said: This is how it strikes me. When I obey a rule, I do not choose. I obey the rule Blindly.

165 To emphasis this point Wittgenstein starts his Investigations with the Augustine concept of naming (see PI §§1-3). This comprises that an object is ostensibly defined. In this, every word has a meaning. Yet Wittgenstein moves radically away from this picture. Imagine a red teddy bear. I point at it and say to the child "red". What is the child to make of this? How do they view my finger—from the nail to the joint? First they must learn what it is to point! Then we discover the bear. Does "red" refer to the bear, the shape, its material, its nose? No, to learn "red" we must show many examples, many shades, which eventually lead to the recognition not what red is, but rather that "red" is used to indicate red. The child can already see red.

166 Norman Malcolm, Wittgenstein on Language and Rules [1989]. I must agree here with Michael Lynch that Hacker and Baker have perhaps been too "zealous" in advocating the internal relations argu-
action". It is by this that we mean rules arise through actions which are a social relation. We act together in "quiet agreement" within a form-of-life which constitutes the framework of what we are.

The background of a rule rests in customary response—not intellectual understanding but an unreflexive reaction. In this way rules lose their hold on our attempts to provide an explanation for rational thought and action. They do not transcend the presuppositions of our actual understanding. Our understanding is our


ment. We live in community and accordingly, we seek to fit in and belong to community. In this we tend to let our own identity "give way" to cultural norms. But this in no way diminishes the main point of the internal relations argument. Rationality is ultimately the ability to accomplish things for ourselves—to make sense of what we do. Malcolm is a great variance with Kripke's reading on Rules.

167 See J. C. Edwards, Authority of Language [1990] at 167-8. Smith supra note 73 points out the Greek presuppositions found in our Law's Roman origin. "Roman law contains concepts which are theoretical, having "image-less" logical rather than "image-ful" naive realistic properties." This transformation to law as science is revealed in his quote of Savigny at 312:

"The conceptions and rules of their science do not seem to them to be products of their own creation—they are real beings, with whose existence and genealogy they have become acquainted through long and intimate association. That is why their whole procedure is tinged with an assurance not found elsewhere except in mathematics, and it is no exaggeration to say that they make calculations with their conceptions."

What will be of interest will be the effect of opening up the judiciary to "non-insiders"—those whose experiences in life do not conform with the traditional characteristics of the legal profession; women and minorities. How will their backgrounds come to play in legal practice? If Law itself remains unchanged we may find that, in adopting the role, the impact of their views is mitigated by a belief in the system as system.
ability to relate to our social world in a way that makes sense within it. If my actions does not accord with the "rule", I am simply doing something else.

The following of rules is the open-ended regularity which is necessary for language to work—what we are trained in must be capable of going further than the set of examples we learn. This capacity sets out our actions as rational in contingent circumstances. What a practice needs to be able to accomplish is that we can go further on together. 168 In justifying what we do, there must be an explanation which satisfies others.

This lends itself to question the Kantian notion of the autonomous being—we assent to or reject the rule—which identifies rationality with moral freedom. To represent oneself metaphysically as a rule follower then is to make a choice of the rule as one's own—to recognize oneself as the determiner of the principles upon which one acts.

From our examples we see however we cannot determine for "myself" the ground upon which language rests within the language-game itself. Language is social. Experience always contains unforeseen contexts upon which our language is, and must be, rich enough to respond. What rule following is about is explaining or justifying

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our behaviour. It is to give explanations for why we do what we do. The need for explanations and conceptualizations is a fetish of both philosophy and law—a need for rational explanation where none is available.

2.6 The Origin of the Legal Fact

If a lion could talk, we could not understand him.

The evolution of legal theory illustrates the growing recognition of the importance of understanding the relation between language and reality. As this thesis is concerned with the construction of legal reality, we must consider how the practitioner understands the process of law and speaks a legal language, rather than how law is. How the law "is" is to be left within the representational domain of legal theory. This section will deal with the resolution of the hard case within the thinking of rule-following.

Contemporary accepted theories of how judges decide hard cases have

169 We seem to need the security of certainty. For us, certainty resides within rationality—a belief that things are so because they must be so. The search for certainty, from the Greeks on, has been the search for absolutes. Wittgenstein's real point is that we can be certain of things in our world, but there are no absolutes because nothing we do is tied to truth.

"How am I able to obey a rule?"—If this is not a question about causes, then it is about the justification for my following the rule in the way I do.

If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do." §217, Philosophical Investigations.

170 Wittgenstein, Philosophical Investigations at 223
incorporated a positivist perspective.\textsuperscript{171} H.L.A. Hart has argued that "Hard cases" are determined by the judge exercising a discretion.\textsuperscript{172} Law consists of the primary social rules which are to be found in any society by virtue of being a society where there are norms of interaction. With this there evolve secondary formal legal rules which impose obligation. The assumption is that legal rules have a clear core meaning. Beyond this core meaning drifts into ambiguity, and therefore uncertainty. The lawyer therefore must attempt to characterize the facts as falling within this core. If the lawyer is successful, then the judge must apply the rule, even if the result is irrational (the "rule of recognition"). If the lawyer's characterization takes the situation outside of a core meaning, then the judge must legislate.

Ronald Dworkin argues that law is more than rules, it also consists of principles and policies.\textsuperscript{173} Here the judge is to weigh or balance the interests of the parties and must find for the more important interest. This appeals to an objective standard which lies within the law and remains for the judge to find.

A current approach to legal rationality is based on a coherence

\textsuperscript{171} Smith and Deedman, supra note 6 at 87
\textsuperscript{172} H.L.A. Hart The Concept of Law [1961] Chapter VII.
\textsuperscript{173} Smith and Deedman, supra note 6.
theory-law as a narration.\textsuperscript{174} This notion of creating the world by interpretive or hermeneutical understanding is an idea that knowledge can be derived through language which is embodied in a sense of purpose—a sense of social actions. This current turn to an intersubjectivity in communication and meaning (that is to say, the 'interpretive turn') is a further attempt to found a rational discourse which makes the break from positivism.\textsuperscript{175} Dennis Patterson has endorsed this model applying a Wittgensteinian approach to rule following.\textsuperscript{176}

\textsuperscript{174} This approach is expressed by Dworkin in "Law as Interpretation" 60 Texas Law Review 527 (1982), and see also his "Law's Empire", particularly chapter 2; also the anthology of Stanley Fish, \textit{Doing What Comes Naturally}.

With the recognition that understanding is tied to culture, and therefore becomes a hermeneutical viewpoint, theory attempts to restore the possibility of a rational discourse. This theory is put forward for two distinct tests for coherence; "normative" coherence which seeks to justify legal rulings, and "narrative" coherence which seeks to justify findings of fact and inference from evidence. As MacCormick posits, Coherence is always a matter of rationality, but not always a matter of truth. See Jaques Lenoble "Narrative Coherence and the limits of the Hermeneutical Paradigm", at 135-139.

\textsuperscript{175} This phrase (from Jaques Lenoble, "Narrative Coherence" at 138) refers to the turn away from a representational view of language to that of an interpretative methodology (perhaps best characterized by the differing hermeneutical philosophies of Habermas and Gadamer) derived from our lived-experiences which begins in the thinking of the later Wittgenstein. See Rorty on this in PMN. MacCormick suggests that "Hart's primary distinction as a legal theorist is that he introduced the hermeneutical method to our jurisprudence." See N. MacCormick and O. Weinberger, \textit{An Institutional Theory of Law - New Approaches to Legal Positivism}, at 135. The theory consists of two coherence criteria; normative and narrative (factual).

\textsuperscript{176} Dennis Patterson's "Law's Pragmatism: Law as Practice and Narrative", in \textit{Wittgenstein and Legal Theory}. I refer also to two other writers who have considered Wittgenstein's thinking; Hart's well-known \textit{The Concept of Law}, and Alexander Carnera in his
In a recent article on Wittgenstein, Dennis Patterson examines the Kripke/Hacker debate on rule-following. Mr. Patterson accepts the merits of both positions but then suggests that:

"...the determination of what a legal rule requires is arrived at through the disclosure of the point of the rule in a legal system, a 'disclosure' that is essentially a matter of social anthropology. In order to follow a rule, we must know the reasons why the rule exists as part of the normative structure of law."\textsuperscript{177}

He distinguishes social practices, such as law, as having prescriptive as well as constitutive elements. That is to say he argues that a social practice such as chess as a game is constitutive; identical and co-extensive with the sum of the rules. Law on the other hand, with "primary" and "secondary" rules, embraces what Hart describes as a "critical reflective attitude" that entails criticism, conformity and justification.\textsuperscript{178}

In contrast to games, normative practices like law provide for the evaluation of conduct by reference to norms that are analytically antecedent to the rules that embody them. Norms are embodied in legal rules that are comprised of concepts having the character of "open texture".\textsuperscript{179}

Prescriptive rules state "ought" conditions. It appears then that it is this moral constituent which lies as the reflective criteria. This model of rule following adheres to Dworkin's "Interpretative Attitude" in \textit{Law's Empire}.\textsuperscript{180}

\textsuperscript{177} Ibid at 96.

\textsuperscript{178} Hart, \textit{supra} note 172 at 56.

\textsuperscript{179} Patterson, \textit{supra} note 176 at 97.

\textsuperscript{180} Dworkin, Chapter two, "Interpretative Concepts" at 45
Having tersely, and hopefully not prejudicially, set out Patterson's premise, we will seek to place this within the current debate between knowledge-as-practice (ethnomethodological study of work (ESW) as held by Garfinkel/Lynch) and the knowledge-as-science school (the sociology of scientific knowledge (SSK) set out by Barnes, Bloor and Shapin) which incorporates the arguments of the previous section.\textsuperscript{181} Although both camps incorporate Wittgenstein's thought, as with any expropriation, their fidelity should be questioned.

Lynch sets the rule-following debate as being between rule-scepticism; that the relation between rules and conduct is indeterminate, and that it is social conventions and learned dispositions which account for rational conduct, and antiscepticism; that rules are inseparable from practical conduct.\textsuperscript{182}

We will place Patterson within the rule-scepticism camp because we see him as placing meaning as isolated from the practical exper-

\textsuperscript{181} For a current assessment of the state of this debate, see Andrew Pickering's anthology \textit{Science as Culture and Practice} [1992].

\textsuperscript{182} Michael Lynch, "Extending Wittgenstein" in \textit{Science as Culture and Practice} [1992] at 217. Lynch falls squarely into the antisceptic camp. He places rules for the ESW as being an internal relation (and hence determinate based upon the criteria set out for an act), while he places Bloor and the SSK camp as being sceptics and constructionists.
ience of the agent who constitute's the rule. While this may well be the appearance of law, as seen in legal doctrine, we argue it is not the actuality of law. "Interpretation" reveals the problem raised in our discussion on theory underdetermination. If we cannot explain an action based on the facts (because they are always inadequate) how do we relate the point of law?

The effect of the antisceptic argument is to place, as we have seen in Foucault's inference, that institutional practices establish meaning through ostentation (the point) rather than the social (internal) conditions which give rise to language use. Social value is thus consigned to the wisdom of the institution. The means of verification is precedent. The sceptic effects closure between the rule and the practice using the (external) convention of judicial arbitration which lies outside of the practice itself. Yet we

183 I could paraphrase Kripke here and say "Patterson, as he struck me." His sociological stance is set out by his initial assertion that ". . . what constitutes acting in accordance with the rule is determined by the point of the rule and is analytically and specifiable apart from the rule." I do see his initial stance however as being "constructive". By this I mean that Patterson is attempting to inject a validity or justification for legal rules which lies outside of the practice itself. Patterson adheres too closely to Hart. I am not sure if Patterson has acknowledged that Hart, who although he uses Wittgenstein's thesis, does not draw the radical consequences of Wittgenstein's ideas i.e. Hart sees law as a unity of rules. As a positivist, Hart continued to hold to empirical criteria as a means of justifying legal validity. This is a point brought out by both Smith [1976] and Carnera [1992] forthcoming.

184 We shall, in the following Chapters, give an description of language use which suggests the effect of institutional thinking. We recognize that language is figurative. We agree with Foucault (and Heidegger) in that Institutional thinking takes its precedents as literal interpretations of reality. The position we are
see that this point gets ahead of itself. From where does this institutional thinking arise? The question we must ask is; what is the origin of the precedent?

As lynch notes, the critical move for the sceptic is to isolate the formulation of a rule from the practice which it formulates.\textsuperscript{185} This is Foucault's point. Once we are left with merely the literal form of the rule, we are forced to interpret the rule in its extension. That is the explanation of the rule is made outside of its application through a social construct. Wittgenstein sought to dissolve this kind of "foundational" dilemma (i.e. the realist-antirealist debate) by the examination of grammar in which such practices are conducted.\textsuperscript{186}

If we think of Chess it really makes no sense to think of it as a

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attempting to put at this point in time is for those cases where goal values are legitimately uncertain; the so-called hard cases. The hard-case is where there is no institutional position that the judge can readily speak. It is something which calls for a decision.
\end{quote}

\textsuperscript{185} \textit{Ibid}, note 181 at 226.

\textsuperscript{186} When we speak of a "rule" we are saying there is a way of going on. If I have a formula such as \(X_n + 2\) then to doubt the following of the rule is not to doubt its application but rather it is to doubt that there is such a thing as a "rule." At §189 Wittgenstein asks "But are the steps then not determined by the algebraic formula?". So the question is miscast. To follow a rule is to follow something within what the rule itself sets out. The question then turns to simply whether it is correctly applied. This is not a question of interpretation but of knowing the rule. §189 then is a question which presupposes an independence between the rule and its application, i.e. that rules are "entities." This is the Platonism which Wittgenstein sets out to refute. See Lynch at 227, also Baker and Hacker, supra note 107 at 74.
collection of rules which comprise its self-identity. Chess, like all games, is social activity involving strategies and decision-making. Rules are about explaining the parameters within which an action within the game occurs. We cannot think of a game as a game without an already present notion of what games are. In this sense it is wrong to say that a game is the sum of its rules.\textsuperscript{187} Do we perceive Law as something other than a phenomena arising from our social world?

Smith and Coval have set out for us that decision-making is tied to the functions of agency and the set of values to be found within the relations of its practice. What we must ask when a legal decision is made is: Of what does the Law speak? The being of the law must come before the speaking of the law. We have been tempted to see law as something separate from the activities which it regulates, as if it sits atop of our social life guiding us in our steps. When we wish to know "right" from "wrong", we find this in "Law" itself. This picture is reinforced by the way we "do" law. We look at statutes and precedents to validate what it is we say. Yet there is a certain fallacy to this. The presupposition fallacy (which Patterson, like Hart before him, falls into) is that because

\textsuperscript{187} At §68 (PI)

For how is the concept of a game bounded? What still counts as a game and what no longer does? Can you give the boundary? NO, you can draw one; for none has so far been drawn "But then the use of the word is unregulated"—It is not everywhere circumscribed by rules; but no more are there any rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all that and has rules too.
the "Law" speaks that it in some way exists independent of our social life. This is the fallacy which arises if we fail to recognize the true relation between language and reality; that language is a cultural artifact.\footnote{188} The speaker of this language is the institution itself.

In looking to Patterson's position we see that it flows from Winch's early sociological study of Wittgenstein.\footnote{189} Winch shows that human beings follow rules because they "know the right way to go on from their training."\footnote{190} Winch contrasts this to dogs who learn tricks and are merely acting the same way based on past behaviour. It is this example which is to show us the difference between the dog's stimulus-response and the human being's "critical reflection".\footnote{191} Dogs then are without an origin, without a history.

\footnote{188} Hacker, in \textit{Meaning and Understanding} at 614, canvases Wittgenstein's treatment of the effects produced by a machine. The point here is to distinguish the ability of the object and its substantial form, to point out that the ability is not identical with the object. "science explains powers by discovering underlying structures, but it is a mistake to think that it reduces powers to the structure of their vehicle." at 611. This is a revolt against reification of grammatical concepts [such as "mind" or "law"]. It is instead that through our construction of law and world in the legal case that we provide a sense of what it is we experience.

\footnote{189} Peter Winch, \textit{The Idea of Social Science and its Relation to Philosophy} [1958], particularly pp.24-40, and pp.62-64

\footnote{190} \textit{Ibid} at 62

\footnote{191} This argument sounds very much like G. E. Moore's attempt to prove the external world to the solipsist by arguing that the hand in front of him is his own, and he "knows" (i.e. has a conscious object) that the hand in front of him is his own, and that everyone else knows it too. We know rules by applying them correctly in the present situation. A dog behaves like this no less than a person. A dog seems to able to grasp the point of learning tricks. We call
Hart's "critical reflection" leads us to examine our history. In looking to law's doctrinal discourse, Hart finds "open-texture" terms which are unintelligible without context structuring. However if we are speaking about a rule following practice, then the rule itself must be practically rational or else it is makes no sense to speak of "rules" which constitute a practice. This is that the extension of the rule, its future application, is internally connected to how we apply a rule. Patterson states that it is Hart's critical reflection which separates what is a rule in law and in chess.192 Yet this reflection only arises if we see law as separate from the actions of its concern.

David Bloor points out a weakness of Winch's argument, which also suggests a problem inherent in Patterson's approach.193 Bloor suggests that Winch, unlike Wittgenstein, tries to draw boundaries around our social behaviour.194 What Dworkin, Hart and Patterson do is to set out that the judge is free to discover the "proper"

dogs "intelligent", "clever" and such. It's merely that we don't attribute human thinking to a dog. There is much argument (Bloor, Putnam) that suggests Wittgenstein wants to look at human response and action as a biological derivative. Dogs are presumably firmly in the ethnomethodological camp.

192 Ibid at 96-7

193 David Bloor, Wittgenstein: A Social Theory of Knowledge [1983], in chapter 8 "Positivism and Social Pessimism".

194 Ibid at 173
interpretation of the rule.\(^{195}\) The community-consensus construct implies there is an authoritative (i.e. "correct") position which eliminates the so-called indeterminacy of multiple perspectives.

Bloor points out that rule-following is about the agent acting rationally. To reflect on this rule other than in its application means that we must follow another set of rules; the rule which, for Patterson, tells us what the point of the rule is, a rule which is revealed through an interpretation.\(^{196}\) It was this observation

\(^{195}\) For Habermas it would appear that in order to interpret, the observer is to renounce the privilege position of the observer, they are to become involved. In becoming involved in communicative acts the observer assumes in principle a status identical to the people whose statements they seek to understand. This understanding then, like law, is undertaken in every speech act, in every case so that reality is reconstructed. The consequence would appear that the validity of the normative proposition is not truth (which can be neither verified or falsified) but "rightness". This rightness then is dependent upon the carrying out of the argument rather than the monological play of thought. The argument must constitute an "ideal" speech act where every avenue is open for interpretation. Such a universalization is contingent upon the pragmatic presuppositions by which meaning is deduced. This is clearly an idea in the Kantian sense-a transcendental ideal. It is a model which presupposes a critical self-reflection which can then progress to the ideal of transparent communication. This is firmly rejected in Gadamer's hermeneutic model in which all reference is prejudiced. In this Gadamer rejects the possibility of a meta-language within which questions the link between legitimate action and truth (through reason) which Habermas seeks to obtain. See Lenoble's "Narrative Coherence" at 141-157.

\(^{196}\) This is Winch's conclusion, supra note 189 at 85: "The Phenomena being investigated present themselves to the scientist as an object of study; he observes them and notices certain facts about them. But to say of a man that he does this presupposes that he already has a mode of communication in the use of which rules are already being observed. For to notice something is to identify relevant characteristics, which means that the observer must have some concept of such characteristics; this is possible only if he is able to use some symbol according to a rule which makes it refer to those
which led Dworkin to argue that the sceptic cannot both attack the ground upon which rests our moral values, i.e. the belief that slavery is a bad thing, and at the same time hold these moral values herself.\textsuperscript{197} The belief that reflection is required in rule following separates the actor from the act. It severs the internal relation between acting and understanding.

To ascertain the point of the rule through critical reflection creates an intractable problem.\textsuperscript{198} To place the reason for a rule requires that we must observe; we theorize a judgment about the concept. Yet Winch has told us that to observe we must use concepts which make the act rational.\textsuperscript{199} For Patterson, it is a matter of "constructing a purpose or rationale for law."\textsuperscript{200} Yet if we separate the rule from the act, we deny the understanding of the agent (i.e. those who "do") for the understanding of the jurist (those who "know"). This understanding is indeterminate. It is the agents understanding, set against a background of customary characteristics.

\textsuperscript{197} Dworkin, supra note 174 at 82-3.

\textsuperscript{198} Bloor, supra note 193 at 175.

\textsuperscript{199} Bloor points out that Winch's approach to culture is similar to Kant's transcendental unity of apperception (see Chapter One, note 17, supra). To see the world, for Winch, requires an a priori structure of the mind and an organization which is imposed upon the data of experience. Spengler and Derkheim posited this as historical and cultural. It is however precisely this kind of transcendental argument which Wittgenstein is attempting to escape. See Bloor, \textit{ibid} at 175.

\textsuperscript{200} Patterson, supra note 176 at 99
practice that counts as being in accord, or going against the rule. It is this language of the agent which sets out the law.\textsuperscript{201}

What is required then for legal validity is to show that law conforms with our way of being in a community, our form-of-life, and not be seen as the imposition of a \textit{particular} point of view. This "point" of view is always the obstacle to legal validity and not its verification. A point of view arises when we are not embodied in the action itself. To see this is to see that we do not act because of the law rather we act within law. What counts as criteria for following the law is set out in the action itself. Obeying the law is tied the explanation for our actions.

Putnam relates that an institutionalized use of language (within a language-game) is necessary for language (or thought) to have any meaning at all.\textsuperscript{202} What I think I mean must fit with what I mean,

\begin{quote}
Smith and Coval, supra note 49 at 98-99 put it this way in setting out the language of an action:

The manner in which we must particularize an event is with descriptions which refer to it uniquely. The event we want will have to satisfy that description, namely that it is the event which in the particular circumstances of its occurrence...will satisfy the events within the agent which caused it.
\end{quote}

What is being suggested is that if the law is connected to regulating actions (and therefore goals) of agents, it must do so through the language which particularizes the event. Otherwise it is not regulating that action. The law therefore is derivative of the activity itself along with the goal-matrix which constitutes that activity.

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\end{footnotes}
and my thoughts fit within a language. When I say, with Putnam, that "Cats don't grow on trees", I am sure that cats are what they are because I don't think of a cat any other way. The truth "value" of this statement cannot be justified any further than by the fact that cats don't grow on trees. Institutions, to make any sense at all, develop a use of words tied to the rationality of what it is they speak.

Legal language is used to sanction the function of agency from which law is made manifest. As is implicit in Wittgenstein's treatise, while we can observe that judges make verbal utterances, we cannot be sure from a detached perspective what rule is being applied. To understand a concept is to understand the grammar for its use. Legal rationality is to be grounded within what constitutes acceptable actions and goals.

Our presupposition is not that we must reveal reality through legal argumentation, but that we use legal language to justify actions which are already set out in social practice. When we seek, in the manner Patterson does, "what is the point of the rule?" by examining with Hart for a construed rationality, we risk mistaking a justification of the imposition of legal force with the validity of the rule itself. The point is already set out within the Action. An Interpretative methodology is an attempt to inject humanism in the law. We argue that the language of law is not interpretation but rather that it is authoritative; constituted to enforce the
relations between agents.

Smith puts it that for law "the social pressure generally entails coercion through the application of authorized power or force." If we recognize Smith's argument, then legal language is part of the practice of rule following but it is not the rule itself. Law cannot be validated by reference to its stated rationality. Language follows understanding.

We come to what is basic in our understanding. What is most basic is what we do, the everyday activities of our lives. The attempt to get beyond this subjective aspect of our lives leads to presuppositions about the world which are unverifiable. An objective account of the world cannot get us beyond the subjective account which constitutes this world. What is objective for us is the social plain within which actions take place. A subjective account cannot make sense outside the world which gives subjectivity its place.

Any argument for a "ground" for a rule is to miss Wittgenstein's key point about rules. Rules are reasons. We get no further using rules to justify a rule. There lies nothing below the meaning human beings give the world. In this we say that law is about "what we

203 Smith, Legal Obligation at 31. See also the point made earlier; Derrida, supra note 7.

204 This is the main point Dwyer makes in his Sense and Subjectivity [1990] which is an interesting assimilation of Wittgenstein and Merleau-Ponty's methodologies.
Rule application is not a matter of interpretation. There appears to be no rule, no circumspection, which can fit over both what the law says and what it does.

Wittgenstein recognized that the hardest thing for us to realize is that there is no ground to explain why we are: to give a "true" meaning of why we do what we do. In *On Certainty* at §110 he states:

"What counts as a test?—"But is this an adequate test? And if so, must it not be recognizable as such in logic?"—As if giving grounds did not come to an end sometime. But the end is not an ungrounded presupposition: it is an ungrounded way of acting."

In *Philosophical Grammar* (§244) Wittgenstein remarks that "You can't get behind the rule because there isn't any behind." The world gives us truth, and human beings give meaning. Life just is.
Chapter Three  The Real as Reasons: Aspects of Explanation

3.1 Interpretation and Expression

We possess art lest we perish of the truth\textsuperscript{206}

We have suggested that law is tied to practical action. In this the understanding of legal language is an ability to effect goals. These goals are constituted within our form-of-life. When agents act they affirm a rationality which is derivative of social practice.\textsuperscript{207} Legal language is to be seen as an artifact of the social world. We have suggested one thematized understanding of law as purposive; law manifests as the ordering of agent actions and goals.

We will now consider the legal qualification of an agents' action. We have seen that to follow a rule is tied to the explanation we give for an action. An action can be interpreted by the various

\textsuperscript{206} Nietzsche

\textsuperscript{207} As Heidegger tells us, expression reveals itself as such only because it is previously understood as expression, that Language already speaks. Experience (Erlebnis—the sense of immediacy) therefore cannot transcend itself—it is in the sphere of subjectivity in that language refers back to the "I" (who has learnt its use).
aspects or the sense of the situation.\textsuperscript{208} The role of the lawyer is to articulate the intelligibility of the sense of the situation that accords with the client.

In this we mean that the lawyer is concerned with justifying agency: showing that the agent acted in accord with a rule. It is in this that the lawyer becomes concerned with facts. By tying the actions of the agent to customary practice, the lawyer seeks to place the an event within the rule. In this the lawyer constructs the legal reality of the agent. This we might call an act of imagination.\textsuperscript{209} Legal understanding is the capacity to see the relationship between actions and the creation of legal concepts.

The articulation of law is derived through the use of analogy. Analogy is used in law as a means of predetermining the content of the legal debate. It transforms the facts of the external world to

\textsuperscript{208} We have already noted in Chapter two that, for the actor, there is no gap between an interpretation and its application. We mean what we think we mean. We believe what we think we believe. This is not something thought like an opinion. It is reflexive. Interpretations are a social element. They are a form of knowledge. An interpretation acts as the signpost to the rule. Without applying the rule, the interpretation "hangs in the air" (\textit{PI} §198).

\textsuperscript{209} Sartre, in a line of thought we will reject in section 3.3, characterized the imaginative act as constitutive, isolating and nihilation of the world. Sartre means that in imagination, a self-reflective conscious attitude towards the world, we posit the object as existing somehow apart from the world. In this way we create world as world. Before consciousness, there is only the undifferentiated being-in this way the imaginative function is the same as conscious in general, its essence, its means of distinguishing itself from world. See Sartre, \textit{The Psychology of Imagination} [1991], in the chapter on Method, and \textit{Being and Nothingness} [1966], the Introduction, "The pursuit of being".
possess a legal meaning. It can do this because analogy resembles
the real world. This resemblance rests on the belief that you can
compare that which exists in the external world to that which
already exists in the legal discourse. This represents the fusion
of experience with legal knowledge. In this fusion we create
likeness within the context of what we, the lawyers, already know.

The use of case law doctrine articulates a representational image
that creates the basic meaning in the legal domain. This way of
arguing reflects a circular picture, that is, a mirror of the world
which is in its essence a reflection of the "legal self".

Legal knowledge is ultimately, for the lawyer, about acting in
order to resolve situations. The lawyer adopts a certain attitude
about what is open for them within the context of legal situations.
When we consider the role of computer technology within the
practice of law, we are to consider the computer's utility in
assisting the lawyers to satisfy the legal situation.\textsuperscript{210} In this,
Gadamer has recognized a separation of the cognitive from the
practical aspects of discourse\textsuperscript{211}:

\begin{footnotesize}
\begin{enumerate}
\item For perspective on Artificial Intelligence which seeks to set
out an approach based on situational context, see Winograd and
Flores Understanding Computer's and Cognition [1986]
\item Dallmayr points out supra note 11 at 1462 the linkage of under-
standing and praxis has implications for the approach to all human
science.
\end{enumerate}
\end{footnotesize}

In both legal and theological hermeneutics there is the
essential tension between the text set down—of the law or of
the proclamation—on the one hand and, on the other, the sense
The jurist understands the meaning of the law from the [vantage of] the present case and for the sake of this present case. As against this, the legal historian [theorist] has no case from which to start, but he seeks to determine the meaning of the law by considering constructively the whole range of its application.\textsuperscript{212}

What the lawyer necessarily does in a legal situation is to interpret and apply legal text to the facts of the world. It is in the interpretation itself that the meaning of the text is made concrete. In this the lawyer sets about seeing the world intentionally, with a purpose of making it her own. Reading the text is with the necessity of making the text conform with how the agent acts in the world, and in conformity with how the lawyer understands the legal presuppositions. It is in understanding the presuppositions that the lawyer reveals imagination; the ability to see the text creatively and to construct a legal reality.\textsuperscript{213}

arrived at by its application in the particular moment of interpretation... (Gadamer, Truth and Method at 275).

\textsuperscript{212} Ibid, See Gadamer at 290. Dallmayr argues that for Gadamer this does not suggest an objective versus a contingent meaning of law. Neither the jurist not the theorist can fully extract themselves from a practical engagement with the law. Gadamer's point is that we are embodied within the present, we are in a temporality. How can we know the change in circumstances which give meaning now, the meaning previously? As we have seen from Wittgenstein's contribution, we can only understand a situation by "grasping" or understanding the constitution of its content which gives that situation its meaning—it is a lived experience dependent on how we come to know the world through being in the world and engaging in that world. The problem Gadamer notes is that "...when faced with any text, we have an immediate expectation of meaning." (Truth and Method at 292).

\textsuperscript{213} The genius of the lawyer is that they are obliged to express a world in which they are not part, to speak of something they themselves are not engaged. The lawyer is not a mere observer however in that a case is presented with a client. The ability of the lawyer is tied to this relationship and the ability of the lawyer to understand the client's case. The "expert" is one who has
Hermeneutics is the recognition that the individual is embodied within a social and cultural life. This life is largely mediated to the individual by social practice. It is because of this that history; traditions and pre-understanding, cannot be eliminated from an individual's perspective. As a social being we are bound within an ideology. Hermeneutics then, according to Gadamer, is not merely an approach to interpretation, but rather becomes the very means to knowledge. There is in dialogue a "fusion of horizons" between the subject and object. The fusion is contingent upon the presuppositions speakers bring with them. Gadamer phrases it that "In the course of our reflections we have come to see that understanding always involves something like the application of the text to be understood to the present situation of the a deeper understanding of the actions of the agent and the application of law. Genius lies within the rhetoric they bring to bear on the dispute.

214 Hesse supra note 8 at 180 in Chapter 9, "Interpretation and Reality". Hermeneutical Phenomenology recognizes that the its product is the interpretation, it is not a methodology.

215 Wilhelm Dilthey, in his later works, suggests that the historian need not see the text limited solely to an object requiring an extraction of the psychology of the author. In his theory of the "Geisteswissenschaften" he recognizes that the events we experience as presented to our conscious (i.e. intentions, ideas, emotions) are private for us. Yet humans, in the very act of expression, objectify this in the intersubjective world, as for example in a work of art. It is this objectification we understand—"We call understanding a process by which, thanks to the sensually perceptible expressions of mental life, the latter is made known". Understanding becomes perceptible, a consideration of the expression-consciousness is no longer transparent to itself but tied to a social, cultural, artistic product. See Stephan Strasser, Understanding and Explanation [1985], at 5ff.
For Gadamer all text is situational. It is subject to new interpretations and meaning which are contingent upon our orientation and perspective. Interpretation becomes a dialogue between the past and the present. With this view of the world, a reconstruction of meaning for "truth" must be abandoned. Gadamer puts it that cultural variations merge into "understanding". Each case is a reappraisal of "truth" where social goals are in contradiction. Meaning is circumscribed within the parameters of the legal


217 Habermas warns us here however that we cannot deny the effect of ideology in language. We must be sensitive to the negation it imposes on the non-dominant class. We are therefore confronted with the challenge of giving voice to that experience which does not speak within the language. This is his quest in the search for a consensual ideal speech act.

218 Fish [1989] points out in "Working on the Chain Gang" at 95, that Freedom of mind and independence of text embodies legal realism and positivism, something Dworkin particularly denies. He summarizes at 102 that:

"In order for a case to appear readable independent of some interpretative strategy consciously employed, one must already be reading within the assumption of that strategy and employing without being aware of them, its stipulated ... definitions, terms, modes of inference, etc.... I would be denying the distinction between hard and easy cases, not as an empirical fact (as something one might experience), but as a fact that reflected a basic difference between cases that are self-settling and cases that can be settled only by referring them to the history of procedures, practices and conventions. All cases are so referred (not after reading but in the act of reading), and they could not be anything but so referred and still be seen as cases."
discourse because every social practice is subject to a change in the dynamic which creates the rule.

The Romantic notion of empathetic understanding—with its concern for reproduction—gives way to the active or productive interpretation, as exposed by Nietzsche (active within the notions of common sense).\textsuperscript{219} This is an important aspect in that it is a mistake in interpretation of a text to see it as the recovery of the mind of the author. Because no situation is ever identical with itself we cannot re-create the setting of the text. For Gadamer, there can be no independent validity for each element of understanding between the theoretical, practical and the aesthetic.\textsuperscript{220}

The notion of determinacy within a text appears entwined with the

\textsuperscript{219} McGill, supra note 25 at 20ff.

\textsuperscript{220} Ibid at 24. Gadamer, echoing Heidegger, argues for aesthetics because art is the attempt to bring in the unspeakable, the background within which we dwell, into a communicative form. We are to realize this message is recognizable only for those who already dwell there.

In On the Way to Language [1982], at 17, Heidegger suggests that Japanese culture and 'the film' are incompatible because the mere framing of a film forces an objectiveness onto the sphere of the world. This, the product of mechanistic art, destroys that which it attempts to capture. The 'gesture' in the work of a No-Play (the traditional japanese form) is what creates the space within which the art occurs. Walter Benjamin has previously recognized this effect in an essay entitled "The Work of Art in the Age of Mechanical Production." There we see how the modern western actor is turned from creator to object as the camera destroys the element of distance, of space, which is so important in the japanese No-Play. To understand this is to understand that the world is never empty, it is never devoid of meaning. Emptiness becomes an encounter in which we bring present that which is concealed.
principle of identity. As we have argued, it is not the rule which causally determines an effect but rather it is the manner in which the action is explained, how the action is said to be what it is, that concerns the lawyer. It is how we make sense of the world. The "intentionality" of this meaning is directed by my purpose. It is this purpose (telos) which must guide the lawyer in

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221 Staten, supra note 16 at 131-135. Eagleton supra note 43 at 82-86 sets out Hirsch's alternate position which moves for the preservation of the text independent of the reader—the meaning is purely the author's without alteration by a reader. Hirsch argues that without a rigidity of the rule, there is no norm of interpretation. In a world of public language we may ask if it makes sense to speak of meaning as being one's own. A problem with his position is that we cannot know outside of our own hermeneutics what a text means, what the author intended. It always is interpreted in time, within a temporality. Hirsch is attempting to circumvent complete relativism—where there is no fixed meaning.

Staten (at 140ff) sets out Hisrch's phenomenological approach to meaning. To preserve determinacy it is, for Hirsch, necessary to construct meaning as an object which is of, and belongs to, a conscious subject. In rendering meaning as an object, Hirsch wishes to detach psychologism from the text (which would be variable and unstable). Hirsch draws upon Husserl's phenomenological distinction between the act of conscious and the intentional object of consciousness (see footnote 24, supra). Verbal meaning, as intentional object, remains stable across the accidentally varying moments of consciousness of the intending subject.

The verbal meaning is a theory of "type"—a class concept independent of its actual embodiment in a specific instance. It is in this that verbal meaning is sharable, a possibility of multiple applications or contexts. This application—its determinacy—is construed by the interpreter through an act of will. My will makes my meaning my own. In so exercising my will I have created then the intentional object which is embodied within the text. The reader to construe the meaning of the text must be subservient to my will.

222 What Kant saw is that in applying thought to experience, we cannot avoid to some degree a conceptualization. It is language then (the naming) which subdues the object it creates. So in thinking we subdue what we seek, so that we can never actually attain the goal of the thing itself. See Heidegger, supra note 19 at 25.
the interpretation of the text.\(^{223}\)

Those who argue that law is indeterminate focus on the word which is incomplete and therefore ambiguous. This ambiguity is the fountain of indeterminacy. For the Rhetorician however the partial definition is what enables thought.\(^{224}\) In classical Rhetoric it is the play or invention which enables multiple judgments to be applied in a situation which has multiple possibilities. This play is facilitated by relative indeterminacy rather than the radical indeterminacy of the legal realist or post-modern deconstructionist.

Staten relates to us Plato's attack on poetics (that which divides the soul) in Book X of the Republic:

> The higher part of the soul, on the other hand "trust measure and reasoning" which provides a standard against which indiv-

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\(^{223}\) This requires an orientation, a pre-understanding. Gadamer notes that we bring to the text an expectation of meaning. As William James puts it "We feel its meaning as it passes." (William James, *The Principle of Psychology* Vol 1, at 253; as in Hacker; *Meaning and Understanding*, at 601).

Under the traditional epistemological view of knowledge, Husserl and Kant argue that we can never know the thing-in-itself, there can be no absolute knowledge because our perspective is temporal and partial. To know the whole, the phenomena, would blind us in its excess. We are able to speak because knowledge is not entirely present within conscious, it lies waiting in an idealized form which is actualized in speech. Consciousness is the essential now, which arrests the unseen-already-there of the unconscious. With Wittgenstein in mind however, we would argue that "knowledge" does not sit there waiting to be discovered. Instead the world is a process of new understanding, new ways of doing what it is we do.

idual perspectives may be set. But this higher part of the soul is seduced away from the objective measure by the charm of language. "the poetic workman dabs on certain colours by using the words and phrases of the various arts...so that others, as ignorant as himself, taking their view from words, think he is speaking magnificently...So great is the natural charm in this manner of speaking."225

The higher part of the soul seeks that which is unchanging, the absolute truth. We, the audience of this speech act, must be wary of the speaker's truth, its seductive rhetoric.

Olmsted uses Levi's text to illustrate legal ambiguity over the shifting of referents as the use of the words apply to new situations.226 She makes the distinction between "inherently dangerous things" and "things not of themselves dangerous" which change as they came to refer to new objects—loaded guns, defective lamps, defective coaches and finally defective automobiles. "What was latently dangerous in Thomas v. Winchester became...just plain or probably dangerous."227 In this light, indeterminacy is recognizable only where the world is rigidly divided into the literal and the figurative.

The forms of rhetoric relevant to legal reasoning are argument by example (analogy) and analogical figures (including metaphor and simile). To argue by example is to cite the circumstances of one case and to show how they resemble the facts of the present case.

225 Staten, supra note 16 at 135.
226 Olmsted, supra note 224 at 7.
227 Ibid
In this legal analogy resembles faulty inductive logic.\(^{228}\) It invariably strains the facts to fit the picture. "The steps are these; similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case."\(^{229}\)

As we have noted in section 2.3, the similarities are a matter of fact construction. This is a rhetorical discovery as the lawyer argues the existence and relevance of a state of affairs, "the finding of similarity or difference is the key step in the legal process."\(^{230}\) Similarity of sense is conveyed through the metaphorical quality of words to evoke an experience. It is through deriving similarity, the construction of what is, that the judge can then determine the issue of conflict. Rhetoric acts as the guide in its construction of facts as to where lie the social tensions. What we may recognize from our discussion on rule following is that at this point the case is essentially determined. We have explained the action. If the action and the customary practice has been properly presented through the language of the

\(^{228}\) John Stuart Mill's in a supplement to Logic outlines the possibility of applying inductive logic to human sciences. Human sciences are, according to Mill, concerned with establishing the similarities, regularities and conformities to a universal law that would predict individual processes and phenomena. This is known as the Geisteswissenschaften. See George Wright, "On a General Theory of Interpretation", in *The American Journal of Jurisprudence* Vol. 32 (1987) at 191 for a discussion on the work of Emilio Betti on Legal Hermeneutics.

\(^{229}\) Levi, *An Introduction to Legal Reasoning* [1949], at 2

\(^{230}\) *Ibid* at 2
agents, then we have as noted in chapter two, even hard cases are decided. We apply the rule blindly. It is in this that what the law does is not a question of what the law is, rather what is establishes the possibilities of what the law does.\textsuperscript{231}

An interesting point which Olmsted brings out is that legal terms become too determinate.\textsuperscript{232} What ambiguity enables is the transmutation of meaning from one situation to another. As she says "the inability to formulate a term may prevent change. The legal understanding of a single case can change when that case is set next to a later one; reasoning by example may allow new considerations to

\textsuperscript{231} This raises two points. Dwyer, \textit{Sense and Subjectivity} [1989] at 215 speaks of freedom. He quotes Hegel's pun "essence is what has been"; that is, we are our past. Yet the notion of freedom is tied to choice. Choice is the transcending of our past. This is Heidegger's point. We are always projecting ourselves forward. We are never wholly constituted by the present.

The second point is that of determinacy. In terms of the application of a rule, the indeterminacy of sense arises out of an indeterminacy of appearance. Once the picture is clear, so is the rule. This raises what is perhaps the question. If the meaning of a word is its use, how do we communicate this meaning. This is the problem, in the building of expert systems, as to how we create a formal representation of practical actions. Lynch suggests (at 285) that "...once we no longer assume the classic posture of an objective observer, the general problem of indexicality dissolves." We will discuss the schematization of practical actions further in Chapter Five. (Indexicality is the dilemma of a standard meaning of a term; such use cannot be readily "objectified" if the meaning is contextual. i.e. does "here" refer to this page, this place, this time?)

\textsuperscript{232} Olmsted supra note 224 at 14. This remark reflects Sarah Kofman's treatment of metaphor in Nietzsche's work (infra). It is the play of words which enables the expression of new experience, it allows the human will to speak. Where words become rigid, they lose the play which enables freedom of thought.
emerge."223 It is in the placing of situations in juxtaposition that reveal we the characters of both.

Analogical figures are also a means of revealing what is constituted within an event.234 Simile reveals a picture which evokes a means of going on, of seeing what to do. Simile is a means of anticipating how we should look at the extended simile. Such comparisons are not guided by the terms used, such as "inherently dangerous" but by the whole situation, a way of relating the story to human action.235

To practice in law would appear to be a matter of remaining loyal to the myth and the metaphors. Loyalty is established by severing legal reasoning from the contingency of culture. Legal concepts are being hypostatized and therefore neutralized. This fundamental confusion is vitalized as a way of keeping the wheel going.

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223 Ibid at 15

234 Here Olmsted provides the illuminating example of an instruction to a woman in labour. "Pant like a puppy". It seems to instantly evoke an image of quick, rapid and yet restrained inhalations. Yet the point to realize, as we have covered in chapter 2, is the notion of understanding. [In conjecture] we see the woman responding by obeying as any man would, but in doing the thing itself (i.e. embodying herself in the act) she should in someway grasp for herself why she pants like a dog. She should (if the instruction is valid) experience the purpose of this way of breathing in response to her situation. She should take over for herself the breathing and breath like a woman in labour who suddenly feels the effects of breathing like this.

235 Ibid at 20
While some argue that the hermeneutic model of interpretation is merely the downgrading of reason to relativism\textsuperscript{236}, others see interpretation as a method of preserving the myth of legal rationality.\textsuperscript{237} In his deconstruction piece, Haverkamp attacks the law's rhetorical use of metaphor. He sets out

"The rhetoric of persuasion, it seems, endorses unity; it legitimizes and stabilizes, formalizes and institutionalizes meaning. The rhetoric of tropes, on the other hand, does not care about unity, works on the grounds of arbitrary positions, and endangers the process of institutional evolution whenever its...'focusing' work [per Max Black] gets thematized and the mechanically produced tropes are exposed. But it is only with the help of tropes that persuasion comes about and the reflexivity of legal institutions is possible. The sheer force of law would be just that: sheer force, no law. It takes the transformative power of tropes and the situating potency of figures to make the law the law."\textsuperscript{238}

He goes on to argue that it is metaphor which, as used, imposes the force of law; "Is it surprising that Paul Ricoeur's La Mîtaphore vive has been translated as The Rule of Metaphor? It is not unrestricted metaphor that rules the reflective mechanism, but the tropological potential is used to the self-maintaining effect of


\textsuperscript{237} The leading critic of Gadamer is Jurgen Habermas. Habermas sees Gadamer's method as being uncritically accepting of tradition. It is tradition which incorporates the ideological forces or repression and domination which are incorporated within language itself. See Dallmayr's Between Friburg and Frankfurt, and Schrift's Nietzsche and the question of Interpretation [1986].

law's empirical rule. The marvellous efficiency of world maintenance rests on this use..." He attributes the flexibility of metaphor as producing what Staten calls Law's 'super-hardness'.

We return to the performance of the speech act. Law maintain's itself, as suggested by Broekman supra, by its metaphorical self-reference.

The performance of the law draws upon a violence founded upon nothing but historical contingencies.... But the "performativity" of law's discourse ... is nothing but the metaphor of law's model of performance, the proliferation of this metaphorical process.

We have already noted Humpty Dumpty's now classic mot on meaning and language. The attack that language is without content implicitly contends that we can do whatever we wish with language. This is not really the case. Heidegger's has provided us with an emphatic argument that we are thrown into a world where "language already speaks." This speaking is our social world. What we should now

\[239\] Ibid at 1647.

\[240\] See Staten, supra note 16 at 152.

\[241\] Ibid at 1650. See also Derrida, supra note 7 at 969.

\[242\] For Heidegger, language is a revealing of the world. The primacy of language reveals itself as we name, and in so doing bring a nearness to the thing - we bring forth the thing itself - the physis. If we recognize that language is experienced in this way, as contingent upon experience, we cannot representing language as a set of rules. In On the Way to Language at 133 he states; "There is no such thing as a natural language that would be the language of a human nature occurring of it's self, without a destiny." In The Authority of Language, James Edwards at 116ff relates that it is possible to formulate rules-to make language static, captured, but only at the cost of losing what language is. We must therefore, according to Heidegger, realize the nature of language, submit to it, to see it as something beyond ourselves
consider is how meaning is injected within the social experience and through language.

3.2 Metaphors: Making Sense of Non-Sense

Reality is a cliché from which we escape by metaphors. Metaphor is gaining recognition as an important aspect of language and cognition. Traditional analysis has put metaphor on the periphery, or as deviant to the proper usage of language. Metaphor in traditional linguistics is viewed as an essentially literary or poetic device used as imagination. Others see metaphor as "noise", a device to draw attendance upon itself.

There is a growing sense that metaphors are much more than mere noise. Levi-Straus points out that language contains the ability to express the unknown, the unsignified. How do we then express this unknown as unknown? If we are limited by language in which meaning within which the being exists. "There is no place for us to dwell, to think outside the house of language". Language must speak before human beings can speak their natural languages in creative response (Edwards at 118). Here Heidegger refutes the humanist naturalism of Nietzsche's will to power. The overman is self-measurer and self-grantor who could not be such if there is the primacy of language. "behind all self-conscious is language, and that behind language there is that which cannot be brought to light as such in language." (at 121).

243 Wallace Stevens, as expressed to me by my friend Alexander Carnera.


245 Rorty, "Unfamiliar Noises". Here Rorty draws heavily upon Donald Davidson's approach to language as the literal.
already exists, then we are limited to the purely literal. Lacan writes that "Metaphor is located precisely at the point where meaning is produced out of non-meaning." This is accomplished by removing the signifier from its conventional use and thereby introducing new meaning.

One of the first modern writers to draw our attention to metaphor is Nietzsche. A fundament to Nietzsche's philosophy is the theme of play which is expressed metaphorically both in the stylistic sense and as an exegesis of "truth." Nietzsche recognizes the metaphor as the origin of language and truth. We speak of origin because metaphor enters discourse only to perish. Its fate is to become "literal", to become the transparent and unstriking description of a phenomenon as we forget its

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247 I will rely on Nehamas and Schrift's (supra note 237) discussions of Nietzsche's work. Sarah Kofman (as translated in Rickels anthology) provides an examination of metaphor in Nietzsche's writings in her paper "Metaphoric Architectures". See Schrift at 86ff. Nietzsche's own exposition on metaphor is to be found in "On Truth and Lies in a Nonmoral Sense" (Ueber Warheit und Lüge im aussemoralischen Sinne), 1873. We will cover this paper further in chapter four of this paper.

248 It is in this sense that, on Jerry Gill's reading on the work of Merleau-Ponty, that we can see the parallel between Nietzsche and Merleau-Ponty in the strong use of this technique. Once metaphor is fully understood as connecting form with substance, we can understand the attraction metaphor offers as a full cognitive device. Gill, Merleau-Ponty and Metaphor [1990].

249 Schrift, supra note 237 at 86.
metaphorical nature.\textsuperscript{250} The literal is mortified or congealed. Over time, the inadequate literal description is to be replaced by a description in theoretical categories, that is, a more adequate metaphor.\textsuperscript{251}

Concepts are the "residue of a metaphor", words which become abstracted and generalized by ignoring its individual features; "The omitting of what is individual provides us with the concept, and with this our knowledge begins: in categorizing \textsuperscript{Rubriziren}, in the establishment of classes. But the essence of things does not correspond to this ..."\textsuperscript{252}

The western analytic tradition is grounded upon the primacy of the literal meaning, the belief that words connect us to reality. With

\textsuperscript{250} \textit{Ibid} at 86. Kofman relates Nietzsche's brilliant use of architectural metaphor to relate this tradition. She relates metaphors such as the beehive, pyramid, the Roman columbarium. She culminates the transformation of western thinking with the spider's web. This sequence represents the birth, life and eventual death of meaning. This posits the inhibiting consequences of the construction of a web of beliefs held to describe the play of becoming, and has the poisonous result of inhibiting the free play of creative activity to those who entangle themselves within its structure. This idea is echoed by Wittgenstein as we become "captured by the picture" of language's reflection of reality. For Nietzsche, "if God is the architect of the world, it is only in his being the supreme spider." in \textit{Looking after Nietzsche} \textsuperscript{[1986]}, Rickels at 98.

\textsuperscript{251} See Hesse, \textit{supra} note 8 at xvii.

\textsuperscript{252} \textit{Schrift}, \textit{supra} note 237 at 127.
this belief, to know a word is to know what it stands for. The appeal of the "picture" metaphor for language is persuasive. The use of figurative language does create a picture. The confusion begins when we fail to see that the image is just an image. The metaphor enables us to "picture" an experience which is strange and mystical and make it familiar.

Metaphor reveals reality by creating new cultural meanings within a particular context. This is possible only because a metaphor can describe something different from what it really is. A metaphor

253 An example of this thinking is the basis of Wittgenstein's early work. In the Tractatus, Wittgenstein uses metaphor to give insight into this conception of the world. Reality is a mosaic of independent items called atomic facts. Each of these creates the relation between objects in logical space, the network of logical possibilities. The simplest 'elementary' propositions are pictures of atomic facts, which are themselves facts. All non-elementary propositions are composed of, and truth-functions of, the elementary propositions. Language is the logical network reflecting the fixed form of the world.

254 It is a question of understanding. To say to someone "pick out a yellow marble" does not depend upon on her being able to imagine or picture a yellow marble; it is a simple a case of them seeing a yellow marble and picking it up. Wittgenstein, Blue Books [1946] at 12. See Hacker, Meaning and Understanding [1984] at 607.

255 Lakoff has noted "the essence of metaphor is understanding and experiencing one kind of thing in terms of another.": Metaphors we Live by [1980], at 5. We will relate this to the human conceptual system by which being comprehends the world. Lakoff goes on to argue that thought processes are largely metaphorical. Lakoff's conceptual scheme is to structure "concepts" (which we will call "components" in Part II of this paper) consisting of primitives (for our vocabulary these are essentially "key words"). For example, the concept "hurry up" can be composed of primitives such as "You are wasting my time", "Time is Money".

Lakoff argues against objectivism and subjectivism for (through appropriately enough, another metaphor) what he calls "experientialism". "...no metaphor can ever be comprehended or even adequate-
can only function behind a network of language, in a certain "form of life." It is the shift in culture that gives meaning to the practice of discourses. We recognize that words get their meaning from their use within the social practice and therefore, words express what it is we experience.

For Wittgenstein, the origin of concepts and meaning is in experience, to engage in an activity within a "language game". For the experience to constitute an action within the legal domain, it must be set out as intelligible. This intelligibility arises through acceptable conventional descriptions of the event. These descriptions set out to make real the experiences of the agent. This reality is constituted by our experiences and by our purposes. An action then, is understood as action only in so far as it falls within language. Such an action must necessarily have a public criteria or it fails to be intelligible within the language-game.

Wittgenstein argues that words get both their sense and their reference through their public use. This is his refutation to the so-called "private-language" argument. Understanding words involves understanding the context within which a word is used. At §242 of the Investigations Wittgenstein states that words are agreements in definitions and judgements. If pain is observable only to the individual, then we could not attach a word to a particular

\[\text{Wittgenstein, \textit{Philosophical Investigations} (1951).}\]

\[\text{For example §72 in Wittgenstein, \textit{Philosophical investigations}.}\]

\[\text{Wittgenstein argues that words get both their sense and their reference through their public use. This is his refutation to the so-called "private-language" argument. Understanding words involves understanding the context within which a word is used. At §242 of the Investigations Wittgenstein states that words are agreements in definitions and judgements. If pain is observable only to the individual, then we could not attach a word to a particular}\]
Hesse sets out the explanatory function of metaphor and simile which shows us the relation of language to theory. This sensation which would be meaningful in the public sense. Malcolm, for example, argues that knowledge of pain (that is to say the originary form of the concept) is logically prior to the knowledge of the location. By this we can know someone is in pain. We then ask: "where does it hurt?" The knowledge or "ownership" of the pain is therefore not fixed by its location.

Wittgenstein wishes to show that we cannot look outside of language to show what governs it. Language is a cultural artifact, and there is no necessary logical connection between language and external reality. He wishes to show, if we accept language is a human artifact, then the individual cannot decide for herself what is the correct use of a word. This is a refutation of the Cartesian "priority of the first-person case". In the Investigations at §269 ff, Wittgenstein relates the confusion which arises if we limit a word to a private expression. I name a sensation 'S'. Several months later I experience a sensation which I also name 'S'. In order that the word has a fixed meaning even to me, it must be used consistently, i.e. it must be used to describe the same sensation. Yet how am I to determine I have used the term 'S' correctly on both occasions? If I cannot establish the connection of the sensation to some particular phenomenon, the use of the word will be indeterminate, and therefore meaningless. I have no objective notion of what counts as the same. This solipsism, argues Wittgenstein, is the consequence of accepting the priority of the first-person perspective; that sensations can only be known by the individual. Yet we appear to be able to give meaning to sensations through the very publicity of their expression. Such publicity denies the relativist their position against objective criteria.

It is in this that our form-of-life, which is perhaps thought of here as the western philosophical tradition, that we are drawn to explain and give reasons.

The point that lies here is that Descartes doubt makes no sense in a social world. Rather than doubt the world, we must ask in what sense is there a human being without the world. In what sense do I exist independent of my world? How do I construct myself without the form-of-life to which I am irrevocably and inextricably tied?

259 Hesse and Arbib, supra note 27, Chapter 4. She incorporates Max Black's "Interaction theory" of the metaphor as being comprised within a "Network model". Black has argued that through this network, metaphor constitutes the whole of language.

There are of course alternative views about Metaphor. In an article by Richard Rorty, Unfamiliar Noises, Rorty argues against the
relationship between theoretical concepts and observational language, in the sense of being interactive, can be interpreted as metaphoric re-description of the domain of the explanandum. We use metaphor to re-describe or put forward new ways of interpreting reality.

Language explains the social phenomena of agent action. We describe actions in the attempt to attach a sense within the legal discourse to social reality. When a new use of language, a metaphor, introduces meaning which is accepted into the legal practice, they become "literal". That is, they become dead-metaphors; institutional social constructions with a "certain" legal meaning.260

The objective of an information system should be to provide the lawyer with a representation of the social and legal world in a form which they can use in arguing a set of events. We cannot at

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Hesse/Black position. He relies on Davidson's semantic argument for metaphor—that metaphor is restricted to literal use. Only literal sentences express knowledge and all that can be said can be said literally. Metaphor therefore is a non-cognitive speech-act to be understood as noise. Its function is to draw attention to literal similarities and language change. Metaphors introduce new literal meanings "causally", not semantically. Once literal, they are no longer metaphors at all. Natural language thereby becomes discrete.

Metaphor in this light reduces the subject-matter of semantics to an idealized form of literal language. This is far removed from the natural form of language speech. A semantic explanation of language has as its content the surface regularities of speech. Davidson recognizes the linguistic network of language—but of a literal language only.

260 Smith, J.C. supra note 75 at 75. See also Richard Rorty and Mary Hesse, Unfamiliar noises, Proceedings of Aristotelian Society, 1987 Supplement 1, p.297 ff
present develop a computerized system which is capable of duplicating the intellectual process of a human legal expert. We cannot duplicate the intellectual process because law is victimized by its own metaphor. Law requires that we express experience through analogy. We can't recreate this reality using computer logic because such descriptions are an illusion.

Hesse outlines how we introduce new language to explain the world in a new way. She suggests two 'levels' of language. The primary is that of the observation language, the secondary is the system from which the model is taken, an observation language or familiar theory. We may wish, using simile, to suggest "man is like a wolf." Each of the primary and secondary systems have associated ideas and beliefs which come to mind when the system is referred to-derived through training in a language. There is a principle of assimilation between the two systems which rests on analogy. We cannot use metaphor a priori. Metaphors, according to Black, are not comparisons. It is not a comparison because we do not know how far the extension of the term lies.

Recognizing the cognitive function of analogy, we emphasis features of the primary through the use of the secondary system. If we accept that terms in the primary system (literal terms) are understood in relation to an associated experience, then the use of the

261 See here Hesse, supra note 8, Chapter Four, "The Explanatory Function of Metaphor".
metaphor, by providing further associations (emphasis), expands the range of uses that a word can enjoy. This applies to the metaphor itself as it becomes associated with the primary system. Wolves become more human. It is this key point which refers to "interactive view" of metaphor rather than "comparison".262

While a term to be a metaphor must be absurd or false if taken literally, a metaphor is understood. This seems to imply a cognitive aspect to metaphor which means there is a pre-understanding which sets the use of metaphor as appropriate, true or false.

What this shows is that in language literal terms do not follow deterministic linguistic rules. There is a cognitive aspect in that literal meanings shift in association with metaphoric use. What is of interest are the various mechanisms of meaning shifting, and the recognition of a relative distinction between literal and metaphor-

262 On a slight side note, Susan Sontag's On Photography [1977] reveals what we believe to be the effect of this process. We take events such as war, poverty, beauty, and capture them in images. This voyeur fetish keeps things distant, but at the same time, it makes them familiar. Familiarity brings a comprehensibility and therein is ultimately nihilistic. War, after the initial shock, ceases to be "the horror" because it is sanitized and explicit. We become attuned to this way of experiencing the world in that the image is what becomes the real; it becomes for us, "literal". An excellent thought on this is Baudrillard's Simulacrum and Barthe's Mythologies. Photographs possess something of a magical quality; a levelling of its subject, an instrumental power to create and control reality. Sontag notes that Platonic thinking sought to move us away from image-ful thinking to image-free thinking to apprehend the real. With photographs, "realities understood in the form of images was now being given to realities understood to be images, illusions." (at 153). We can imagine the sense of what it was like for those who managed the first name. A sense of presentment to the being of spirits of wind, the beast and fertility.
ic entities in particular contexts. We can, through metaphor use, agree with Gadamer's observation supra that when we observe a phenomena from different perspectives what we see are two aspects of the same element.263

The Wittgensteinian view of language acquisition implies rejection of a literalist view of language; a static system imbued with fixed

263 Hesse, supra note 8. The view of metaphor held by Hesse and Black would appear to get around the theoretical problem posed by Rorty in Unfamiliar Noises. If truth in language is relative to a particular linguistic framework or conceptual scheme, how can truth values be transmitted between languages and between theories? Davidson looks to the surface regularities of language. Truth values are assumed as a given because languages are about expressing intentions and beliefs. Without this assumption, Davidson holds that such utterances are not language at all. Language is for Davidson a network of interrelated sentences which carry our knowledge and beliefs of the world. Truth is a function of the successful (correct) public use of language. There are no hidden 'metaphysical' meanings hidden in that usage, only a predictable surface regularity of utterance (at 300). Without any structuralism, then, we are to see that natural language is in direct touch with reality.

This is a pragmatic view of language. By placing meaning within language as a network, it has moved away from atomic empiricist to a holistic model of language—ie that truth is measured by language as a whole rather than by specific atomic observations. Within this network, there is an inferential relationship between the language and the sentence. This is an internal network that represents the world as a whole. The problem with this approach however is that the justification of a comparison of networks rests on the initial truth values of the discrete observation sentences. They must be capable of cross translation. This gets us back to the problem of relativism between languages and meaning which means we cannot limit ourselves to discrete literal meaning.

In other words, all language is incomplete and all observations about the world are similarly incomplete. We can however speak about the same kinds of experience about things in the world by virtue of being involved with the matter, by our practical embodiment (cognition) within situations. This is arguing for a Wittgenstein "family-resemblance" which depends on perceptions of similarities for all form of language.
meaning dependent upon fixed syntactic and semantic rules. We can see a difference between the universal (of Plato) where the correct use of the term is correlated to its attachment to the reality of the universal concept, and Wittgenstein's "family resemblance" which is tied to use without assuming any particular universal. The concept of metaphor drops to those who don't understand the use of a word.

3.3 Perceptions of Reality: The Transparent World

Modern cognitive science is attempting to provide a more adequate description of how human beings see their world. It is clear that concepts like law, religion and mind are not to be found in nature. What we encounter through the Platonic notion of language

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264 I can speak of the point of a joke, like the point of a needle. It communicates to the hearer the sense of purpose of the object, the "point" of the joke, and the "point" of the needle are the "sense" of the object. If we can accept this use of language, then we can see how the mind is cognizant of what is the referent, and how language is used. We should recognize that no two objects share precisely the same properties. With this, language contains general terms which are used to approximate meaning. This enables ready communication without overbearing the speaker with every specific. (see Hesse and Arbib at 151) Wittgenstein uses the metaphor of "games" to explain language. We can see that there is no literal meaning of the word "games"—for example chess, darts, football, swimming can all be put under the rubric of games. We just know what we mean when we see it.

265 An area for further consideration, beyond the scope of this paper, is the "symbolic system". This is the language of legends, myths and fables which contain the trace of cultural identity. This speaks to thinkers such as Freud and Joseph Campbell. They are about the classification of languages and the social orientation—they have no meaning in themselves (Daniel Sperber 1975 Rethinking Symbolism), they are not a "language" with some corresponding literal meaning.
is a world of experience reduced to identities.

Sartre, in a famous encounter with Raymond Aron, discovers that we can look at a beer glass philosophically. Hegel coined the term *Erlebnis* to express the immediacy of the revealing of objects to consciousness, the immediacy with which something real is grasped. It is always experienced for oneself. The glass in this sense is an act of imagination. Wittgenstein describes such an encountering as "noticing an aspect."\(^{266}\) It is a moment in which we express our experience of the world with a new comprehension.\(^{267}\)

\(^{266}\) "I contemplate a face, and then suddenly notice its likeness to another. I see that it has not changed; and yet I see it differently." \(PI\) at 193c.

\(^{267}\) The early Sartre held, as in the case of the beer-mug, that objects are constituted by the intentional act and so embarked on a brilliant but futile odyssey in *Being and Nothingness*. In *Visible \& the Invisible* [1968] at 63-69, Merleau-Ponty attacks this interiorization of knowledge-If I am Being, how do I transcend my own isolation, if I am nothing, how do I ever constitute knowledge?

This encounter is described in Annie Cohen-Solal's biography; *Sartre: A Life* at 91. Aron briefly relates Husserl's Phenomenological approach, which constructs a pure conscious apprehension of an object bracketed from its surroundings. Phenomenology seeks to provide a pure description of the fundamental or original structure of transcendental consciousness in which a world can be constituted as given to consciousness. This is known as the phenomenological reduction. The reduction, free of contextualization, opens the possibility of reflection of the sense of an object of its originary self. (See Staten, Chapter one and three, and Dreyfus, *Husserl*). For Derrida, this is the moment of signification, the disappearance of the empirical subject. What both Derrida and Wittgenstein question is whether this moment can be said to be 'idealized'-whether it is possible for us all to experience this as a selfsameness, a true consensus of experience, or whether because language is independent of us who experience (and therefore beyond us to make language mean what we for ourselves intend as the Husselian phenomenologist have it), we are in some sense destined to differences of our situation. Merleau-Ponty tells us that the reduction teaches us the impossibility of
Sartre's comprehension is an attempt to explicate the pure essence of an object—something which lies beyond language. Kant had realized that we never see this object in itself. Sartre holds a glass which is "ready-to-hand"; an object which is seen as what it is potentially used for—holding beer used in drink. When we do not use such an object, it drifts into the background, it is "standing-reserve"; waiting to be used later (Heidegger puts it that equipment is, in our mode of thinking, always for our use).

Sartre puts this moment of a new awareness of the glass as a glass as the constitution of a transcendental knowledge; that the being forms and constitutes the world. Merleau-Ponty argues that every transcendental reduction is eidetic. We cannot scrutinize the object of perception without ceasing to be identified with the act of positing the world.\(^{268}\) We have by virtue of our perspective, no possibility of a transcendental knowledge.

To illustrate the consequences of this difficult point we will look at Wittgenstein's Duck (figure 1, which he borrowed from Jastrow) in which we can see the "Rabbit" aspect. This experience I have alluded to as the "deepest intimacy", the übersicht. It is the moment of the gesture by which understanding is apprehended between the intimacy of a word and an experience—the "grasping the rule".

\(^{268}\) Merleau-Ponty, *The Phenomenology of Perception* [1962] at xiv, also see there in footnote 1 on page 376 his direct reference to Husserl.
It is "seeing" the world as it is for us.

The descriptions we give our perceptions are not a description of the experience of perception; that is expressions are not experiences.\textsuperscript{269} When I say "Her eyes burned into me the deep blue of august", or "I see she has blue eyes", it is not the actuality itself I can describe (that her eyes are blue, or that I see) but rather it is that I have a sensory experience of the world. I speak the sense of what my experience is.

Hacker's student, Stephen Mulhall, has explored fully the concept of "aspect-dawning" and its relation to "meaning-dawning" in language.\textsuperscript{270} He explores Wittgenstein's point that we continuously see the object—that it doesn't change before our eyes. What changes is our descriptions of what we see. Mulhall's point is that we have a perceptual experience which we give expression to. "I see a Duck"; "Now I see a Rabbit". These expressions are tied as much to language as to what we look at.

\textsuperscript{269} Hacker wrote Appearance and Reality [1987] to make this point.

\textsuperscript{270} Stephen Mulhall, On Being in the World [1990]. Other reports of this illustration are to be found in the works of Malcolm Budd, Philip Dwyer and Roger Scruton [1974] listed in the appendix. I have read all these other works and no doubt their good ideas have filtered in to shape my own thinking.
We cannot go beyond the recognition of the duck or the rabbit in our descriptions of this experience. We cannot transform a description of an object of sensible experience into a description of sensible experience. This is not a "mental" experience but rather is tied to the attitude we have towards particular images and words. We similarly cannot take the fact we see something to be the objective real.

What we say we see is its meaning. When we look at a portrait

271 Hacker, supra note 269 at 222.

272 For example, we tend to take the photograph as the real, whereas a caricature is recognized as an image. Marshall McLughin, in his text The Gutenberg Galaxy gives an interesting account of showing a film of approximately 15 minutes to an audience in a developing nation on how to sterilize water. When later asked what the film was about, the response was that all they saw was a chicken. Aghast, the film was reviewed and found that in several frames of film, a chicken ran across in the corner of the shot. The conclusion was that the chickens were the only thing in the film that the audience was familiar with, and so they saw it even though the chickens were virtually impossible to notice. A similar observation was made about reading. In order to read, we must focus several millimetres above the page. This is something we learn to do. Focusing directly on the letters themselves makes reading extremely difficult.

273 Merleau-Ponty, supra note 268 takes note in "Things and the Natural World" at 303 that Kant presupposes this to be the case. M-P tells us Kant's position is that if we see the object, then consciousness embraces and constitutes the object. This is because objects must otherwise be constituted by experience which we would never acquire. When I am far away from an object and when I am close the permanence of the size of the object is given. However M-P argues that it is the case that we have a lived-experience of objects. It is an existential. A car is a different thing if I am viewing it from atop a skyscraper than when I am on the street.

274 Wittgenstein, Remarks on the Philosophy of Psychology I §869. Mulhall re-emphasises the point that "seeing something as something" is not a matter of interpretation. We cannot doubt what we see if we see it. What we see may be unclear or turn out to be
we see it as a human being always. We can see this image is an image but we do not try and see that it is a human being. Aspect-dawning reveals that the "meaning" of words do not "absorb or assimilate the technique of their use." Aspect-dawning in language-use arises when we encounter a word which is used unfamiliarly (metaphorically). We are drawn through the literal to a the sense of how the word is used. Mulhall sets out that how we look at images (and words) reflects an attitude towards the use of the word. Having mastered a technique, we usually experience language as "transparent"—there is no gap between its use and understanding. It is because such expressions of experience are so often conventional that mastery of language dulls the technique and sense of experience words express. Taking a context as serious or metaphorical changes the way we experience meaning. This is something other than we thought—but this is not doubt which invites an interpretation. This places no logical constraint on our experiences and associated expressions. What we require, as we discussed in rule-following, is that an intelligible explanation of what we mean be available. Without that we establish no meaning within the situation. In looking at an aspect of an object, I cannot say I see this as a without being able to show a a (Mulhall, supra note 270 at 136ff).

275 Mulhall, Ibid at 205
276 Ibid at 46, using PI, p.218g
277 Ibid, From (PI) at §92. It is in this that Strasser notes that philosophers should no longer ask "What is..." questions, as Plato and Socrates were prone to do, because meaning depends entirely upon the situation. I explained this point to friends over dinner by using gestures of my fingers. I showed one gesture that had a clear meaning and another which was nonsensical, a gyration of my finger. They nodded with understanding. The very next day this exact gyration was used by the librarian to solicit my library card. Perhaps I have put new meaning in the world?
because meaning is the experience we have of the context.

Where a word is used in a different situation, we show its use as being "by this I mean...". It is "seeing-as" this concept. With this realization that the world is as it is for us, we begin to grasp how we convey meaning in use. We say in use because we have understood the rabbit because we already understand rabbits. A word has a shape or sense which we "see-as" in our horizon. We do not always understand how to use a word—how to express an experience. Sometimes there is a break-down between an experience and our ability to express that experience. This involves showing or doing, painting a picture of something familiar to point us to something that is unfamiliar. All things are open to be used in another familiar light. "The inclination is there" to use these words. Words may be said to have a secondary significance but this is only because for me the word has a primary significance.

The comprehension of the beer glass as a glass (as with the comprehension of law in our social actions) lies in the relation

278  Ibid at 216.

279  PI at 216e, Wittgenstein gives an example of "fat" Wednesday and "lean" Tuesday. Wittgenstein says we use such terms because they are the ones which come to mind—they express the experience we wish to relate. Our ability to use such terms reflects our familiarity with the sense we have of their use—it reflects the level of our mastery of a language—the physiognomy of the word. If we cannot branch into secondary significance, we will find a limit to revealing our experiences. The right word comes to us like a reaction. We use words "in certain situations and they are surrounded by behaviour of a special kind, and also by some characteristic experiences" (at 219e).
between what it is and how we experience it. What we comprehend is tied to the internal-relations of the glass for us. This is not a property of the glass itself but an ability to associate it with a context.\(^{280}\) In recognizing the phenomenon of context, Lakoff and others have argued that imaginative hierarchies—"frame" or "schema"—are necessary for the definition of concept.\(^{281}\) Lexical items are defined only with respect to the frame itself as to whether it comprises an intelligible element within the frame. Thus an "ideal"\(^{282}\) is established and the element is examined as to whether it accords with the model.

How are the lexical elements appropriated? Hesse and Arbib relate that it is through a process of learning and training that we comprehend the world.\(^{283}\) They draw on Pierce's notion of habit which describes the connection between the individual and the social.\(^{284}\) Pierce used the term to cover the hereditary action

\(^{280}\) Wittgenstein, *PI* at p.212

\(^{281}\) George Lakoff, *Cognitive Science and the Law*, "Legal Theory Workshop series", Faculty of Law, University of Toronto, 1989. See other works by Lakoff including *Metaphors we Live By*, and *Women, Fire and Dangerous Things*. The concept of frames has also been used Marvin Minsky and Roger Schank. For a discussion of experientialism and Lakoff's work in legal theory, see Steven Winter, "Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law", *University of Pennsylvania Law Review*, No.4, Vol 137, (1989) at 1105

\(^{282}\) by which we mean a "family resemblance", an association of word use which language is cognitively recognized.

\(^{283}\) Hesse and Arbib, *supra* note 27. See also along these lines Holland and Quinn, *Cultural Models in Language and Thought*

\(^{284}\) *Ibid* at 44.
patterns of individuals of the species; learned habits of individuals; and the concepts, rules, methods and procedures of social institutions which form the set of operative rules embodied in a system. Such a structure provides both stability and adaptability; stability in that the individual operates within a structure of existing and practical knowledge, adaptable in that its evolutionary mode allows for change over time.\textsuperscript{285}

To illustrate this point consider the phrase "non-pecuniary damages" (as in the quantum lexicon in the appendix). In a particular domain we could include terms such as "pain and suffering", "general damages", while excluding terms such as "total losses". Over time, as Levi has shown us in Chapter Two, this list will change to incorporate a new lexical significance.

Human cognitive development is also a process of accommodation and assimilation.\textsuperscript{286} Assimilation is the process whereby experience is incorporated within the individual's currently existing schemas.\textsuperscript{287} This is an active process leading to action within a

\textsuperscript{285} \textit{Ibid} at 44.

\textsuperscript{286} \textit{Ibid} at 46. Arbib has based his thinking on the work of psychologist Jean Piaget.

\textsuperscript{287} This term of art was set out by Piaget to help structure experience. His observations of the development of his child suggested to him that the evolution of human intelligence took place within a structure of action (an underlying form of repeated activity pattern) which can transcend the particular physical objects it acts on and become capable of generalization to other contents (that is, of substitutions). See Rotman, \textit{Jean Piaget: Psychologist of the Real} [1977] at 38.
structure of anticipations or techniques. Where these anticipations do not materialize, then accommodation occurs whereby the individual's representation or schema evolves or transforms to better reflect experience, a paradigm shift when experience is incompatible with the representation of the world. We learn new ways to do things. We must note the pragmatic criterion this process invokes. Pragmatic behaviour occurs as a result of finding ourselves in situations which call on us to act.

Arbib, echoing Piaget, speaks of reflective abstraction—the process of encountering the world of experience and, in so doing, acquiring a conceptual understanding of that experience. For example, object permanence is something which comes to the child through sufficient examples. Once the concept of object is established, then the understanding of its subset is thereby enriched. "Cat" is understood as an object or entity within the world of objects. It is clear that it is some form of reflective abstraction which enables the child to uncover "object" as universal through the specific. This reflection, the formation and internalization of representations, must be viewed as a process. It is this 'decenterization' in realizing that they are one object among many that constitutes a child's first "Copernican revolution" which enables a rudimentary idea of causality in a world of distinct objects.²⁸⁸

²⁸⁸ Ibid at 40.
A child does not learn how to speak only by the ostensive act. Instead it observes the use of language—how complex sets of statements are used, each made up of readily recognizable elements, and by causal relations of sounds to actions. It would seem then that the child most of all learns how we combine words with experiences. An interesting problem is that of perspective as the mother speaks to the child. At some point the child must recognize subject and object and reoriented its own manner of utterance.

The verification of the self in society is this process of assimilation and accommodation; the orientation of language, actions and goals. In learning a language, children recognize that certain utterance produce certain results. From this to understand a

289 The beginning of the Philosophical Investigations addresses Augustine's ostensive naming in the Confessions. From our discussion on rule-following we surmise that the gap between what is necessary to effect understanding and what are sufficient conditions collapses. What effects understanding is the pre-understanding we each bring with us to a situation. It is through this that we can derive the sense of meaning. We cannot tell in advance what this pre-understanding consists. As Dwyer emphasises in Sense and Subjectivity [1989] (at 182ff), there are not two categories of understanding (i.e theoretical and practical); all understanding is a practical matter. Language is a matter of sense—what it is the subject perceives. The application of the rule is the intentional phenomena. There is no understanding which will transcend how things actually occur for us. The world is, for us, a practical matter.

290 My friend's one year old son, Peter, was given a regime of medicine. He began to refer to the tonic as "medicine Peter" which flows from the mother constantly saying "Here's your medicine, Peter". This re-orientation apparently occurs once a child is approximately three years old.

291 Piaget suggests that the whole process of schema formation is not complete until the child is approximately 11 years old, and takes place within poles of cognitive activity; the figurative
sentence, Wittgenstein tells us, is to understand a language. Learning goes towards the creation and refinement of an internal attitude about the world, and towards orientating behaviour and actions in response to the contingencies of social life.\textsuperscript{292}

Lakoff and Johnson have gone in depth to show a structural basis of metaphorical categorization.\textsuperscript{293} They have shown how basis experiences such as up/down, in/out, hot/cold orientate our recognition in language. These basic (and dare we say universal) experiences lead to a proliferation of language use to convey a sense or

which bears on static reality and observable configurations, which is predominant in the activities of perception, imitation and mental imagery (which leads to language); and the operative which deals with the active structuring of reality-transformations of one state into another. Cognition involves both figurative and operative aspects but, for Piaget, the operative aspect is theoretically predominant. By this he means that the initially predominant figurative thinking merges into an operational thought. See Rotman, at 41

\textsuperscript{292} Perhaps to impress this point further; it struck me that to understand a set of traffic lights is to understand an action. To comprehend that "Green", set off by the green light, means "go" rather than whether any other traffic is coming, is to comprehend the relation between a sign and what it is we do. To comprehend this is to comprehend that the world is ordered by rationality premised on the use of sign rather than the actual events in the world. That is to comprehend sign is to comprehend the order in the world. It is a comprehension that one submits to others. Once this order is made one's own—that is when one forgets what the event in the world that originally created the sign—then one has embraced this order and rationality becomes "transparent".

\textsuperscript{293} See Lakoff and Johnson, \textit{Metaphors We Live By} [1980], which is a joint work, and also the more recent \textit{Women, Fire and Dangerous Things} [1987] by Lakoff. These works have been incorporated into Winter's work "Transcendental Nonsense" which is undertaken for the legal audience. Lakoff has also given a seminar "Cognitive Science and Law" which discusses very briefly the ideas contained in the above work.
meaning in a new way. For example we can say that "litigation is war". We have from our unfortunate experiences derived a cultural conventional sense of what war entails. This then is recognized as we speak into the use of the word "litigation". It either strikes a chord with the listener or it does not.

What is visualized as a basis for legal expert systems is a schema to incorporate an aspect of agent action. We can use the language of a specific activity to verify the occurrence of that activity. For example, our schema for Pure Economic Loss visualizes a cause of action in which actual communication has occurred between the litigants which we recognize as having a causal or operative relation to the economic loss.²⁹⁴

Wittgenstein recognized that in our linguistic practices, we associate expressions within a notion of "family resemblances".²⁹⁵ These relations are contingent upon perceived similarities and differences. Metaphor is a particularly pervasive mechanism in this function.²⁹⁶ Through this association of experience with express-

²⁹⁴ Such expression reflects our experience as we might learn as the child trained to ask her mother permission to play (the figurative thinking of the child) which evolves into an operative thought once the mother agrees. The child has recognized that play involves this transformation from doing to asking. It instills a sense of how we come to the law.

²⁹⁵ His most famous family is the family of "games." What is interesting is that games typically have no resemblance-i.e., football and chess, and yet we know them as games.

²⁹⁶ Hesse, supra note 8, Chapter 8
ion, we can better see how we are capable of using figurative language to give a "sense" or meaning to our descriptions of the world. We can better understand how meaning shifts. What counts as significantly similar is a conventional cultural decision. For communication to be able to take place, it is presupposed that within the particular discourse, these associated meanings are grasped by the users. The creative or imaginative aspects of language-use flow from the presuppositions which rest in the legal mind as to how the world is.

We can see this if we recognize the illusion of objective knowledge. There is an essential interaction between the knowing subject and the world which involves both the categories used to describe it, as well as the activity of social life itself which are cognitively constituted within language. In this we recognize that the metaphorical and imaginative use of language reflects not the objective reality of a situation but rather the way that human beings come to experience a situation. The use of language reflects a culture, and without being in a culture, we can express nothing. Words are not neutral terms but are based on a pragmatic criterion of imparting a sense of what is (in a legal world) within a framework of normative values.

297 Ibid

298 Ibid

299 We can take for example (here we illustrate for automobile negligence) "The car proceeded through a green traffic light." Perhaps a simple enough statement, but it encloses within it the
The expert has grasped the meaning; they understand what is said in language about an experience of the world. In this the expert is able to see through to the known—the system of values within the culture expresses an experience of how the world is. The expert's comprehension of language-use reflects an understanding that goes beyond the literal representations of law. Metaphoric explanations are the attempt to transcend the limits of the institutional language within language. The expert can see through the literal to the lived experience. Metaphor brings forward and clears the way to the already known fact.
4.1 Things We Can't Do With Words

You see things and you say "Why?"; But I dream things that never were and say "Why Not?".

We have suggested in the previous chapter that the role of the Lawyer is to convey meaning within the rationality of the discourse. The meaning of a action is the explanation we give for its occurrence. Lawyers are to construct the act of the agent as an event intelligible within the legal world by establishing a meaning which preserves the coherence of the legal order. The lawyer is to see that the agent in this act constitutes a rational being and that the event is within the pragmatics of social order. The result is to confirm the what and the why of an event within the natural order of the world.

To recreate the actuality of the agent, the lawyer acts with a rhetorical imagination. We suggest, with Piaget, that the lawyer fits events into basic categories or schemas which we recognize and

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300 The Snake in the Garden of Eden—George Bernard Shaw, Back to Methuselah
which make sense. It is a process of reality "reconstruction".\textsuperscript{301} The legal world is reconstructed metaphorically in every case so as to invoke a world as we believe as being the world as it is; paraphrasing Merleau-Ponty, "bringing truth into being".\textsuperscript{302} In this we make sense of an action which fits in with our perception of our social world.

We recognize that rational models are inherently limited. To put forward a rational theory, as we learn from the Greeks, is to presuppose a natural order in the world. Such an order is captured by the mind that thinks it. This mind can do this because the categories of the mind reflect the order of the world. Theory presents us with the paradox of the thought that thinks it can think the thought that thinks itself. That \textit{a priori} categories are unable to account for errors which occur outside of the \textit{a priori} necessitates rationalism's reliance on arguments that are always transcendental; projecting an interpretive structure on our sensations to create a unity of experience.\textsuperscript{303}

\textsuperscript{301} The reader may note a twist on "Deconstructionism" here. To a degree this is valid. We consider with Wittgenstein, Schopenhauer and Nietzsche, there must be a will to be. The world is there for us. This will would appear bound to a certain "attitude" we hold to the world, and which is constituted through that world. If we deconstruct language and the social world, we simply show that there is nothing upon which it rests. Yet language works in that it conveys some sense of experience.

\textsuperscript{302} Merleau-Ponty, supra note 268 at xx.

\textsuperscript{303} Gill, supra note 248 at 7.
The paradoxical nature of rationality infers that no system of belief which demands statements be criterially verified can be justified empirically within its own logic.\textsuperscript{304} Causal explanation and the existence of general laws does not entail causal determinism.\textsuperscript{305} One explanation for this, as Kuhn and Merleau-Ponty shows us, lies in the root of theory underdetermination; no set of information is complete.\textsuperscript{306} Actions, we argue, are justified through their internal-relations. If we accept this, then we need not look beyond the practice itself. Law, in as far as it speaks through the agent, is constituted by the rationality of agency.

Wittgenstein came to recognize that language is not primarily about

\textsuperscript{304} Putnam, supra note 26 at 111. We see this applies to both formal and non-formal systems. See footnote 312, supra. Nietzsche further enlightens us: "When someone hides something behind a bush and looks for it again in the same place and finds it there as well, there is not so much to praise in such seeking and finding. Yet this is how matters stand regarding seeking and finding "truth" within the realm of reason." at 892 (Rhetoric tradition). Dwyer, supra note 231 has noted the presupposition fallacy that, in explaining the phenomena, we presuppose the phenomena to be explained. For example, in explaining a theory of subatomic particles we establish the "quark" which explains the action of subatomic particles. "Quarks" may or may not exist. We presuppose "law" to explain the actions of legal institutions. In cognitive science we speak of "mind", "thinking" and "intentionality" to explain the appearance, our representations, of causal components of actions.

\textsuperscript{305} Determinism is the characteristic of a theory by which through a complete description of the present and past states of a system, all future states can be precisely and uniquely calculated. Hesse, supra note 8 at 48.

\textsuperscript{306} Ibid
naming but rather it embraces a whole range of human activities.\textsuperscript{307} Wittgenstein's profound insight is the limit of language. There is no correspondence between a proposition and reality. More words do not get us closer.\textsuperscript{308} Understanding is about the activities in which language occurs. This recognition that language is part of a form of life means that we cannot look outside of the language-game itself to justify a statement's truth or falsity; rather we look to the social practices in which the statement is made.\textsuperscript{309} Truth is attached to our social world. It is in this, as Putnam rightly notes,\textsuperscript{310} that the representative picture of language is fundamentally misguided. The intentional object of consciousness is an expression of thought. Understanding

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307 Wittgenstein, Blue and Brown Books [1946], at 17. We recognize here Kant's insight of the transcendental unity of apperception which sets out the world as constituted as an object of consciousness. See supra notes 17 & 95, supra. Gier, Wittgenstein and Phenomenology [1981] at 34 notes that "Kant taught us that reality conforms to forms of thought; and Heidegger and Wittgenstein show us that forms of thought are ultimately dependent upon forms of language and life."

308 With such an observation we are tempted to cease writing. In the Tractatus Wittgenstein held the limit of the world to be the limit of the expression of thought; we cannot speak about language itself unless we are in some way "outside" of what we speak. (TLP at 3) Wittgenstein ironically suggests in the conclusion that having written the Tractatus that with this realization we must "Kick away the ladder". In the Philosophical Investigations a similar dilemma ensues in that Language is an artifact. The relation between words and reality is such that we can only show what language is by its use. A famous quote from the introduction to the Tractatus reads:

What can be said at all can be said clearly; and what we cannot talk about we must pass over in silence.


310 Hilary Putnam, supra note 26 at 20.
is not an occurrence rather it is an ability. \(^{311}\)

Words act as a signpost to an experience. They do not correspond to the experience itself rather their use guides us to a sense. We see for example in the different aspects of Jastrow's drawing that we can uncover different experiences with the same image. Words are tied to a practice and therefore the possibility of an exactness, conceptual transparency or logical unambiguity is untenable. \(^{312}\) "The essence is hidden from us"; we are limited to the language-game for our definitions. \(^{313}\)

Objects fall into a background of meaning. We have a sense of objects (and the categories within which we constitute objects)

\[^{311}\text{Ibid}\]

\[^{312}\text{Strasser, Understanding and Explanation [1985], at 11. Perhaps to further emphasis this point is the work of the mathematician, G"odel. His incompleteness theorem sets out that:}\]

"Any adequate consistent mathematical logic is incomplete: if the logic is adequate to express a full range of arithmetical statements and consistent in that it does not allow the deduction of any contradictions, then it is incomplete in that there are true statements about arithmetic that can neither be proved nor disproved using the rules and axioms of that logic." (See Hesse and Arbib supra note 27 at 31-32)

This theorem, which requires a more adequate mathematical mind than mine to set out more plainly, sets out a proof that refutes a basic tenet of positivism—that of logical consistency. Malcolm [1989] at 14 notes an exert from Wittgenstein's Lectures on the Foundations of Mathematics. If we have very large calculations which at some point cannot be verified—that the results all become indeterminate and there is no way of preventing this deviation—then it is not merely a deviation but rather it ceases to be a calculation.

\[^{313}\text{Wittgenstein, PI at §92}\]
because we have a sense of our world through our presence and involvement in the world. It has been suggested that meaning becomes bound to "frames" of pre-understanding derived from our existential and physical apprehensions. In this perception itself becomes something directed, something already bound up in a teleology of our situation in the world.\footnote{314} We cannot look for meaning in objects and events isolated from this situation. It is also apparent that we cannot avoid perceiving; our sensual faculties always connect us to the world in such a way as to force meaning upon us.\footnote{315}

\footnote{314} Piaget, in his Biology and Knowledge, goes so far as to imply that we think with our bodies.

Cognitive processes seem to be, at one and the same time, the outcome of organic self-regulation, reflecting its essential mechanisms, and the most highly differentiated organs of this regulation at the core of interactions with the environment, so much so that, in the case of man, these processes are being extended to the universe itself. (from Rotman, supra note 287 at 37)

We tend to agree that the role of the body in thought itself has not been properly recognized. We must also recognize that human beings are more than just a body, that there is a highly attuned awareness of the self as a body. This hypothesis of thought as body, as a self-regulating mechanism appears to find its way into the theoretical foundations of the "autopoietic" law theory of Nicholas Luehmann and Gunter Tuebner.

\footnote{315} Lakoff has gone to great length's to show that language-use is cross-culturally identical for much of our essential condition. Hot is hot, up is up, water is wet, etc. It is this similarity of experience, a kind of universality, which led Chomsky to create his rather dubious supposition that language itself is innate.

It is apparent from our position that interpretation appears to demand a cultural reference point. This point is taken to be the body, our point zero on the numerical graph. To be able to make something intelligible means that it ties in with one's own experience, one's own way of seeing the world. This experience is of the world one is in, which is the limit of our thought. We
There can be no knowledge of experience which does not presuppose reference to a public world. "I" know my own experience but only through the concepts which are given "sense" through public usage. The publicity of my language guarantees its objectivity of reference. This reference is presupposed in the existence of experience. Language is the sense of experience connected to human actions. Mulhall tells us that with words we "experience their meaning." It is that we master language and its use. By this, as we master a word, we master how to convey a sense of an experience through its use. The word, as we come to understand in its use, has a sense which is bound up with an experience.

cannot think outside of what we can conceive of. We recognize, as does Merleau-Ponty, that conscious can never be transparent to itself. There is present the apprehension of a subjectivity.

Merleau-Ponty has pointed out that meaning does not exist except for the being that thinks it. Within this is his realization that I am a body in a world, I encounter the world whether I choose to or not and so I am bound to deal with that world in a way which is not personal; "In so far as I have hands, feet, a body, I sustain around me intentions which are not dependent on my decisions and which affect my surroundings in a way I do not choose." From this we must recognize that human beings cannot, by virtue of being bodily in the world, totally diverge from some sense of common form of anonymity or "humanness". (See Strasser, supra note 312 at 136-7 for this quote).


Mulhall, On Being in the World [1990] at 197. We may recall from Chapter Three (supra note 221) Hirsch's intentional object. For Hirsch, using the treatise of Husserl, the word preserve's meaning because I intend it so. Meaning is private object and so interpretation must secure the meaning of the author. A difficulty with this, as we have argued, is that language gets its sense only in a public world. Because language is public it can transmit meaning, and this is independent of the author.
We have spoken much of "sense" of meaning. Sense is tied to a situation. It is an encountering. A presupposition of sense is an attitude, a way of directing oneself towards a situation. We are always possessed of an attitude because we are always in a situation. We are always conscious of being or conscious in acting. This consciousness, for us, is always more than an "I am". It is "I can".\textsuperscript{318} From this we say that attitude is our sense of what is open for us. This is what constitutes our intentional being and this is what circumscribes our freedom to be. Our attitudes are revealed through our actions. What is open for us is set out within the background of our lives.

It is this background which sets out what is for us certain. Certainty is what we go on. The law is about reinforcing the certainty in which actions have sense. It is against this certainty that we set out to construct our expert systems. Dreyfus and Winograd, modern critics of AI,\textsuperscript{319} have suggested that we cannot build\textsuperscript{318} Dwyer, \textit{supra} note 231 defines this as "basic intentionality".

\textsuperscript{319} "Strong AI" is the name for those who advocate that we can construct intelligent machines which "think". Chief proponents of this school are the Churchlands; \textit{Matter and Consciousness} [1988], and John Haugeland; \textit{Artificial Intelligence} [1985]. It advocates that machine logic can essentially duplicate the workings of the "mind" and thereby create a conscious. Both Hubert Dreyfus; \textit{What Computers Can't Do}, and Terry Winograd; \textit{Understanding Computers and Cognition}, take strong Heideggerian positions which advocate an ontological position that thought embraces action and is situated within a background of activities. We will recall from our initial discussion in Chapter One that this is what Dreyfus corresponds to Minsky's "Husserlian" project; the construction of "common-sense". As we mentioned earlier, Ann Gardner has suggested that we cannot build expert systems which deal with "hard cases". We argue against this position.
expert systems which can simulate human reasoning because such reasoning presupposes a background or way of being which we cannot capture. Work at the FLAIR institute shows that we can create programs that duplicate the efforts of legal research. Whether this constitutes "reasoning" is a question of semantics. We will cover the actual construction of expert systems in the next chapter.

To construct the social world there must be conditions which enable social relations. By this we do not mean that social relations are caused by any presupposition, only that they exist. Relations exist in our world as human beings experience the sense of things in the world. As I accumulate this mass of experiences, and the sense that goes with these experiences, I assume a stance towards the world. This stance is how I have experienced the world itself, through my own body, in a world. What I have experienced in that way is, for me, certain. I experience a way of encountering the realities which constitute my form-of-life. I find myself in a family, a school, a job, a hospital. This encountering instils within me a sense of the situation. This Sense becomes the real. I am that experience. This experience flows throughout and from our social world.

This background is Heidegger's articulation of our being-in-the-world. It is our mode of being. In order for there to be

\[320\] "My" reflections here on the early Heidegger are from a reading of Dreyfus [1990], an earlier reading of Gleave's commentary, and from Heidegger's Basic Writings [1976]. My reading is no doubt
subjects/objects, idea/things there must be some way of being that these aspects are revealed for me. What is revealed lies in the sense we have of our world. It is that we encounter the world and re-encounter its sense and the possibilities it presents to us.\(^{321}\)

We always interpret the world in a situation through the experiences which constitute our attitude towards the world.

When we say we are certain of things, Wittgenstein wants to say "it is not that on some points men know the truth with perfect certainty. No: perfect certainty is only a matter of their attitude."\(^{322}\) We have an attitude about the world because we are in it. I cannot doubt my name because everything else goes with it. But this is a stand I take. It is the framework within which my actions and thoughts make sense.

Wittgenstein sets out the difference between subjective and objective certainty.\(^{323}\) At the heart of objective certainty lies the tainted by my understanding of Wittgenstein's thought's, many of which are echoed in Heidegger's thinking.

\(^{321}\) This is Heidegger's hermeneutical phenomenology. We experience and re-experience the world. It is never the same. Dasein is never identical with itself.

\(^{322}\) Wittgenstein, *On Certainty*, §404. For a discussion on Wittgenstein last writings, see Norman Malcolm's *Nothing is Hidden 1986*, "Certainty".

\(^{323}\) See Ray Monk's biography *Wittgenstein* [1991] at 563. As well as providing an interesting account of Wittgenstein's life, Monk also discuss quite well many of Wittgenstein's philosophical points. Wittgenstein covers certainty so as to show that it exists as an aspect of our form-of-life. What makes sense is what we are trained to see as sense. Within this training things become unshakable. At
realization that doubt has no sense. I cannot think of its negation. $1 + 1 = 2$ or else, for me, it means nothing at all. Of course we can then say, but I meant binary notation, so the answer is 10. But this is a misunderstanding about the question not the answer. In that lies the subjective uncertainty. What are the rules of *this* language-game? Certainty then is not an existential, but is tied to grammatical presuppositions. To speak of certainty is to show how this manifests itself in human action.\textsuperscript{324}

What *counts* as a doubt is also set out for us. If I point, with Hart and Fuller, at a chevy-sedan and say "there's no vehicle there"; this is not a mistake but a mental disturbance. What counts as a "vehicle?" If we have to say something then it depends who gives the explanation. The judge can't look elsewhere because there is nowhere else to look.\textsuperscript{325}

\begin{quotation}
the same time, some things become unthinkable. I cannot think of a physical object that is not solid. All this leads us to see that it is not the point that we can say things are or are not, only that they are so only according to the sense of our lives. Certainty is the kind of language game. This does not preclude that there might well be universal and absolute truth, only that it really makes no sense to think that what we can know something as certain outside of our language-game.
\end{quotation}

\textsuperscript{324} Wittgenstein, *PI* at 225.

\textsuperscript{325} Of course, who and how an explanation is given is also set out in the practice. This we have tried to show in Chapter One and Chapter Three. When we come before the court we already have an expectation, a way of proceeding on. In *On Colour* [1968] Wittgenstein puts it that a definition presupposes the knowledge which fits that definition. What counts in ordinary language as a definition is set out in "quiet agreement". In law the definition is an institutional affair. We accept the definition not because it is "correct" but because we submit to the force of law. This force sets out for us that everything has a legal element. Can we think...
4.2 The Intentional Being: Pulling Up the Ladder

We come to what, for law, is a crucial juncture. It is about how we act in the world, how we project our attitudes. In this the law looks to the intentional acts of agents as the causation of events. This question of intentionality sits with us since the scepticism of Hume.

We speak of matters of fact. That this gun fired this bullet which struck this person. This is empirical truth. But for us what is most relevant is the relation between such empirical facts. That is we are interested in the a priori where the effect is not logically implicit in the cause. We may say for example that my driving at a high speed does not necessarily entail that it is the cause of an accident. Such a relation is contingent.

It is in language that agency is constituted. We have seen in Chapter One that we use an observational language—a set of domain predicates—to accomplish this task. Such language constitutes the limit of what we attribute to the person as agent and to the event of something not in law? Only if law says so. Through this the logic of the law makes sense. Explanations must, at some point, come to an end. If we reject the authority of law, then nothing law speaks to makes sense.

For a discussion on this scepticism of Hume, and an interesting read on the utility of explanation, see Stephan Strasser, Understanding and Explanation [1985], here at Chapter Three.
as an action. We noted that such agency was accomplished through the application of an adverb modifying an event. "I accidentally ran into the back of the car". In this modification we attribute a certain quality to the experience which gives it a sense for us.

Wittgenstein sets out in the Tractatus the self which is limited to language, and the ego which is in a privileged perspective. We are alerted to the confusions in our language which arises as a result of this duality; not the cartesian duality of mind and body but the duality of reference, of how we speak of things which are the perspective of the ego and of things which are the perspective of all.

Ricoeur points out that the semantics of analytic philosophy of action move to avoid the issue of "who" in the attribution of agency.327 Events have been set out here as the state of the world. An action is that which makes things happen. Between the event and the action is the cause.328 In this we return again to the notion of agents and rules. To say what an action is, is to state the relation between cause and effect; to be able to attribute reasons for the effects. This ties what an action is to

327 Paul Ricoeur, Oneself as Another [1992]. Ricoeur's project is an examination of personal identity within the context of a universal subject, or transcendental ego, required by ethics. In his discussions of agency we are to realize the existence of a self which is not solely personal but rather, as we have shown through Wittgenstein and Merleau-Ponty, exists within a public world.

328 Ibid at 70
why the agent acts.\textsuperscript{329}

For Wittgenstein this is a grammatical proposition, it is to speak of a concept. We can speak of intention only because we speak of a changed state of the world, not any "mental" event. In this the conceptual analysis of action theory does not concern itself with the Husserlian notion of intentionality of consciousness.\textsuperscript{330} We recognize then that mental events are established through public acts. This is not possible in the case of "intending-to" propositions.\textsuperscript{331}

Intentionality is an attributed quality derived from observational language. Ricoeur puts it that "The virtue of practical reasoning, in fact, is to make a future state of affairs appear as a subsequent stage of a process in which the action considered is the earlier stage."\textsuperscript{332} He adds that between explanation and description "the order introduced between two a series of reasons for acting by practical reasoning rebounds onto the very description of the

\textsuperscript{329} \textit{Ibid}

\textsuperscript{330} \textit{Ibid} at 67

\textsuperscript{331} \textit{Ibid} at 67. Here he is considering the works of G.E.M. Anscombe and Donald Davidson. We can think of the Criminal Code offense of Conspiracy which is one of the few offenses which do not require the completion of the operative event. Even here however the proof lies in rigorous public acts. This approach is also reflected in the work by Coval in \textit{Agency in Action} [1992]. The criteria for possession is set out implicitly in terms of a practical rationality.

\textsuperscript{332} \textit{Ibid} at 71
action.\textsuperscript{333} The question of intentionality then becomes one of veracity rather than truth.

The teleological explanation, in which law is set out as a system, avoids the question of intention-to altogether. Here a rationality of necessary events for an action to obtain is prescribed. In showing that the effect is obtained, we prove the antecedent events. Describing and explaining coincide.\textsuperscript{334}

An alternative to the action-event dichotomy is causation-motivation.\textsuperscript{335} Whether something is an intention is a derivative of its adverbial use, as opposed to adverbial modification. This necessitates the problematic of a direct reference back to the ego in the agent of the action. We have already considered in Chapter Two however, that without any observable criteria, it becomes questionable that we can attribute, within an ontology of events, intentions to agents.

The justification for rational attribution of responsibility is that the ethics are at once universal and particular. The agent acts, and so we attribute moral responsibility because the agent

\textsuperscript{333} Ibid
\textsuperscript{334} Ibid at 78.
\textsuperscript{335} Ibid
possesses the freedom to act.\textsuperscript{336} To attribute moral judgment is to add a further attribute to responsibility—the attribute of "good" or "bad". This takes the form of constitutive rules found within the rationality of law itself. These rules, following the logic of practical reasoning we outline in Chapter One, are those which "swallow" (to use G.E.M. Anscombe's phrase) the chain of events.\textsuperscript{337} We place blame through closure of series of events.

The process of placing blame is the culmination of legal reasoning. We have seen that the Rule of Law is that like situations be treated similarly and that all are "equal" before the law. This notion of justice has a sense of logic and order to it. It appeals to an adherence to a natural order in the world. Analytic thinking brings home the value of abstraction in we see that things are the same.

\textsuperscript{336} Kant's statement on the thesis of the causality of freedom is set out as: "Causality in accordance with the laws of nature is not the only causality from which the appearance of the world can one and all be derived. To explain these appearances it is necessary to assume that there is also another causality, that of freedom". From this Arthur Danto defines the basic action as: these actions which require no other intermediary action one would have had to perform in order to do this or that. This represents the basic particular of the theory of actions; this represents a practical knowledge. see Ricoeur at 102ff. (see also footnote 111, supra).

\textsuperscript{337} Nietzsche's \textit{On the Genealogy of Morals} [1987] moves to rebut teleology by seeking origins. In looking backwards we deny the purposiveness of morality and see its archaeology—to abolish the aim and its alleged rationality: "To breed an animal with the right to make promises—is this not the paradoxical task that nature has set itself in the case of man? Is this not the real problem regarding man?" (GM at 57). "Good" and "bad" is set out in Human—All too Human at section 45 "Whoever has the power to repay good with good, evil with evil, and also actually repays, thus being grateful and vengeful, is called good; whoever is powerless and unable to repay is considered bad.".
Holland and Webb give us an insight into the process of this way of legal thinking. We can speak of inductive and deductive logic. Inductive logic is set out, in giving Persig's example, that I realize my bike backfires only when I hit a bump in the road; so backfiring is caused by bumps. Deductive logic is that I have Knowledge which enables me to trace a cause; my headlight doesn't work because the battery is dead.

Logic is sometimes a difficult thing to comprehend. Holland and Webb give the simple illustration. A statute says that to take someone's property with the intention of keeping it is an offense. X takes my bike and sells it. "Our starting point is a general rule, laid down by a statute, which we are then applying to a specific instance." And so this is deductive logic. We can set this out as a syllogism. This is true; but is it not the starting point that someone took my bike?

The modern age provides us with the "world picture." To see

338 Holland and Webb, Learning Legal Rules [1991], Chapter Nine "Exploiting Legal Reasoning".
339 Purzig, Zen and the Art of Motorcycle Maintenance [1976]
340 Holland and Webb, supra note 340 at 195
341 Ibid
342 Heidegger, The Question Concerning Technology [1977]; "The Age of the World Picture". In this collection of Essays Heidegger confronts what it means to be in the modern age. The modern age is the age of technology which springs (so the early Heidegger insisted) from the productionist metaphysics of Greek thought. The Later Heidegger moved to see techne as the being the saving grace
the facts of this world they must be made clear. Explanation within this investigation falls, as Levi-Straus has already told us, to an account of what is unknown by what is known. This is the principle of *stare decیدendi*. In revealing the unknown we affirm what already is. It is belief in the known, what is already certain, that holds us to its logic. The logic of law is that the same is the same. This point Haverkamp has already made for us. We can establish this sameness by verification of what is with the comparable and objective what was. In this the law is made self-evident.

Our statutes and our case law lead us to the already known fact. We can show that what is as the same as what was because we can never see the entirety of experience. Despite this, It is because of art in the work. For Heidegger, there are several senses to the meaning of "world." Dreyfus [1990] points these out at 89. There are two worlds of inclusion which are based on either the objects or the forms of categories - such as the physical world. There are two worlds of involvement. This can be either categorical involvement such as "business world" or what is the worldliness of the world-that sense of the incomprehensibility of everyday life, or perhaps the life of the lion.

This is Heidegger's description of the scientific method. See *Ibid*, "The Age of the World Picture" at 121.

*Ibid* at 123. "Through the constant comparing of everything with everything, what is intelligible is found by calculation and is certified and established as the grand plan of history." The mysterious is reduced to explanation within this grand scheme. Progress is revealed by methodology.

This is the point Heidegger wish to leave with us; contra Husserl. This is also the emphatic point of Phenomenology of Perception (Merleau-Ponty). We can only see what is before us. This point also lies in the seeing-as an aspect example we have held to be so important to this paper. Consciousness cannot simultaneously
the law is able to render the right decision that law sustains itself. It sustains itself by the power of the institution. It verifies itself with the presupposition of its own truth. The lawyer then must come to a reason which recognizes the primacy of this institutional legitimacy. This is law's pragmaticism.

What then is the nature of legal thinking? The affirmation of legal thought is the affirmation of this social world. Language can only be language if the intelligibility of its meaning can be coherently maintained. In this the lawyer is bound by the language of their world. The speaking of the legal language is the voice of the legal world and its metaphors are case law and statutes. Legal thinking is directed towards the possibilities which exist for clients in the language of law.

The thinking of law is Rhetoric. To speak the language of law is to be the master of the technique of legal analogy. "Only in this way is he capable of acting effectively, and only thus, after the manner of his age, is he real." To act effectively the Rhetorician hold two points of view.

346 Zimmerman, Heidegger's Confrontation with Modernity [1990] at 144 puts it that for something to be said to have a meaning, then its intelligibility must maintain itself—it must be that we are able to transcend the immediacy of its occurrence. This is Heidegger's thoughts which lie with the temporality of Being

347 Heidegger, supra note 342 at 125. This is Heidegger's observation for the thinker. The modern thinker is confined to the logic of the discourse which is ever increasingly institutionalized. Thinking is institutionalized because it is seen as an "on-going" process which requires continued research and modification. Thought
is not required to comprehend how the agent sees the world, but to present an aspect which accords with that world. The image of this world is all that is required. The truth is to be defined in the representations used to explain the rule followed. To do this we must be "in the language" of the law, to see the world as law.\textsuperscript{348}

We have seen already, by Foucault, that the law takes control of, and gives order to, the social world. It is the institution which is the engine of social progress. The institution gives voice and represents the necessary teleology to reform a reticent world. It can do this because it is the institution which constructs the real.\textsuperscript{349} The institution appropriates progress for itself and so progress is associated with the reform of the institution.

Derrida and Smith have suggested that the law imposes its own justification to effect closure. Without this imposition, law would cease to be binding. The imposition of law ensures certainty and in that, a veracity. We should admit that the question of indeterminacy drops out of the picture once we recognize that the concept of determinacy exists nowhere except within the rationality of dissatisfaction can only be maintained within a singleness of purpose.

\textsuperscript{348} The "world picture" is the image of the world-like the duck/rabbit is an image of duck or rabbit. The point is that they are both parts of a line. We see into the image the reality of what is represented-we see the lines as real. We grasp the real as an image. See \textit{Ibid} at 129 for this point made within the context of Heidegger's work.

\textsuperscript{349} \textit{Ibid}, at xxix; That the "natural" world is the world of science.
The law is just what we do.

What justifies law, for us, is that language is public. When "I" point and shoot a gun, we know what this means. When "I" drive my car through the park, we know what this means. We know these things because we are too much the same about things such as cars and guns. We are inauthentic beings in the public world. It is in that that law has its strength. At some point the law makes sense because we make sense.

Wittgenstein leaves us (PI at 224) with the notion that what is certain is what we cannot doubt—that for example my experience tells me when I see a persons face scrunched up so, that they are in pain. We might respond "but this is subjective". Yet is this less certain than 2 X 2 = 4? Is that not also subjective because it is something I have learnt? "The kind of certainty is the kind of language-game." What passes as "true" depends on where we speak. This as Dreyfus points out [1991] is that we can only point out the background to those who already have an understanding of that background, who already dwell there. We cannot doubt everything because to do so does away with everything. We cannot doubt because in our mode of being it is the background, our beliefs, upon which we conduct our lives. Heidegger and Wittgenstein both point out in their own way that because of this we cannot completely reveal the background, that is to make it serious. Instead we must perhaps focus more on the individual capacity for self-reflection, the ability to, in some sense, see one's own situation. Psychoanalysis is one such tool.

But this of course is not the truth. In Saskatchewan where native women are less than ten percent of the population, they are ninety percent of the women prisoners. This is justice but it is not the truth.
4.3 Out of the Mouth of the Lion

The modern age is an age accentuated by science and technology. In *The Question Concerning Technology* Heidegger moves to examine the presuppositions which give rise to the modern mode of thinking. The mode, which we touched upon in Chapter One, is instrumental thinking; thinking which is directed to our purposes.\(^{352}\) Heidegger places the origin of this mode to Greek productionist metaphysics and the development of the *eidos* or idea.\(^{353}\) The objectification of the world—the appropriation of the world for the subject—culminates in the modern artifacts of control and domination. The essence of technology is that it is a means to an end and, that it is a human activity.\(^{354}\) The development of Technology comes from science and the recognition of the connection between the product of science and what we do. This is the recognition that instruments can be utilized in a technique (*techne*) of production.\(^{355}\)

\(^{352}\) As well as Heidegger's text, an excellent analysis of both Heidegger's controversial life and his thoughts on productionist metaphysics, see Zimmerman, *supra* note 346.

\(^{353}\) *Ibid* at Chapter 10.

\(^{354}\) Heidegger, *supra* note 342 at 4.

\(^{355}\) Franklin, *The Real World of Technology* [1989] illustrates the emergence of the ceremonial urn. Human reason and creativity are applied to the problems of production. Techniques are developed to do work proficiently and, through this, instruments and methods of organization evolve over time to make these techniques more efficient. The holistic production of the craft clay pot, which a single individual would create, evolves into the prescriptive technology of the industrialized product. In the creation of the urn a whole series of related activities are undertaken—the
The world of things, for Heidegger, are either ready-to-hand (available for my use) or present-at-hand (that which occurs in my experience); we view the world as the possibilities for its use.356 These things assume for us the aspect of being equipment. Our attention is directed by our purpose towards things and the means of effecting and increasing their use. It is this seeking to use things more effectively which leads inevitably to employ technology.

Things are in the world because they reveal themselves to us as things. This revealing (poiesis) is the presentation of the existent actuality (physis) as a way of being.357 Techne is also seen as a way of bringing things forward but what is brought forward is not an itself but an art.358 The product of a technique is not a thing but an artifact. Technique is the method or familiarity someone who is proficient possess over a process. It is a way of doing something. We call someone an expert who is master of a gathering of minerals, the creation of raw metal, the moulding and firing of the pot, the decoration, all become specialized. This complexity reveals a requirement of organization. Later Heidegger moves to argue that techne itself was a form of art—a craft—which becomes appropriated through instrumentalism.

356 Ibid. Zimmerman, supra note 346 at 150 shows us that the forest reveals itself ready-to-hand as a timber resource, that the farmland reveals itself as a mining quarry. In the modern age we move to see that the number of people in a household making π dollars is a number corporations can use. This is called information. Information is an element of data which, when place within a logical structure, serves a use.

357 Heidegger, supra note 342 at 10.

358 Ibid at 7-10.
Modern technology, which is most explicit in the methodologies of Frederick Taylor and Henry Ford, seeks to expropriate the manner in which a technique is performed. Science seeks to reduce a craft to a blueprint. This is achieved by prescriptive methodologies—breaking down a process to its atomic elements and then reconstructing these elements in mechanical form.\textsuperscript{359} The scientific method then is tied to revealing and representing the being of how a thing is. This revealing or unconcealment, is the truth of what happens (\textit{aletheia}).\textsuperscript{360}

Once the means of bringing things to be is mastered, then they are present for us. By this we mean that once it is possible to convert what is present \textit{physis} into what is our purpose, then what is present is standing-reserve (\textit{Bestand}) for our use.\textsuperscript{361} The manner things which are \textit{Bestand} are familiar and ordered is called enframing (\textit{Gestell}). \textit{Gestell} sets out a sense of the relation between human beings and things \textit{Bestand}. It is the sense we have of modern production in that organization evolves around the ends sought by the means to bring about that end.\textsuperscript{362} Our world consists of these things which are, for us, the possibilities which can be.

\textsuperscript{359} Franklin, \textit{supra} note 355.
\textsuperscript{360} Heidegger, \textit{supra} note 342 at 13
\textsuperscript{361} \textit{Ibid} at 17
\textsuperscript{362} \textit{Ibid} at 19-20.
For Heidegger, the danger is that human beings themselves become *Bestand* as our purposes become removed from the *techne* to the technology.\(^{363}\)

It is that as technology moves from mere instrument to causality that we forget the being. In this, human beings are themselves become objectified within the world of purpose.\(^{364}\) From *Sein und Zeit* it is apparent that Heidegger holds the view that if something can be, it will be. We see this in our everyday mode of being.\(^{365}\)

Heidegger points us to the direction we are taking. We build technology into our law. This is not merely that we can, but that we will. There has been much wasted intellectual energy arguing whether we can build "expert" systems, or whether such systems are "intelligent." That we speak of expert systems means that the being

\(^{363}\) *Ibid* at 30-32

\(^{364}\) Modern production seeks to eliminate the human being from its participation. The human being is alienated to be the agent of consumption rather than production. This is most evident in the recent "restructuring" of the global economy. The danger lies now that the purpose no longer corresponds to its initial means; the human being no longer participates in production. Heidegger gives us the difficult proposition, from Holderlin's poetry (*QCT* at 34), that the danger is also the saving power (see also Zimmerman at 219). I can only assume by this he means that human beings will transcend productionist metaphysics; i.e. the logic of capitalism, and cease to be agents of production—to move on to a life without "purpose." We can do this presumably because the a priori of capitalism is an illusion.

\(^{365}\) We see this in every aspect of production from atomic weapons to genetic engineering to glass skyscrapers. Once the human being is "of a mind" of something, it seems impossible to prevent its deployment. We do because we can. The world then appears not to be a matter of the human will.
of techne is revealing itself (Heidegger).\textsuperscript{366} That we ask whether a machine is intelligent means that language finds a new use (Wittgenstein).\textsuperscript{367} We move on.

What lies as the technique of law? In law we seek to master the technique of rhetoric—the means to our advocacy. What is Bestand—our case law and statutes—are not merely objects but potentiality. They are ready for our use. To effect this potentiality is Gestell. We recognize ways of going on in advocacy that effect the purposes of our clients. As lawyers we look to our clients purposes as our ends. We do this within the institution which is our setting.

What calls for thinking?\textsuperscript{368} What is it we call thinking? Thinking can never arise in abstraction from experience.\textsuperscript{369} In law our clients speak the events of the world. They bring forward what it is we must show in the legal world. We must speak this. We show this in a language which is already there for our use. We do not concern ourselves with the meaning of events—we do not concern ourselves with our attitudes—but with what is. We find ourselves already in a situation, in a form-of-life. It is the world expressing itself that the intelligibility of what we experience is

\textsuperscript{366} For example, see Dreyfus, \textit{What Computers Can't Do} [1986]

\textsuperscript{367} For example, "The Chinese Room" debate between Searle and Churchlands. This point is raised by Neumeir.

\textsuperscript{368} The title of a Heidegger Essay; see \textit{Basic Writings} at 345.

\textsuperscript{369} Heidegger, \textit{supra} note 342 at xiv
4.4 Revealing the Legal Fact: Shock of Recognition

To discover a new truth is to discover a new metaphor. Nietzsche instructs us that "The drive toward the formation of metaphors is the fundamental human drive, which one cannot for a single instant dispense with in thought, for one would thereby dispense with man himself."\(^{371}\) We have said that knowledge (as definition) is limited by language to what is said.\(^{372}\) When we recognize language's limit to our world, we see the paradox which unfolds from the world as a representation of itself. We create new metaphors to remove the consequences of this paradox because new metaphors recreate the world.\(^{373}\) The human being escapes the

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\(^{370}\) Ibid

\(^{371}\) Nietzsche, From "on Truth and Lies in a nonmoral sense" in a version printed in The Rhetorical Tradition, Patricia Bizzell and Bruce Herzberg (eds) [1990] at 894

\(^{372}\) The lasting element in thinking is that which makes experience experience—the non-verbal being—the way of seeing one's own world, which cannot be translated because its presence is outside of language.

Wittgenstein emphasised to Russell (who had missed the point of the Tractatus) that the ethical (that which cannot be said) is the most significant. "The main point is the theory of what can be expressed (gesast) by propositions—i.e. by language...and what can not be expressed by propositions, but only shown (geseigt); which I believe, is the cardinal problem of philosophy. ", from Bell, Essays in Kierkegaard and Wittgenstein [1978], at 12.

\(^{373}\) Nietzsche, supra note 371 at 893 on the philosopher:

"His method is to treat man as the measure of all things, but in doing so he again proceeds in the error of believing that
paradox of rationality metaphorically.\textsuperscript{374}

"What then is truth? A movable host of metaphors, metonymies, and anthropomorphisms: in short, a sum of human relations which have been poetically and rhetorically intensified, transferred, and embellished, and which after long usage, seem to a people to be fixed, canonical, and binding. Truths are illusions which we have forgotten are illusions; they are metaphors that have become worn out and have been drained of sensuous force, coins which have lost their embossing and are now considered as metal and no longer coins."\textsuperscript{375}

In the Seeing-as aspect drawing we come across the enigma of the image as the real. It \textit{is} a duck, it \textit{is} a rabbit. It is also line and form; a thing itself. As we look at it, that is the hardest thing of all to see. We come to the image with an expectation of

he has these things [which he intends to measure] immediately before him as objects. He forgets that the original perceptual metaphors are metaphors and takes them to be the things themselves."

\textsuperscript{374} We have seen previously in this paper, for example, that in science a new theory removes instrumental anomaly; in law, a new term of art redefines intention, in philosophy, we encounter a new way of explaining the inexplicable. It follows from this that philosophy itself must turn for a ground outside of language. This limit of language has been recognized in Wittgenstein's Form-of-life, and Heidegger's "Being of beings". Merleau-Ponty, \textit{supra} note 268 at 18 puts the problem this way;

"But the question is precisely to know is whether there is such a thing as logically coherent thought or thought in the pure state.....One of Kant's discoveries, whose consequences we have not yet fully grasped, is that all our experience of the world is throughout a tissue of concepts which lead to irreducible contradictions if we attempt to take them in an absolute sense or transfer them into pure being, and that they nevertheless found the structure of all our phenomena, of everything which is for us."

\textsuperscript{375} Nietzsche, \textit{supra} note 371 at 891. This short essay captures entirely the futility and limit of rational thought, thought which to be rational must correspond not with how the world is, but how we see it.
meaning. We are irresistibly drawn through the image to the real.\(^\text{376}\) It is, to use Aristotle's phrase, a "shock of recognition" of the existent in the physical experience of our world.\(^\text{377}\) Gadamer suggests that understanding of the work of art is the model for all understanding\(^\text{378}\), that such experience provides the norm for the whole process of human understanding and experience. We must try to see what it is before our eyes. There is no meta-language by which meaning can transcend discourse.\(^\text{379}\)

Analytic philosophy sees unconcealment as an act of agency—the effective cause. This is the cause which shows the face of an event. It is the aspect (eidos) by which the thing is known as a

\(^{376}\) Of course, the danger with modern image is a belief that it is real. I have just watched a woman shot on television. She was hit by a sniper in Sarajevo. We have seen many such images. I look through these images with the natural sense of shock. But it seems that the one thing I do not feel, which is what the picture speaks, is fear.

\(^{377}\) This is taken from Aristotle's phrase on the effect of metaphor. It is that we encounter a similarity which is strikingly out of place and yet we can see that it makes sense (MM at 109).

\(^{378}\) Gadamer, *Truth and Method* [1966] particularly the section entitled "The Subjectivization of Aesthetics through the Kantian Critique" at 42ff. At p.53 Gadamer suggests that "...the irrationality of genius brings out one element in the creative production of rules evident both in creator and recipient, namely that there is no other way of grasping the content of a work of art than through the unique form of the work and in the mystery of its impression, which can never be fully expressed by any language. Hence the concept of genius corresponds to what Kant sees as the crucial thing about aesthetic taste, namely that it facilitates the play of one's mental powers...and thus the originality that creates new models." For Gadamer then, it is the 'play' which is most true.

\(^{379}\) This is, of course, in contrast to Habermas's communicative action theory which is similarly hermeneutical in orientation but relies on the notion of a transcendent 'ideal speech' discourse. It is through striving for an ideal form of communication-based on a consensus—that we come to understand across discourses.
thing. The revealing which Heidegger seeks is the truth of the being by which things come to be.\textsuperscript{380} It is this search for what brings about the question of the fact of the legal fact.

How does the fact become an entity? The \textit{eidos} is the objectification which identifies the thing as an entity. It is this entity with which productionist metaphysics is concerned. Before we can speak of the cause of the entity however we must be able to speak of the entity itself. It must be present to us as an actuality (\textit{physis}). This bring-forward or revealing is \textit{Poiesis}. Poiesis is always something which is effected, which comes about because of an involvement.\textsuperscript{381} We have already noted \textit{techne} as one way of producing to bring about something skilfully. \textit{Techne} is a mode of knowing which does not signify the action of making.\textsuperscript{382} Disclosing, as in art, is another way that we can speak of things coming to be. Art is always something created.\textsuperscript{383}

As creation, art speaks to the revealing of truth. The truth of the work of art (\textit{Aletheia}) is its unconcealment. Its play is within the juncture of what is coming to be. Looking at the image sees us through to its actuality. We can speak of the art neither as an

\textsuperscript{380} Heidegger, \textit{supra} note 342 at 6.

\textsuperscript{381} Heidegger, \textit{supra} note 342 "On the Origin of the Work of Art", at 189

\textsuperscript{382} \textit{Ibid}

\textsuperscript{383} \textit{Ibid} at 178
image for we see the real, nor as the thing itself because it lies beyond the image. Mulhall puts the image as irreducible and inexhaustible.\textsuperscript{384} Art is not the thought of Being, but the expression of the being of Being.\textsuperscript{385} We understand the image to be what it is we perceive, not what we interpret. It is the merging of colour and perception into a unified whole that speaks the truth of the world.

Art stands out from the world by its utter purposeless.\textsuperscript{386} This is the great truth of art. Rilke gives us an insight into the unhappy life of the later Cézanne. His work is ridiculed, he cannot get young models to pose, and he works to exhaustion without joy every day.\textsuperscript{387} His art is created because it forces itself to be created. It must be. He is inconsequential to the work itself.\textsuperscript{388} What makes him a great artist is that he is moved to present the world

\textsuperscript{384} Mulhall, supra note 270 at 162

\textsuperscript{385} Ibid. The usual Heideggerian phrase speaks of "man", I have replaced that here with "Being."

\textsuperscript{386} Zimmerman, supra note 346 at 234 puts it that it is utility that separates art from commodities. Once a piece of art becomes a commodity, it cannot be what it is. In this way we can suppose that "high" art ceases to be true art because it is used as a signpost; it is used to show what we mean by art. In "What is Thinking" Heidegger puts it that art is not the thought of man but the expression of the being of man.

\textsuperscript{387} Rilke, \textit{Letters on Cézanne} [1985]. See for example at 34. Also Merleau-ponty write's similar remarks in "Cézanne's Doubt" in \textit{Sense and Nonsense}.

as it is without care for beauty.\textsuperscript{389} His work reveals the lived experience.

Heidegger, following Nietzsche, holds that there is no reason why anything should be at all.\textsuperscript{390} This is of course the point Wittgenstein has drilled deep into us. The meaning of a word is its use because there is no other meaning. The world, and the way we are in it, presents itself to us as an experience. The world just is a fact. It is a lived-experience which we encounter through our presence in a particular situation.

The modern world, denied the respite superstition, myth, religion and science have provided us as explanation for being, finds nowhere to turn but to the purposes of our lives. These are ground in the \textit{telos}. Heidegger tells us that there is nothing to be found

\textsuperscript{389} Merleau-Ponty, \textit{Sense and Nonsense} [1964] at 16; The object is to capture what is seen rather than what is thought (interpreted). "If I capture all the little blues and all the little maroons, I capture and convey his glance." The personality is captured by the glance, yet the glance itself can be perceived of colours only. In \textit{Phenomenology of Perception} [1962] (at 326), M-P puts it that "My gaze 'knows' the significance of a certain patch of light in a certain context; it understands the logic of lighting." It is in the perception, how things appear for us, that a meaning emerges. M-P puts it that if we conceptualize the expression first, we miss the mystery. Cézanne sought to paint so that one could smell the flowers. Rilke puts it (at xv) that what is sought by the artist is an "objective telling" preserving the "balance between the reality of nature and the reality of the image."

\textsuperscript{390} \textit{Ibid} at 235
here either in these humanist attempts to ground being.\textsuperscript{391}

The meaning of our experiences lies with our presence in a situation.\textsuperscript{392} In a remarkable point Merleau-Ponty relates Cézanne's expression on the artist and his art: that "The landscape thinks itself in me and I am its consciousness."\textsuperscript{393} The world speaks itself through the artist. The authentic lawyer then, if it could be so, is the one who would speak the aspect which we are

\textsuperscript{391} See for example Heidegger, supra note 342 at 135-136. This point is particularly emphasized in his rebutle of Sartre's humanism; see Basic Writings "Letters on Humanism". There he seeks to show that Dasein is the way of revealing the possibilities of the world, but it does not discover or create those possibilities. Heidegger held Nietzsche, to whom he owes much of his thought, to be the last metaphysics philosopher precisely because Nietzsche continued to place value in the world even though it was his own.

\textsuperscript{392} Merleau-Ponty, Primacy of Perception [1964] at 25-27

"If we admit that our life is inherent to the perceived world and the human world, even while it re-creates it and contributes to its making, then morality cannot consist in the private adherence to a system of values. Principles are mystifications unless they are put into practice; it is necessary that they animate our relations with others....Just as I grasp time through my present and by being present, I perceive others through my individual life, in the tension of an experience which transcends itself."

\textsuperscript{393} Merleau-Ponty, Sense and NonSense [1964] at 17. In a similarly remarkable point Dwyer relates Merleau-Ponty's analysis of a brain-damaged man by the name of Schneider. I have not pursued this point (perhaps its veracity is of no consequence) but in my imagination, Dwyer has placed Schneider as a "literal" man. He can only see the image as image. He is one who appears unable to experience the world in any other way than literally. When the sky is blue, it is blue and cannot be imagined as something else. There is no such thing as a joke for this man. He doesn't see sadness. We can refer back to our discussion here on "noticing an aspect". The aspect-blind; those who can't see the alternate or secondary aspect, are those who cannot see the representation as the reality it depicts. Mulhall, supra note 270 at 146 puts it that for the aspect-blind "the linguistic technique stands between him and the world."
otherwise blind to. This is not the fact of the institution but the fact of the world. Gill provides us with this in the core of Merleau-Ponty's imagery:

The visible can thus fill me only because I who see it do not see it from the depths of nothingness, but from the midst of itself; I the seer am also visible. What makes the weight, the thickness, the flesh of each colour, of each sound, of each textile texture, of the present and of the world is the fact that he who grasps them feels himself emerge from them by a sort of coiling up or redoubling, fundamentally homogenous with them; he feels that he is the sensible itself coming to itself and that in return the sensible is in his eyes as it were his double or an extension of his own flesh.394

It is the experience of our situation which forms the basis of what truly makes sense. They merge into a rationality; "To say there exists rationality is to say that perspectives blend, perspectives confirm each other, a meaning emerges."395

We should recall at this point from chapter two the "hard case"; the sad plight of the character of Sartre's L'existentialism. We see that the very question facing the young resistance fighter arises only as an event. It is this event that imposes the identity of a self upon the self. We see that situations arise which call for decision. Heidegger has put it that "Every decision, however, bases itself on something not mastered, something concealed, confusing; else it never would be a decision."396 It calls for


395 Merleau-Ponty, supra note 268 at xix.

authentic thinking; an act where the world does not speak its own preference. Merleau-Ponty puts it that:

... the experience of perception is our presence at the moment when things, truths, values are constituted for us, that perception is a nascent *logos*; that it teaches us outside of all dogmatism, the true conditions of objectivity itself; that it summons us to the task of knowledge and action.\textsuperscript{397}

Thus, as Dreyfus tells us, it is that what is most meaningful in our lives cannot be accessible to critical reflection. Critical reflection presupposes something that cannot be fully articulated.\textsuperscript{398}

\textsuperscript{397} Merleau-Ponty, *supra* note 392 at 25.

\textsuperscript{398} Dreyfus, *supra* note 22 at 4. Heidegger's early view of language presupposes that the background cannot be explained but only shown. This is with Wittgenstein. Heidegger however thinks that the background can be pointed out by the existential analytic. This is in keeping with the Husserl phenomenological reduction. Unlike Husserl however this cannot be context-free. Meaning is a described as the odd project of hermeneutical phenomenology-the thing itself through an interpretation. In *On the Way to Language* at 133, Heidegger takes the more nostalgic view:

There is no such thing as a natural language that would be the language of a human nature occurring of itself, without a destiny. All language is historical, even where man does not know the history in the modern European sense. Even language as information is not language *per se*, but historical in the sense and the limits of the present era, an era that begins nothing new but only carries the old, already outlined aspects of the modern age to their extreme.

Language is already speaking to which we reply in learned response (from *Poetry, Language and Thought*).
5.1 Introduction: The Domain of a Practical Action

Within every action lies a form-of-life. For us to speak of an action there must be a recognized pattern of communication, behaviour and practice that counts for an action. It is in the recognition of the domain as an activity that we look to the events of the situation for understanding. As we shall point out, this is not a detached observation requiring a "theory" but rather is based upon practical reasoning about actions.

If we rely on legal text we see, as pointed out by Garfinkel, that we are talking about legal "talk." That is to say this is analyzing how judges speak, not what they speak about. To understand their speaking we have to understand how to use legal language. This means we must understand the action which is in the situation we speak. To understand this is to understand the grammar

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399 Harold Garfinkel, "Remarks on Ethnomethodology", in Directions in Sociolinguistics: The Ethnography of Communication [1986], Gumperz and Hymes, eds. I will use Suchman's analysis here as it fits well with the overall intent of this section. See Suchman, Plans and Situated Actions [1987] at 46.
of the agents themselves.

The job of the system analyst then is to design an effective model which captures the "what" of the complex process, while creating a modularity which enables the construction and emulation of the dynamic of that process. In examining a legal situation "what" is it we are talking about?

This presents to us the problem in building expert systems. It is not that we don't know how a word is used in a social practice; we can usually show an example. What the problem is is that we don't know how it is going to be used. How it is going to be used is subject to the grammar of the situation. Each new situation possesses within it the possibilities of new meaning. Suchman coins this the situated action. This underscores that "every course of action depends in essential ways upon its material and social circumstances." The situation is the crucial point in an action. By

400 We come back to Heidegger here and the notion of "transparent" actions (as we showed in Chapter Three using traffic lights as illustration, supra note 292). When the world is as it should be—when we are moving unreflexively in our everyday activities—then we experience no sense of actively directing our thoughts. [of course, if our everyday activities are selling cocaine, etc, we would likely be in a state of dread; a sense of apprehension]. The objects and activities of our use drift into the background ("ready-to-hand"). It is when things "break-down" (a disentwining by which the chiasm appears between the being and the world) that we become aware of intentional activity, activities that can in some sense be said to be intentional. It is in this notion of transparency that the thematization of purposive activity loses its grip on us. Suchman covers these points in her text. For a review of the situated action see Suchman at 50.

401 Ibid
establishing the relevant aspects of a situation, the more we give that situation a context within to a specific legal domain.

In law we speak of an action because we speak of a changed state of the world, something which we make sense of post hoc. What comes out of this talk of situations and interactions is that what counts as rational is a product of how agents act in the world.⁴⁰² What we speak of as rationality is a phenomena. It is the phenomenon of experience reified into a social world. In this an ungrounded way of being is made certain. We construct the goals, beliefs and intentions of human beings and then tie these to the description of the changed state of the world.

Suchman gives an important insight into the nature of background or "tacit" knowledge.⁴⁰³ When we act, for example when we walk across the floor, there is no mental content as to what the state of the ground is under ones foot. It is only if there should appear to be a hole, some reason that we can't go on, that we "act." This is Heidegger's articulation of break-down. It brings forth consciousness and practical reasoning. It is in this that our situation speaks us.

What is argued here, adopting the ethonomethodological approach, is that we need not concern ourselves with general "tacit" knowledge

⁴⁰² Ibid at 58
⁴⁰³ Ibid at 47
because it does not form part of the content of the action. Tacit knowledge is the internal-relations of the situation only in the case of a break-down. We concern ourselves with apprehending that situational element. It is this element of the background which reveals the necessary aspect of the agent's action. Such an aspect is recognized as the instance of the legal fact.

That every action is determined by its internal-relations means that we cannot say anything is certain. No field in Law is static because no field of human activity is static. Understanding must exist before expert systems can be built. We must know the practical activity of agents before we can emulate it; the perceived legal domain. Suchman proposes that we must look to the intelligibility of an action, in situ. In law we created an

404 Garfinkel points us to this conclusion in his studies on practical actions. In a study on "cocktail" conversations (Suchman relates this at 46) students are asked to write down the "tacit" knowledge which accompanies ordinary conversation. They find this task overwhelming and finally impossible. This raises the question whether such assumptions are part of the agents mental state prior to acting. The tacit knowledge arises as we account for what it is we are doing. It becomes a way of explaining our actions.

This concept, a pseudo-problem arising out of our understanding of being-in-the-world, consumed Husserl. He argued that the phenomenological reduction would lead us to understand this background. Wittgenstein had argued in the Tractatus that reality was composed of "atomic" elements to account for this vagueness of sense. He was never able to show an example. Heidegger appears to hold that the existential analytic can apprehend the world (see Dreyfus supra note 22; Introduction). Later Wittgenstein holds the background to be incommensurable. Merleau-Ponty, as we noted earlier, argues that the phenomenological reduction shows us its impossibility.

405 Ibid
intelligibility by creating a domain of a language-game. The domain acts as the reference point to both the structuring of our data base, and to the structuring of the user-interface which links the situation of the user to the necessary case law. If the logical structure is too rigid the system will be unable to deal with slight modifications in factual situations. If it is too flexible, then the system will be unable to provide specifically relevant information for the lawyer.

It is stated in the thesis that to construct an expert system in law we must believe in an underlying structure of rationality. There is no consensus about what law is, nor about the true nature of legal reasoning, but it is nevertheless needed if legal rationality is to be self-conscious.406 To deal with this problem of action representation the approach has been to develop systems which are conceptually "closed domains".407 A closed domain is the self-contained representation of a legal doctrine. It is an area of the Law which is substantially "settled". We can equate "settled" with the concept of "literal" as set out in Chapter Three. The closed domain has the structural advantage that the algorithm for legal concept is relatively easy to design. It also enables a more manageable data base.

406 Smith and Deedman, supra note 6; see also Susskind, Expert systems in Law [1987].

407 For a good review on this subject see Kowalski, "Case-Based Reasoning and the Deep Structure Approach to Knowledge Representation".
The schema or frame of an action which we touched upon in Chapter Three sets out a rational construction of an action. Such a characterization of a situation enables us to perceive a sense of an experience, a simulacra of the phenomena. Through the closed domain we eliminate the problem of "plan recognition" in our selection of schemas. This approach has been attempted by Schank and Abelson [1977] in their "restaurant" script. In that approach we recognize something of an external approach to an action. It is an attempt to construct "common sense", the background of our lives. In building frames for law, we look to the purposiveness of human actions. We emphasize the teleology of practical action. We observe a practice and try to describe it.

Indexicality is Charles Pierce's description that the significance of an expression is the occasion of its use. The use of language is tied to making sense in a situation. There are conventional expressions which impose their use precisely because they are conventional. I cannot point at a car and say it is a "baseball" without giving an explanation that is its meaning. I can say it is a "lemon" without need of further explanation because that is a metaphor which has a conventional (literal) meaning which is embedded in that use. From this example we recognize that words are fundamentally situationally communicative rather than

\footnote{Suchman, supra note 399 at 36-39.}

\footnote{For a discussion of indexicality see Michael Lynch, supra note 182 at 233ff. Suchman also covers indexicality in her text.}
possessing any identity of "core meaning." Words are not isomorphic to their sense. When we analyze a word we are forced to look to the situation for its use.\textsuperscript{410}

We have seen the paradox of language use. In looking at the seeing-as aspects of the duck-rabbit illustration, we recognize that language use directs our thoughts to what can be perceived even as it is constituted by that perception. We experience this phenomena because we already have a pre-understanding of the situation which is presented to us and in which we are present. This is our form-of-life.

The limits which exist in law are not to be confused with the indeterminacy of law as articulated earlier by Gardner. We are confronted with the shift in social situations which create new metaphors and consequentially new objectivity. The limit on the expert system is the ability of the system to adapt and incorporate this shift within its representation of the legal domain. It is precisely for this reason that legal experts are involved in the construction of expert systems. They are most able to conceptualize and incorporate legal metaphors in a dynamic framework.

\textsuperscript{410} Professor Smith, in one of his illuminating lectures on the Neurotic Foundations of Social Order [1990], related an experiment where subjects were brought in to administer an electric shock to patients in an institutional setting. The patients were actors who feigned varying degrees of pain as the subject "turned up" the dial. The subject received instructions from a "doctor." The test was to see how far they would turn the dial as the patients exhibited increasing signs of excruciating pain. Naturally most of the subjects obeyed the orders to maximum levels.
5.2 Building Expert an System: Pure Economic Loss

We now consider how to implement the goal-hierarchy into a structured computer algorithm. We will show how the deep-structure presents the most practical methodology in the design of the logic-flow. By applying this technique, the resulting computer program will be more stable and coherent, and better reflect jurisprudential reality.

The application of a deep structured programming technique reflects that computer systems are tools. The expert system is a tool which we use to solve problems by machine rather than by human effort. At the present time we are restricted in developing such tools by our limited capacity to deal with natural language's situational dynamic. Accordingly any application we develop must be one which deals primarily with a well accepted practice.

How do we put the grammar of the agent into a computational form? In the design of any computational model we attempt to break down what appears to be a complex processes in order to facilitate

411 The author and Alexander Carnera undertook to create an operational expert system in Tort Law. The area chosen was "Pure Economic Loss". This area was selected because it is a relatively stable area of law, which straddled the boundaries of tort and contract law. As such it presents the opportunity to study certain "hard" cases. "Algorithm" is method of describing the structure of logic which is incorporated into the computer program.
practical design. This can be termed structural modularity.\footnote{As for example in Terry Winograd, \textit{Language as a Cognitive Process} [1983].} Modularity is the prescriptive process of de-constructing complex functions into simpler components which can be better emulated. By effective modularization, we not only appear more capable of dealing with complex relations, but also incorporate a methodology which is inherently flexible and expandable. This is because changes in or to the composition of the model can be localized.

In building a research tool we are to consider both the way in which the Law functions conceptually, and in terms of how the lawyer may utilize the body of case law to perform within the judicial system. We will break down the utilization of case law into two approaches. The first will be Rule Based Reasoning (RBR). The second will be the Case Based Reasoner (CBR).

The rule-based approach (RBR) incorporates the knowledge of the expert directly into the program shell. This system derives its conclusions \textit{from modus ponens} logic structures that capture domain expertise. In a rule based system, the conclusion is not derived through the cases themselves. The system may justify its conclusions by referring the user to relevantly similar cases in an associated database, but it does not "consult" the cases before reaching an outcome.\footnote{Smith, Gelbart and Graham, \textit{Building Expert Systems in Case-Based Law} at 2.}
Legal research, the *geist* of legal life, is about retrieving relevant decided cases and statutes. The cases and statutes provide both a perception of what the law is with which to advise clients, as well as a means to able to conduct legal argument. An effective information retrieval methodology will unequivocally improve the quality and effectiveness of the lawyer's practice.

The most effective form of legal case based reasoner is one which asks the user only factual questions, but utilizes an extensive case database to formulate a legal conclusion. The task of the knowledge engineer is to ensure that the right category of facts is established to serve as match parameters with the database. The program should incorporate weighting calculations which will approximate some degree of similarity, and therefore how "on point" the case is based upon the facts provided. This will be done against an entire data base of case law. From this the system should be able to provide some measure of predictability and provide a list of relevant cases to the user.

The Case Base Reasoner is utilized through the construction of case profiles. The technique, which also uses *modus ponens* logic, is to establish from the expert the set of facts which are relevant in a given area of the Law. These facts are then used as the matching criteria to derive or determine the conclusion for the user against

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414 Gelbart and Smith, *Toward a Comprehensive Legal Information Retrieval System* [1992].
the data base Case profiles. A CBR is the most valid form of reasoning because it connects the situation to the legal domain directly. Cases are justifications judges use to choose between alternatives in the real world.

CBR are the most difficult form of data base construction. It necessitates constructing a relation between an event in the world and a fact in a legal text. This differs from the purely modus-ponens hypothesis of RBR where legal theory plays the guiding hand. CBR must establish from the legal text the situation judges are actually concerned with. That is we must reconstruct reality from doctrinal language rather than construct doctrinal language from reality. It is in this that Smith guides us to what counts as significant in the domain.

The shell of the system conceptualizes the legal reality through the responses the user provides. The questions must create an impression of the factual reality which we are to consider in legal terms. The quality of the questions is essential to this process of clarification. Because of this process of recognition from an external perspective to a meaning within the legal discourse, it is imperative that the questions be constructed by those skilled in the process of conceptualization by analogy. Lawyers must be involved in designing questions for expert systems.

This point may seem trivial but it is the key to the validity of
the system. We construct questions using natural language rather than language using legal terms. This impresses upon the user a sense of the situation. When we ask whether communication took place between the parties, the response sets up a possibility which can be proved at trial. To answer the question, the user must relate the fact which underlies the legal concept. It is through ordinary language that we establish the legal "obligation." It is in this that the intelligence of the system is imparted by the user through what Michie calls the "human window"\textsuperscript{415}. The point here is, as Suchman discovered,\textsuperscript{416} that the user does not know the relevance of any specific fact of the domain. They can only respond in terms of how the questions are set up. The questions must therefor capture the essence of the legal fact; that which gives the fact its legal relevance.

To accomplish this the question-flow is structured using an inference-engine. This process can be characterized as passing through a set of logic gates until sufficient facts are interpreted to correspond to one of the recognized node-categories of the domain we are analyzing.

The facts which are relevant to a given action are set out for us

\footnotesize
\begin{itemize}
\item[\textsuperscript{416}] Suchman, supra note 399 at 92
\end{itemize}
in two senses. In one sense we derive through the expert the relevance of facts to a specific legal domain. In establishing the telos of the domain, the analyst draws upon the factual and social elements of reality which constitute a situation. By this we say that what counts as a relevant fact is set up for us being relevant to the legal decision. The number or type of facts which are truly significant to the domain prove to be of a manageable number. The matching case law become the appropriate cases incorporated into the database. How we view a case, the characteristic aspects which we have alluded to in Chapter Three, are pointed out for us by the analyst in accordance with their perception of the domain.

In the second sense we use the facts as attributes which determine how we are to conclude the outcome in accordance with the matrix values set out by the analyst. These attributes are set up by the logic of the system as we gather the user's responses. Once we construct the "picture" of reality of the user's situation, the logic of the system is then to compare these attributes to the fact-patterns within specific cases of our database. It is in this that the situation speaks its resolution.

We have attempted to apply a weight criteria which fits with a notion of preference to certain sources of authority. The level and Jurisdiction of the Court is one such factor. A higher Court or local jurisdiction fits in with how we perceive a decision to be influenced. Weighting factors are also set out by the telos of the
system. Aspects of an event will be deemed more highly relevant to the domain. The weight criteria we use for the captured facts depends on the responses given by the user in the situation. These weights combine to give us degree of predictability.

We must emphasize Wittgenstein's point on rule-following that the rule does not determine the result. We can match the case and give a reasonable interpretation, but the outcome at trial is determined by how the judge applies the rule. That is connected to the internal-relations of the rule. These internal-relations are tied to how the judge sees the aspects of the case. Of course, in a truly "hard" case, either decision is "correct."

Let us set out an example. Our task here is to construct a system to evaluate a case of purely economic loss. The expectations we will have of this system depend in part on the objective we hold for the expert system. We can develop the tool as a means of evaluating argument. That is to say we can use the Case Based Reasoner to examine doctrinal level arguments and create a scale of relevance to our existing fact situation. We do this by understanding the approach a good lawyer takes to evaluating the prospects of success, and then incorporating this in the Case Based Reasoner by adopting a numerical case evaluation scale.

We consider pure economic loss to be a concept independent of contract, negligence or Trust. In contract risk is allocated
between the parties according to their preferences and intentions which are recognized within the language-game of contracts. When we speak of damages in contract they are to be considered in purely economic terms. We do not include these in the concept of Pure Economic Loss because the agents have already agreed how any breach is to be arbitrated. In negligence we are concerned with the restoration from injuries inflicted as a result of injury to property or person. We therefore attach liability to the injury itself. The law on Trusts has prescribed remedies based through the establishment of fiduciary obligations.

Pure Economic Loss is the loss of money which arises as a result of a legal breach from causes other than breach of contract or actual physical injury. In considering the validity of a claim for losses which are purely economic, we are concerned with questions of remoteness to physical injury, and of accepted extension of liability by the Court.

We believe the core of pure economic loss in non-legal terms can be described as the "relationship" between knowledge, the communication media, and the goals of the agent. This can also be considered as "justifiable" reliance by one agent on another. By media we refer to the body through which the goals of the agent are to be achieved. It is breach of obligation by the media in communication to the agent which results in a failure by the agent to fulfil its goals.
In the development of the Pure Economic Loss Advisor we have attempted to incorporate what we consider to be the a structured flow of the relevant case law with the necessity of building a tool which will access the relevant case law necessary for the practising lawyer.

We have determined from a review of relevant cases in the area of pure economic loss that case law is broken first into the area of remoteness; where the loss arises out of risk of physical injury and, second the area of extension; where the Court considers the loss to fall within a recognizable head of liability. In reviewing the area of extension we see an underlying logic which focuses on the concept of communication between the tort feasor and the plaintiff. This aspect reveals to us the underlying structure within the action theory.

In the area of pure economic loss, we must, like the lawyer, consider the inherent contradictions which exists within case law at the doctrinal level. Of particular concern is the opposing conclusions between Anns v. Merton London Bourough Council [1978] A.C. 728 (adopted in Canada in Kamloops v. Nielsen (1984) 2 S.C.R. 2) and the case of Murphy v. Brentwood District Council (1990) 3 W.L.R. 414.

Anns sets out economic loss as a prima facie duty of care where there is a foreseeable risk of harm. Murphy rejects this doctrine

We start with the premise that Agents are autonomous beings who are free to fulfill their goals. The agent has free-will. From this we digress to incorporate a *prima facie* duty of care not to inflict physical harm on their fellow agents. The contradiction then arises where the free will of the agent conflicts with the effect of economic loss by another agent. In reviewing the matrix of goal-ordering, we see that free-will is valued higher than the suffering of economic loss. Accordingly we assign no *prima facie* duty of care to avoid pure economic loss. Money is merely an abstraction in an abstract world.

5.3 The Construction of a Database

5.3.1 The purpose of SLATE Technology

The late Guy Vandenberghe proposed the idea of a legal "workbench" and in this he relates four layers in which information technology can be applied in legal practice.\(^\text{417}\)

1. Administrative applications: word and data processing;
2. Legal documentation systems: data bases with text of legislation and case law;
3. Knowledge bases with legal information not found in legislation or case law, including document generation systems;
4. Expert systems capable of solving legal problems.

\(^{417}\) G.P.V. Vandenberghe, "Object and Scope" in *Advanced Topics of Law and Information Technology* [1990] at 7.
Such information systems comprise the tools of the legal profession. These include statutes, regulations, case law reporters, law journals and legal forms. What makes these systems more vital is the introduction of technologies and methodologies promise to dramatically alter the way law is practised.

Manual research techniques, including reporters, gazettes and journals, permit lawyers to query using a wide range of search parameters. The researcher will bring knowledge with them that limits the investigation to what is relevant. This includes using particular search phrases, legal concepts and fact-matching parameters. Using automated boolean search tools, such as the commercial computer-assisted services, lawyers can do legal research without leaving their desk.

Applications are being developed with the idea of providing query capabilities which go beyond boolean techniques. These methodologies attempt to create an environment more closely resembling the traditional manual search techniques. FLEXICON is an intelligent legal information retrieval system being developed by the FLAIR project group at the University of British Columbia, Canada. FLEXICON provides different quadrant search parameters which can be used singularly or in conjunction to derive relevant

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418 FLEXICON: (c) Copyright 1989, Daphne Gelbart and J.C. Smith. (Fast Legal Expert Information Consultant)

419 Faculty of Law Artificial Intelligence Research
cases. A search of relevant case law can be conducted using as parameters fact situations, statute, legal concepts or case name.

Intelligent search procedures are designed to be more "user-friendly" in that they narrow the search to the most relevant case law. This eliminates the objection to boolean search methodologies found in the current generation of text retrieval systems. The current systems require perhaps too much proficiency in the use of command syntax. The greatest attribute of FLEXICON technology in text retrieval is perhaps that it is a familiar approach to the lawyer in the way they do legal research. Lawyers do approach case law with both facts and legal concepts in mind. Both are important in using a case to characterize legal reality.

FLEXICON complies with Bing's [1987] definition of an effective retrieval system: a search function in the form of a non-boolean effective retrieval mechanism; a relevance function in the form of computer-generated profiles, case summaries and HYPERTEXT links to rapidly determine the relevance of retrieved cases and; a source function in the form of electronic and hardcopy full text and summaries of cases.\textsuperscript{420} FLEXICON is designed incorporating expert legal knowledge. This legal understanding forms the basis of inference rules and search techniques to automatically analyze cases and other legal documents to produce intelligent case

\textsuperscript{420} Gelbart and Smith, "Flexicon: Towards combining Automated Text Retrieval and Case-Based Expert Legal Advice".
representations, and as well, to retrieve best-match cases relevant to the user input parameters.

One of the major problems with constructing a database representation of a legal domain is the development and maintenance of data fields. Data fields are the factual elements which are necessarily relevant to the domain found within specific legal text. Case base reasoners (Legal Expert Systems) and legal databases must be built and maintained through the addition of information in current case law. Typically such maintenance requires large investments in time and money to extract this information manually.

The SLATE project (Specialized Legal Automated Term Extraction) is a research project intended to develop tools which will automatically determine the values of key attributes of a case, and to extract and incorporate these values into the domain database. In doings so we would be able to construct the necessary facts of the domain upon which FLEXICON text analysis and case base reasoning may be executed.

5.3.2 SLATE Template Methodology
The problem of language acquisition is, as Winograd points out, one of the central problems of linguistics which has not been dealt with in a comprehensive way in the computational paradigm. The Slate methodology incorporates a parser to search for words which

421 Note 412, supra at 19
have relevant significance. The recognition of significance comes through the process of training in the legal language. We attempt here to capture the style and terms of the institutional language which is used to express specific legal facts. This language is posited into a dictionary or lexicon of terms which we use in our analysis of case law to extract legal meaning. Legal knowledge is implicit in the lexicon of terms we create to drive the text analysis process.

Natural language enables a seemingly infinite combinations of meaningful expressions. It is possible in natural language to express a combination of words and phrases which have never been uttered before, and that such utterances are capable of being perfectly understood. The only apparent constraint on combinations is grammar. Yet we realize that any sound or gesture can be intelligible if both speaker and hearer have the necessary communicative background to understand what is meant. In the disposition of a judgment we see that language is tied to the formality of the institution.

In constructing parsing techniques we can take advantage of the institutional style of speaking which a judge uses to impart the finality of the situation. It is this style which sets out the rationality of the discourse. A characteristic of legal decisions is the formality of the speech. Legal text tends to be relatively
error-free and syntactically correct. By focusing on specific factual elements we take advantage of this formalism to create a simple parsing technique. This avoids the need for a general semantic approach to text understanding. The pragmatic convenience of this approach is of course countered by the specificity of the particular lexicon. We hope that the flexibility of this methodology will however show to be a strength rather than a weakness.

Our purpose is to create a recognition procedure for the quantum of damages in whiplash cases. What we do is seek out given sentences which speak to the specific function of a judgment; an award, an outcome, etc. To capture the facts we use a method of linguistic pattern matching. Grammatical structures consist of a formalism which include such categories as nouns, adjectives, adverbs, verbs and prepositions which we use to give the sense of meaning. In describing the structure of a given sentence in legal judgments we notice that we can structure the search using a lexicon with these elements:

| term: | the piece of text data such as quantum; |
| key word: | term phrases in each lexicon component; |
| component: | the groups of synonymous key words; |
| template: | the "formula" or pattern of components that compose the sentence by which the term is captured. |

The approach taken in the development of a term parser is to

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422 Deedman, Gelbart and Coleman, SLATE: Specialized Legal Automated Term Extraction at 2.

423 Ibid
establish weighting factors for key words, components and templates:

1. each key word has a weight factor (i.e. indicating the likelihood that it alone would satisfy the component);

2. In each separate template construct, a specific component which is used in different templates may have a different degree of relevance, A specific component will therefore have its weight characterized by the template in which it is utilized;

3. each template has a weight factor (i.e. the likelihood that its components represent the right term and sentence).

We can take a template "ABC" which is made up of components "A", "B" and "C" (See Quantum of Damages Lexicon in Appendix for detailed description):

\[
\begin{align*}
\text{if } A \ B \ C \text{ is found} & : \text{ weight } = .95 \\
& \text{ with } S & : \text{ weight } = .70 \\
\text{if } A \ B \ Z \ C \text{ found} & : \text{ weight } = .90 \\
& \text{ with } S & : \text{ weight } = .60
\end{align*}
\]

EXAMPLE:

\{In conclusion\}, \{I assess\} \{$10,000\} for \{non-pecuniary\} damages.

This template is \{D\}{A}\{C\}{B}. We have assessed this template to be highly determinate of the award and so give it a weighting factor of .95. Each component element in this sentence is most representative of the concept we are attempting to establish in the template so all have maximum weight. Additional components, such as "S" component contain concepts which reduce the likelihood that the template match will yield a satisfactory result.

Words are described in the dictionary in whole, as modifiable or in combination/alternative form. Words which are modifiable for
example would include "recur\*." The asterisk may be found in the text to be "ed", "ing" or "s". The derivation of this letter combination will be recognized as meaning something which is repetitive. In Whiplash case law, this phrase appears very frequently in relation to pain. We are able to verify this by the use of templates which act as context generators. This verification (implicit in the use of order-dependent templates) is necessary because such words can have many forms (i.e. many morphemes strung together) which do not correspond to the usual use of a word in a given context.

We utilize an component order-independent template which characterizes the value of a statement by the content of component elements. This simplification comes at the cost of concept recognition in that there is no detailed examination for meaning. We have found that the formality of legal judgments ensures a regularity of form and content.

The structure of the dictionary/template resolves two components of text analysis. First it establishes what we have analyzed to be the words which have a "family-resemblance"-words which the courts have come to use to establish specific knowledge elements (ie legal facts), and in so doing, to show what words make sense for a particular class of objects or element we wish to establish. The second thing this does is to simplify syntax analysis. We do not attempt to formalize the specific grammatical constitution of a
phrase because it is already implicit in the composition of the dictionary and its component terms.

The template represents the association of concepts. The judge will say in a judgment synomously "I conclude" which signals to the reader that after weighing all the factors she must state what follows. What follows will be a state of affairs which now is the case. This will be a specific fact, an award or an outcome. Other concepts include "general damages". Such a term refers to a particular legal notion that embraces non-pecuniary losses. These two concepts are in our lexicon as components. These components incorporate the variety of expressions which give the sense of these concepts. We combine the concepts into recognizable forms which give the sense of a judgment.

Templates will be incorporated within the existing lexicon file for each element or fact we wish to establish. These templates represent the combination of components which give rise to a sentence having a particular significance to a judgment. Within the lexicon, the template will be assigned a weight which reflects a (experts) reliability factor of certainty held to exist by the usual use of that particular template.

Within the text there may be more than one occurrence of a certain template, or there may be a matching of different combination templates. we will evaluate according to the highest weight. In the
result of matching templates, a further calculus criteria of template placement within the judgment will be generated. This assumes that template matches at the end of the judgment represent the formality of final pronouncement. This factor will represent a slightly increased certainty. We have the belief that the highest rating is the best result.

We emphasize the match-performance of this technique in a self-referential, element-specific function is very impressive. The overriding benefit is that Slate methodology provides a extremely flexible methodology for expanding to many elements of legal-knowledge extraction which exists as a closed domain. We can expand this approach to derive other domain knowledge such as deciding on outcome of cases.\(^{424}\)

5.3.3 Programming Considerations

The purpose of this research is to establish the feasibility of a methodology to extract specific terms. The task was to extract a quantum of damages. The programming objectives where not to estab-

\(^{424}\) The methodology used here for quantum of damages in whiplash cases was modified slightly to extract the "outcome" of the trial. This modification took only a couple of working days and proved successful at the trial level. Another project is on-going to develop a means to establish outcome of trials at the appeal level. This is more difficult because of the need to match "plaintiff" with "appellant" or "respondent". If done correctly this other project should establish a methodology which will enable us to use "tokens" as attributes. This significance of this will be apparent as we review the results of the Quantum extractor. Where there are multiple accidents or plaintiffs in a single trial, there is greater difficulty in assigning what to whom.
lish a definitive technology for obtaining quantum but rather to develop a methodology.

This methodology works on the pragmatic criteria that we search for something we already know. This is what lawyers typically do in skimming through a case. We look for a specific piece of information in a case which we want to use in the Court.

The methodology is a "generic" computer code which can be readily adapted for the extraction of different elements. Each element will have coding requirements which are specifically problematic and accordingly require specific programming modifications. This technique will provide a fast and effective method for extracting specific elements of legal knowledge. Accordingly the emphasis is to create self-contained lexicon/templates tied to a domain which can be reproduced and adapted for new elements of legal knowledge.

The veracity of the extract depends on the ability of the component and template structures to extract legal information. If the composition of templates (the various component combinations) do not capture consistently the searched term over a variety of cases, then the utility of a lexicon driver is minimal. If we are successful, then we will be able to develop term extraction using lexicon modification rather than programming modification. This avoids the problem of requiring technical expertise in developing "hard" coded programs to extract knowledge.
The advantage of this technique is that as well as inviting rapid modification for new terms, it enables the focus of the work to shift to the lexicon itself. By shifting our efforts to the lexicon we enable the non-technical legal profession to be involved in the development of data base design and construction.

In order for the system to work we first load into the computers' memory the lexicon. The lexicon will contain the templates and the components. The program will then process the entire legal text. The texts are decisions of the British Columbia Supreme Court in electronic form. A text is read line by line and processed against the entire list of components.

When any component is matched, we store the value in a component table. After scanning the entire line and matching all components, we then match the resulting component list against the template table. If a match is found, we store the template result for end of text processing. The program utilizes a extract table to store terms and values. As you can perhaps see, this is extremely generic methodology.

At the end of text analysis, the term is determined from the results found in the extract table. The result is determined by checking all matches according to the weighting formula outlined above. The template with the highest weight is assumed to have the desired term extract.
While this is extremely flexible, it is not entirely unproblematic. In extracting dollars for example, it was necessary for me to "hard code" a routine to convert alpha numeric terms into numeric numbers. Such coding will always be contingent to the circumstances of the term. This can be time consuming and sometimes difficult. The point of this research is to establish a methodology which reduces that kind of effort. SLATE does this. It is interesting that in translating numeric literals, I was able to incorporate the quantum lexicon itself in the solution.

From a random sample of 85 whiplash cases we have obtained a 95% success ratio in extracting a suitable result as a quantum of damages (see results in the Appendix). This is an extremely positive first step towards developing this methodology. These results must be explained to put them in proper perspective.

The development of the lexicon itself is an intensive and specialized procedure requiring a good understanding of the way judges present their decisions. In developing a lexicon we are able to rapidly modify terms and phrases to get an "accepted" response.

The sampling draws our attention to the multiplicity of actions which can arise within a single decision. Awards are made to multiple plaintiffs for a single accident. Multiple awards to one victim in the case of multiple vehicle accidents can also occur in a single decision. The consequence of this is that in extracting a
term, the result may be one of many. This is perhaps the single significant criticism of the results obtained. It can only be said that this is the first stage of developing a flexible technology. There appears no reason why lexicon-driven methodologies cannot be developed further to break down the content of the decision and handle multiple claims.

5.4 The Future Directions for Law and Interpretation

Ten years ago the american pioneer in artificial intelligence, Roger Schank, proclaimed that computers in the near future would be able to have natural language capability. Time has proved this to be wrong. Natural language is not concerned with machines thinking like people but with thinking about applying interpretation of language computationally—not the other way round.

Modern AI no longer tries to 'think' like a human—a lawyer—because thinking like a lawyer no longer gets us to the underlying rationality of what law is—it is a separate discourse which is outside the teleology of the law. We believe that emphasising the process of how lawyer's think in solving jurisprudential questions would be analogous to studying how physicists think for us to understand about quantum mechanics. What we are concerned with is giving the lawyer the capacity to make intelligent predictions of what the Law is based on the current legal doctrine.
A recent approach in the sciences tries to challenge the traditional Aristotelian/Cartesian mathematical logic. Fuzzy Logic is an attempt to create a harmony between logic and human reasoning or "common sense". It is the science of imprecision which corresponds to how we use and understand language in the world.

Professor Zadeh has made the claim that we are closer to natural language capability. By recognizing that words quantify an element of truth about the world, rather than attempting to define the world in a pure objective system. Fuzzy Logic:

"..Provides a computational framework for representational framework for representing the meaning of propositions in a natural language which contain fuzzy quantifiers most propositions in a natural language do. This capability of fuzzy logic plays a particularly important role in the representation and inference from imprecise facts and rules in knowledge-based systems."\(^{426}\)

Zadeh has provided a body of computational-orientated concepts and techniques for dealing with linguistic variables.\(^{427}\) The basic idea is that precision and hence specificity carry a cost in terms of methodology and technology and should not be used unnecessarily. Fuzzy logic comes much closer to serving as a descriptive model of human reasoning than traditional logic systems. The guiding princi-

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\(^{426}\) *Ibid*, at 101

\(^{427}\) A variable whose values are words or sentences in a natural or synthetic language. For example if the word *height* is treated as a linguistic variable, its values may be expressed as tall, not tall, more or less tall etc.
ple is do not be more specific than is necessary.

It is apparent that Law is a process of rationalizing linguistic variables. The problem for both the lawyer and the system programmer is applying the language to the real world experience. It is therefore apparent that any methodology which is premised on the reality of imprecision must be a more appropriate technique in dealing with natural language.

It is clear that the legal doctrine itself cannot overcome the ambiguity of its representation. What we can do however is to "defuzzify" the concepts for the purpose of the lawyer by using facts to describe the legal reality because the elements which create facts are themselves are "crisp". Zadeh is concerned in his thinking with creating a greater sense of certainty while recognizing that language itself is imprecise. The point to be taken is that we can achieve certainty within context, which in law would translate to the social practice of agents. We can take legal concepts and determine certainty because their meaning is derived from their use.
Conclusion

In this paper we have challenged the tenets of positivism. We seek to move towards an ontology of law based on the situation which gives rise to the legal question. What gives rise to legal dispute is a matter of perceived failure in conventional practice. The legal right flows from this conventional practice.

The legal fact is a construction of the legal institution. It is the necessary form which meaning is expressed within the legal discourse. Necessary because for the fact to have meaning within the legal institution, it must be spoken in the legal language. This language is used as the formal justification for the intervention of the force of the state.

It has been suggested here that understanding this fact is tied to an ability to "see it as" what is meant within the institution. This ability is tied to experience. Those who have the necessary experience do not interpret such expressions rather they recognize their use in constructing the legal world. There is nothing queer about this. All language-use is tied to an ability to see the image, the sound, in relation to some purpose or existent. Language conveys the sense of an experience. This is a matter of what has meaning for us. What is queer is trying to see legal language as
the social world. The expressions of the legal institution cannot express the social experience. To understand the social dimension of law we must look to the grammar of the social world.

We have considered the social construction of reality. What is rational is what is reasonable to believe. This reason is established by the relations which make up our world. What is a fact is that which contains a relatedness and a relevance to our actions. What follows from this is that values constitute the rational.\(^{428}\) Values, we have said earlier, are the sense we have of the world through being-in-the-world. What is truly rational is the sense we each have of the world.

As Holmer has noted, the criteria for self-knowledge are not laid down philosophically or in any meta-language.\(^{429}\) We speak our world. We use the language which is already there; the familiar. It is through these words that we show what it is we experience. We pick words which possess a sense of our meanings. They show the incommensurable.\(^{430}\)

\(^{428}\) Putnam, supra note 26 at 208

\(^{429}\) Holmer, supra note 78 at 26.

\(^{430}\) Joseph Conrad set out the task as well as any:

A man who is born falls into a dream like a man who falls into the sea. If he tries to climb out into the air as inexperienced people endeavour to do, he drowns—nicht wahr?...No! I tell you! The way is to the destructive element submit yourself, and with the exertions of your hands and feet in the water make the deep, deep sea keep you up.

*Lord Jim*
They can do this because meaning is revealed before it is articulated. Understanding lies in that we can already see what it is we mean. Merleau-Ponty rejects the starting point of knowledge as being that of abstract reflection. We cannot capture reality in thought. Reminiscent of early Heidegger's *Dasein*, Merleau-Ponty argues that understanding is derived within the event because meaning and knowledge are actualities.

The question concerning the legal fact is the question of origins. It comes about in response to the question "Why?" For there to be a legal fact there must already be an issue. It is understanding what is an issue and how we express this issue that is the mark of an "expert." This is the necessary criteria for building expert systems in law.

The factuality of the world is given to us. We are thrown into the world and we must deal with that. There is the existent; things exist such as cars and roads. Our interest however is our involvement with the things of the world. These things become revealed to us for what they are as we use them. We are concerned with the possibilities of the world.

These possibilities become part of how we look at the world. We see that in our involvement with cars, that their use breaks down for

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431 Gill, supra note 248 at 56

432 Ibid
us when we collide with other cars. Our understanding then is not so much with the fact of the car but its (mis)use. We have noted that our involvement with things, such as traffic lights, is transparent until this moment of break-down. It is at this moment that we begin to speak of intentionality and cause and effect. We become concerned with the Agent.

The agent is not a necessity of the world but rather a legal and philosophical presupposition. We can speak sensibly about the world because we speak of a human action. When we speak for example of compensation for injuries, we see that society as a whole pays. There is no particular need to concern ourselves with the defendant or the plaintiff. What is at issue is the injury. This is an issue because we measure pain and suffering with money.

Legal actions bring to attention the transparency of human involvement with the world. We become aware of what it is we do. It is only then that our involvement is an issue. This is the "shock of recognition" of our world when meaning is revealed. It enables us to move towards the Kantian concepts of intentionality and freedom which presuppose the existence of our involvement in the world.

The role the legal institution sets itself is to restore a "natural" order after a perceived break down. In this it gives the illusion that this transparent world of being involved is a matter of the human will. This is what Sartre attempts to show us. We quickly
see, through Wittgenstein and Heidegger, that the world is much too much for that.

It is this break down which brings us to decision. The expert knows the meaning of a legal question through experience. An expert is the master of a technique. In the ontological-existentiell understanding of a domain, the expert is able to see how we "go on." In knowing what is and what is not in keeping with what we mean by the concept of the domain, they are able to speak directly to the issue. It is in this that when we build expert systems, we look to what is the understanding of the expert.

The point of an expert system is to avoid constructing logic for what is not an issue. What is an issue for a given domain is best set out for us by the expert. We build logic and data bases which emphasis this point. In pure economic loss we look to facts such as communication. A communication is fundamental to creating the possibility of economic loss. What counts as a fact in the world of the user and the legal discourse is a matter of analogy. We use the ambiguity of ordinary language to impart this both in the user interface and in the court-room.

It is the metaphorical quality of language by which we see things as things. It is our cultural being bound within the expressions of our experiences which gives us a sense of the world. In constructing legal expert systems we must never lose sight of this. The
system cannot be expected to represent the world. Instead it must interact with the user to lead to an understanding of what is an issue. It is through this that the user, the lawyer, can bring to bear their purpose for the law.

In law much decision-making is already set out. The judgment is the moment of truth. It is a literal application of legal text. Legal text is applied because it is presupposed as the truth, a reflection of the real world. It is the myth of social order which we accept and with that what it says counts. It is in this that it can impose this truth and brings it to the real world. This is the hermeneutics of the discourse.

There are moments of true decision. Experience always contains the possibility of new formations of meaning. It is in this that the judge speaks the world. But it is a prejudiced understanding. It speaks within the horizon of an institutional setting. The very notion of justice is an institutionalized notion. There is no form of justice which can transcend all forms of life.

When we wish to speak about what we do, it appears that we cannot avoid representations and conceptualization. Heidegger puts it that "Speaking about language turns language into an object—and then its reality vanishes."\(^{43}\) Even here in these investigations we cannot

\(^{43}\) Heidegger, *On the Way to Language* [1982] at 50. Wittgenstein put it in the TLP that we cannot speak about language for to do so would require us to be able to be on both sides of the fence.
avoid slipping into conceptualizations and generalizations. How, as Merleau-Ponty has questioned Husserl, do we speak about what we "do?" We not only explain what we know of ourselves, following Kant, we can explain what we do not. We speak of this through a reason which we presuppose transcends our own limited experience.

The modern age, argues Heidegger, has given way to calculating thinking and so is devoid of thought. Calculating thinking is that thinking which emerges from the delectations of technology. In an argument reminiscent of Marx's "technological determinism" he has claimed that technology does not come from man and therefore cannot be halted by man. This thinking is not limited to technology but rather embraces the whole objectification of our thinking being. The world of things and people is reduced to objects which are for our use.

Instrumental thinking is about setting out the order of the world. The problem which besets the legal positivist is the assumption that human beings, as society, possess such order and that such order is to be found in legal language. Through representations found in legal doctrine, the positivist aims to explain this connection as between legal norms and the justification for agent

Things of which we cannot speak we should be silent. It is in this that he says, in his Tractatus (which intends to set the limit to thought), that we must kick away the ladder as we realize this nonsense.

McGill, supra note 25 at 178-9. See also Heidegger supra, note 342.
responsibility. We have spent much time in this paper in critique of representational thinking. Scholarship must address the urgent need to go beyond traditional analytic thinking to a deeper ontological understanding of the nature of social practice. The social world is never as it is represented. As issues such as euthanasia, abortion, gender-equality, sexual-orientation are revealed, Law is being challenged by the most fundamental questions to which it at present is unable to address.

But let us end with an act of imagination.

The first question is by no means whether we are content with ourselves, but whether we are content with anything at all. If we affirm one single moment, we thus affirm not only ourselves but all existence. For nothing is self-sufficient, neither in us ourselves nor in things; and if our soul has trembled with happiness just once, all eternity was needed to produce this one event—and in this single moment of affirmation all eternity was called good, redeemed, justified, and affirmed.435

In What is Literature, Sartre asks the question "for whom does one write?" Sartre ponders upon a presupposition that every literary text is built upon a sense of its potential audience, an image of the "for whom" the work is written. The answer would appear to be that one writes for oneself. But one writes through many. We write through a language which already speaks the shape of our possibilities. It is in being attentive to the world and letting it speak that counts. An honest writing seeks to show what is seen not what is thought. But then we must ask what does it means to say "I write..." It can only be said here that I have let this paper be.

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APPENDIX

SLATE Methodology Test Results

The following samples are from a selection of cases randomly selected from the FLAIR whiplash judgments database. The particular program uses the quantum of damages lexicon in the scanning of the legal text.

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