Ex facto jus oritur

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Abstract The legal relation is the mode in which we allow action to go forward, that is based on reasons that do not appeal to us or may even strike as wrong. The reasons remain foreign to us. We treat, therefore, the having of reasons as a social fact. Someone wants something. At the same time, the law also reconciles ourselves with the traces of foreign reason that we encounter in the sources of law. Indeed, the true story that is to be told about sources of law is that they help us to bridge difference. This reconciliation is, however, never complete and eventually mediated by the serene irony that is the benchmark of genuine hermeneutic suspense.

1 The Historicity of Reason

Hermeneutics is based on a remarkable dual premise. Above all, it suggests that there is something matter-of-factual about how other people reason or used to reason in the past. Put differently, encountering difficulties in making sense of others indicates for hermeneutics that those whom one has trouble understanding inhabit slightly different intellectual worlds or belong to contexts where matters are taken for granted that are not considered to be commonplace among us.[1] The experience of inexplicability is that which lends their reasoning an element of the factual (Peirce: "secondness"[2]), for it resists absorption into principles that we all share. In a rather perplexing manner their thinking seems to be just in place. "This" is how "they" account for the world and what "they" take to be reason. In the final analysis, as Wittgenstein memorably remarked, the indexical "this" refers to something factual.[3] The foreign is encountered in the form of a datum. Certain conservatives

[1] See Marquard (1981), pp. 117–146.

[2] See Pierce (1998), pp. 160–178.

[3] See Wittgenstein (1988) § 28, S. 125.

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believe *de facto* that access to abortions is tantamount to extending the holocaust into an indefinite future. Perplexing as the claim must appear, it is, nonetheless, undeniably what they hold to be true.

Arguably, while such a view is difficult to understand, it may not be impossible to adhere to it. In addition to being reconciled to seeing reason disintegrate into scattered islands of sense-making that do not sum up to something universal, philosophical hermeneutics suggest that efforts at understanding involve fusing our horizon with the seemingly inscrutable outlook of others.[4] Indeed, hermeneutics suggests that insight and intellectual growth require an effort to understand those whose texts or utterances may at first glance appear entirely foreign to us.[5] Reason is not a given. It is susceptible to growth and possesses, in this sense, *perfectibilité*.[6] All true knowledge and insight is, thus, the effect of *Bildung* ("edification" is how Rorty used to translate this term).[7]

In what follows I would like to take up these two themes and to show how they are relevant to our understanding of law. I would like to remind us of the fact, in particular, that dealing with the reasoning *of others* that is experienced as *another* form of reasoning results in the attribution of something that is not rational but factual. The legal relation is the mode in which we allow action to go forward in spite of being based on reasons that appear foreign or even somewhat repugnant to us, such as the production of guns, the observance of rigid dietary restrictions or the distribution of religious pamphlets. Viewed against the background of hermeneutics, the legal relation stands for the unfolding of difference, namely, the proliferation of scattered islands of sense-making concerning either oneself or the world. But the law is also *Bildung* in the sense that it helps us to reconcile ourselves with the traces of foreign reason that we encounter in the sources of law. Indeed, the true story that is to be told about sources of law is that they allow us to bridge difference. This reconciliation is, however, never complete and eventually mediated by the serene irony that is the benchmark of genuine hermeneutic suspense.[8]

2 The Legal Relation

Approaching the law by examining the relation or relationships that we call "legal" is surprisingly uncommon. The only English author I am aware of who ventured into this field was Michael Oakeshott.

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[4] See Gadamer (1976), p. 278; Lafont (1999), pp. 92–108.

[5] See, from that angle, on "edifying philosophy", Rorty (1979), pp. 357–365.

[6] See Rousseau (2012), pp. 89–90.

[7] See above note 5.

[8] These themes are further elaborated in German in Somek (2018b) *Wissen des Rechts* (Tübingen: Mohr Siebeck, 2018).

In an article of the rule of law,[9] Oakeshott sketched a type of relationship in which we are cast as abstract personae that are ultimately only interested in mutually pursuing their own interests and in no manner involved in advancing shared objectives. His sketch of a legal philosophy is thus—and students of Oakshott's work must be aware of this—a specification of his theory of civil association.[10] This explains why Oakeshott's approach is both rather specific and, indeed, much too closely tied to an old-fashioned liberal perspective on the social world in order to pass as a truly elementary exposition of the concept of law. What he gets right, however, is the distance inherent in the legal relation, which reflects the mutual abstention from judging the other's objectives. What he does not explore is that the law is a response to a predicament of morality.

The question that needs to be asked, in the first place, is why it is that we would not get along if moral judgments were our only guide. This is indeed not a live possibility. Social theorists often point out that coordinating and organizing conduct by moral means alone would never work because we could not be assured of the compliance of others. The possibility of their potential defection or, worse perhaps, of their playing by the rules would give us reason to breach the rules ourselves. Since the same is true of them, we could never count on others honoring their moral obligations if it were not for the coercive power of the state.[11] But with that conclusion we are already leaving the domain where people are governed by moral insight and commitment alone. We are then replacing the moral foundation of social cooperation with the harsh realities of law.

While this commonplace cannot be disputed, it does not get to the heart of the matter. The truly vexing problem is that we would still need law if men (and women) were angels.[12] The reason is that we universalize differently (and this is not merely a consequence of the "burdens of judgment").[13]

3 Universalization

Universalization is the form with which we justify our conduct towards—or make moral demands on—others. If you universalize you say that anyone who is in a like situation should do the same.[14] The justification for this claim may consist of putting yourself into the shoes of others and to suggest that it would be reasonable to see them agree.

A moral justification is not likely to be met with contestation so long as merely our interests *in general* are at stake. Everyone wants to be safe and everyone wants

[9] See Oakeshott (1999), pp. 129–178.

[10] See Oakeshott (1975), pp. 127–128.

[11] See Hobbes (2010), p. 104; Ullmann-Margalit (1977), p. 65.

[12] See The Federalist (2009), p. 341.

[13] On the latter, see Rawls (1991), pp. 54–58.

[14] See, for example, Mackie (1977), p. 90.

to enjoy the liberty to be left alone. Undoubtedly, we want that for all. Problems arise, however, whenever we need to decide whether the interest in safety is to be accorded priority over the interest in privacy. As Madison once observed, when people reason about matters coolly and freely, they inevitably fall into different opinions on some of them.[15] Some say that absent an imminent threat, searches of private possessions are an abomination. Others retort that occasional invasions of privacy are a prize worth paying for greater safety. Both universalize. They are putting themselves in the positions of whoever may be affected by a rule, thereby giving one or the other principle precedence. What they do, however, is to evaluate the consequences of searches differently owing to the different evaluative outlooks with which they arrive at the issue. And both may at a certain point and after some discussion conclude that they "do not get it" why their opponents do not perceive matters in the manner they do. How the others think does not speak to them. The others appear to be unmoved by reason. Somehow and strangely, their way of thinking is written into stone.

4 From Judgment to Choice

Remarkably, such a recognition marks the point at which moral judgment can distinguish within itself a substantive and a moral dimension—and if it does not draw this distinction something goes wrong.[16] Along the substantive dimension disagreement persists and could be eliminated only by "taking care" of the relentless dissenters, for example, by locking them up. Why should moral falsehood be tolerated? The matter looks different, however, along the social dimension, for it brings the diversity of moral opinion into focus. The experience of disagreement can be *morally* accounted for by universalizing the conflict-ridden relation between and among substantive universalizations and by viewing yourself as being on an equal footing with others. One is merely one judging person among others. On a reflective level, one can become another to oneself. This is the step toward recognizing the judgment of others.

Such recognition of judgment has to be mutual, not least because it is a matter of good judgment along the social dimension that others recognize your own judgment as a judgment that could be theirs were they different persons.

In mutually recognizing our judgment we can then say to one another[17]:

> I yield to your view if you yield to mine.

[15] See The Federalist (2009), No. 50, p. 338.

[16] For slightly different elaborations of this idea, see Somek (2017), pp. 118–121 and Somek (2018a), pp. 26–29.

[17] On "double contingency", see Luhmann (1984), pp. 148–150.

Such yielding is only possible, however, if the substantive disagreement drops out of the picture, for if it did not the conflict could never be resolved. Rather, we would have to clinch stubbornly to our moral insights. Only if we regard one another as "having beliefs" or "having views" can we discover the common ground on which we recognize that what we share is wanting something to have or to happen, regardless of what it might be:

I want what you want if you want what I want.

What we both want, regardless of our specific wants, is volition itself. We both want to want,[18] with no strings attached. This recognition is the origin of the legal relation. We end up saying to one another:

I want you to want if you want me to want.

That there would not be law unless we made mutually room for volition, thus understood, explains why the law, in order to avail of *substance*, has to embrace the existence of wants as *a matter of fact*.[19] It has to give way to actual determinations, such as routines or choices. The factual is rendered, then, within the form of law. What others may find to have reason to do is cast as a choice. Legal subjects possess and exercise freedom of choice. Such freedom is the hieroglyph that denotes and takes the place of the reasons of others. "Choice" is the mysterious token for the enigma encapsulated in taking actual or potential reasons of others as mere facts for us. The manifestation of such "taking" is the legal relation.

This means that in the law we encounter the work of foreign reason, which is not unreason, but merely reason that we may not have yet grasped as such, let alone fully understood.

5 Limits of the Reasonable

Before examining why the law has to have sources, three supplementary comments are in order. One is short, the others are somewhat more extensive.

First, as Savigny put it, the legal relation is based upon a legal rule.[20] From the perspective introduced here, legal rules are essentially nothing but the presuppositions necessary to make the recognition of that foreign reason mutual which is represented within the legal relation as a choice.

Second, the recognition of choices is, indeed, premised on the idea that the recognition of the judgment of others gives rise to what Rawls called *reasonable* disagreements.[21] The idea entails, however, that there is a limit beyond which disagreements must appear to be unreasonable. It is only within the compass of

[18] See Hegel (1991) § 26, pp. 55–56.

[19] This is a major theme of Menke's most recent work. See Menke (2016).

[20] See von Savigny (1840), p. 7.

[21] See Rawls (1991), p. 55. See also Waldron (1999).

reasonableness that we make room for a variety of pockets of disagreements and of choices. Interestingly, answering the question of where the line needs to be drawn—that is, where the limits to choices have to be drawn—is itself subject to disagreement, in particular where line-drawing is notoriously contested. It follows, hence, that that which is limiting—our reasons for setting a limit to reasonable disagreements—may itself be located within that which it limits. What is limited only by itself is, using Hegelian parlance, infinite.[22] The law is infinite, for it determines its limit itself, and such determinations are a matter of historical fact.

Third, this infinity indicates a normative priority of the factual. There would be no legal authority if it were not for *de facto* determinations of the limits set for the reasonable within which legal relations may legitimately abound. Another name for the same phenomenon is "politics". The authority of law is political.[23] Rule-making is the attempt to arrive at common action and successful coordination of conduct in the face of the diversity of views and judgments. Setting up such authority is a historical achievement.

Establishing and sustaining legal relations by yielding to the volitions of others is superior to any morality that remains entirely substantive and denies the judgments of others their requisite place. The relation between law and morality is that of substantive moral self-restrain resulting in legal rights that take precedence over substantive moral concerns.

It would be entirely misconceived, therefore, to regard the law as a particular field or application of our practical reason. It is not the case that the law is, as it were, some social mechanism to which practical reason can address high-minded demands. On the contrary, any system of positive law is an *embodiment* of our practical reason. Any substantive demands on the legal system coming out of an applied ethic must pay heed to the moral self-restraint from which the law originates.

6 The Subjectivity of Law

With these observations we arrive at the claim that the law necessarily has to have sources.

Any recognition of another person's reasons that do not speak to oneself transmutes these reasons into social facts, *i.e.,* into something that might possibly trigger that other person's conduct. The person believes to have these reasons and might likely act on them regardless of their soundness. Leaving the potential causal connection aside, the having of reasons is the *seed* of what legal positivists understand by a source of law, namely, a social fact that is amenable to being described in "value-neutral terms".[24]

[22] See Hegel (1991) at § 22, p. 53. For an illuminating analysis, see Houlgate (2006), pp. 397–400.

[23] See Loughlin (2017), p. 6.

[24] On the "sources theses", see Raz (1979), p. 47.

Nevertheless, legal positivists—in virtue of who they are—have consistently and persistently ignored, that sources are also forms of knowing the law. They have, that is, neglected that law is an embodiment of practical reason. Correctly understood, however, the law not only belongs, as an intelligible object, to the sphere of objectivity, but rather to the sphere of the subjective. The law is composed of modes of knowing what the law is.

At first glance, this claim must appear to be quite confusing and possibly nothing short of preposterous. But it becomes immediately plausible once we take the most elementary source, customary law, into account.

Ordinarily, this source is presented as though it were a composite of a behavioral and an intentional element.[25] There is steady practice, on the one hand, and that practice is accompanied by the conviction that the practice is mandatory, on the other. This ordinary account gives rise to a rather facile picture, for it does not reveal how one and the other come together and why the behavioral and the intentional element appear in juxtaposition.

By contrast, the alternative to the ordinary account suggests that customary law originates from common or overlapping intuitions of what is lawful.[26] Their normative force is manifest—and cannot be denied—in driving people to create and to sustain common practices. Once the internal composition of customary law is construed from this angle, it becomes immediately clear that the form of custom ("We know that this is wrong and our conviction is shown in how we have acted in the past") is derivative of the form of knowing (viz., asserting, claiming) what the law is in this or that case ("We don't allow this here, we have never seen something like that happen before"). This does not rule out that customary law can develop unconsciously, as people may be unaware of their intuitions.[27] They may develop certain habits and only later realize that they also share the conviction that they are right about doing what they habitually do. The belief that practices have to continue in a certain way can also be reinforced by the sheer fear of the social ostracism awaiting a dissenter. The intuitions about what is right merely need to overlap, but they do not have to reflect the same reasons. Even if the normative relevance of custom is recognized only on the ground of the mere desire to fit in it is, understood from the perspective of a participant, that things *have* to be done in a certain way.

Thus understood, customary law is a form of knowing what to do and how to react to the conduct of others. Something factual is a condition of the authority of that knowledge, namely, some amazingly mute social practice. The reference to "settled practice" serves as an exclusionary reason[28] that makes us yield to intuitions that represent either the beliefs of others ("There is no way to dissuade them") or convictions that overwhelm us as though they were stubborn facts about us. In the latter instance, you view yourself as someone who happens to have a belief as

[25] See, choosing a random example, Crawford (2012), p. 23.

[26] See Puchta (1828), pp. 143–147.

[27] See Gardner (2012), p. 72.

[28] See Raz (1990), p. 41. Exclusionary reasons exclude the relevance of certain reasons as reasons for action and may imply that one must not act on the balance of reasons.

though it were a preference or, worse still, an affliction, and you defend it as though you were entitled to it. You are free to take something as a reason even if the ground for having the reason may remain inscrutable to you.

In the case of sources, then, the legal standard—the norm—is presented as originating from a fact ("It is the law that … because we happen to belief and practice that …"). Moreover, the recognition of this origin from facts is a fact as well. Both types of fact bring the law into existence. Not only is it a fact that something is a law because someone believes or practices something else, it is also a fact that this fact is deemed to be legally relevant.

This dual relevance of the factual is often rendered obscure. Legal scholars refer to legal rules as though they were abstract entities belonging to the "third world" of ideas (and neither to the "first world" of brute facts nor the "second world" of inner experiences).[29] The law is thus presented in the form of an object and lent the appearance of abstract entity.[30] What disappears from view, however, are *both* its subjectivity and the relevance of the factual. If one retrieves either, the other is brought back into the picture as well.

7 Sources Speaking Themselves

Sources operate quite straightforwardly. They say that from the existence of X follows the normative relevance of Y, which can be prescription or proscription, permission or power. For example, if the legislature is in session (fact) it can adopt legislation (power). This conditional is established in the constitution *qua* source of law.

Ordinarily, legal thinking focuses on the resulting Y and refers to it as "law". Y is taken to be an abstract object of "description" by legal scholars.[31] It is the law that has been laid down by someone. Choosing another example, for the existence of a vote in parliament follows, very roughly speaking, the validity of a piece of legislation. Its ground is the observance of secondary rules governing the legislative process (X). The resulting piece of legislation (Y) is then called "a law". It is subsequently applied to a set of facts. X gives rise to Y, and juxtaposing Y with facts warrants the conclusion that Z ought to follow.

$$X \wedge Y \wedge \text{facts} \Rightarrow Z$$

What is being eclipsed, thereby, is that sources embody subjectivity. The latter can be retrieved, however, by focusing on the very point of sources. Any source is supposed to say or to establish what the law is. That's its inherent teleology. Therefore, it is not at all bizarre to assume that sources would, if they could, apply

[29] See Frege (1976), p. 50.

[30] See Künne (1980), and Somek (1996).

[31] See Potacs (2015), pp. 55–62. See also Potacs' contribution in this volume.

themselves to facts by declaring what the law is in this or that case. A piece of legislation lays down what ought to be done in certain situations. It legislates as though it had a view of what things should be like in each and every single case. For if it did not raise this claim it would not truly legislate. Hence, it is necessary to attribute to legislation the intent to dispel all doubts and, hence, to apply the law itself. After all, it is supposed to clarify what the law is.

If the source took care of the application of its own product (Y) it would simply say from case to case that Z ought to follow because of X. For example, the legislature would point out to criminal defendants that they are deserving of punishment because it has said so before.

$$X\left[\wedge Y\right] \wedge \text{facts} \Rightarrow Z$$

Mind that the law rendered in object form disappears once the subjectivity of sources is brought into focus. This reflects the fact that if sources spoke themselves and controlled the application of their product, the problem of application would be entirely submerged. Actually, it would cease to exist.

$$Y : X \wedge \text{facts} \Rightarrow Z$$

A hostile takeover of this kind would be wholly consistent with the ambition of sources to clarify what the law is.

8 Different Outlooks

The above analysis demonstrates that just like focusing on the law *qua* object of description eclipses the subjectivity of law, retrieving this subjectivity is liable to submerge the problem of application. What is also lost, as a result, is the normativity that links X and Y and inheres in Y as a legal rule.[32] It becomes absorbed by the autonomous operation of the source. The gain to be had from submerging normativity is, however, that it brings the law-creating facts into perspective.

Quite remarkably, the facts that matter for the purpose of creating law are rendered quite differently depending on the subjective outlook of legal knowledge that is manifest within the source. Legislation, for example, in virtue of resting on a decision, recognizes what the law is with an eye to what has been decided. Knowing the law from the perspective of legislation, therefore, requires adhering faithfully to the text of a statute or to its original meaning. The pertinent maxims of interpretation mark what it takes to know the law "legislatively". By contrast, the law is known in a manner congenial to customary law if claims are made that "this" or "that" is not what we are ready to condone here. If the law is known "customarily"

[32] The normativity that links X and Y is manifest in a rule saying that Y ought to follow from X. Y can be a proscription, prescription, immunity or legal power. Y would lack any normative force if it were not for the rule linking it with X.

this knowledge is replete with appeals to common understandings. Finally, law that is known "scholarly" comes about in appeals to a different form of fact, actually to argumentatively established differences in situations that are supposed to warrant the application of the appropriate legal rule. The law emerges, ideally, from a better argument.

The forms of legal knowledge that are inherent in sources express varieties of subjectivity. They, in turn, make a legal consequence conditional upon something factual. The sources say "you ought to" because "we see it that way", "we have decided it that way" or "the stronger argument requires that you follow this rule". The law flows from common understandings or decisions or, finally, from better views concerning what is to be considered the applicable rule.

9 From Subjectivity to Intersubjectivity

Obviously, sources *cannot* speak for themselves. This is a well-known truth that was already stated by Rousseau and Kant.[33] If the legislature decided every single case by its own, even by claiming to authoritatively apply its own general rules, no one would be in a position to tell whether the legislature applied the rules correctly or incorrectly. Rather, any authentic interpretation of its own rules casts the legislature in its proper role. Interpretation by the legislature is, using Derridian parlance, "iteration that alters".[34] The distinction between rule-making and rule-application collapses into a continuum that admits of no intelligible differentiation. Any general rule is dissolved into discrete acts of application that no longer add up to applications of general rules. Wittgenstein made a similar point when he recognized the impossibility of rule-following by one person considered in isolation.[35] If a rule does not serve as a public standard and one person on its own determines whether or not he or she is observing a rule, that person is unable to tell whether he or she is right about this. Indeed, in such a situation, just like in the situation of a legislature applying the law itself, the normative force of the rule evaporates (as Marx and Engels might have put it).[36] This reconfirms the point that emphasizing the subjectivity of sources submerges the normative character of the links between X and Y and Y and Z. That is so because the source, if it speaks only to itself, ends up connecting X and Z in a manner that is just as spontaneous as it is inscrutable.

It follows that sources can play their *normative* role only if one is apprehended by another. Custom remains obscure unless some body, then acting in a legislative capacity, articulates it explicitly as a rule. Legislation cannot apply itself to the facts. It depends for its full articulation on legal scholarship.

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[33] See Rousseau (2012), p. 205 (*On Social Contract* III 1); Kant (1986), pp. 133–134.

[34] See Derrida (1988), p. 53. See also Menke (1988), pp. 220–222.

[35] See Wittgenstein (1971) § 258, p. 145. See also Kripke (1982), pp. 68–69.

[36] See Marx and Engels (1966), p. 215.

The apprehension of one source by another entails, however, a relationship of mutual recognition. The application of legislation through the lens of scholarly analysis presupposes that scholars commit themselves to letting the legislature speak. Scholarship must lend its *own* voice to legislation. The recognition needs to be, however, mutual. The legislature has to concede to scholarship the right to elaborate its meaning from a perspective that accords priority to the appropriateness of rule application. Of course, the relationship is rife with tension and conflict, for the later source in the sequence is always inclined to impose its own point of view on the former. Nevertheless, a claim concerning "it is our common understanding" requires a decisive "it is settled law that…" in order to become clear. Likewise, whatever "we have decided" needs to be supplemented with the "force of the better legal argument" so that it can be determined which decision is relevant for which case. Finally, the identification of the force of the better argument presupposes common understandings or may require even a decision. The law-applying official creates new law in the sense that, simply, a norm comes to this world as the progeny of another; and yet, this simple process involves the intervention of something factual: an interpretation of the relevant facts or a reading of the norm that has not been anticipated. In order to fulfill their function, sources require recognition by other sources. This means that law-creating facts are recognized only in virtue of other law-creating facts.

As the sources interact, they are engaged in some struggle of recognition.[37] From the perspective of common understandings, legislation appears wooden and detached from real life; from the same angle, legal arguments are perceived as sophistry. From the perspective of legislation, legal scholarship is always prone to commit some act of usurpation and custom is a perversion of legality that is supposed to flow from the top down to those located below. And from the perspective of legal scholarship, custom is the domain of obscurity and legislation some unfinished project that requires for its completion the benefit of legal expertise. All sources mutually reject *and* depend on one another. This is the *Komödie der Sittlichkeit*.

The sources of law do not only embody subjectivity. This subjectivity is part of intersubjective relations. The relations account for the fact that the normativity that is built into the sources can be made explicit and sustained. Knowledge of the law is something factual. It is essential for the efficacy of the legal system. The law would not come into existence were it not authoritatively known.

10 Reconciliation

Legal scholarship, traditionally understood, is about construing the relevant legal materials in a manner that suggests why it is appropriate to apply one or the other rule in one or the other case. To that end scholarship has to establish coherence, that

[37] See Somek (1996), pp. 35–38.

is, to arrive at an arrangement of the legal materials that demonstrates how the relevant pieces "fit together".

Scholarship could never accomplish this task if it did not attempt to make sense of the *substance* of the legal materials. If, choosing a random example, the law distinguishes between "murder" and "manslaughter" any defensible construction of the legal materials has to arrive at some sensible conception of how and why the line needs to be drawn between one and the other.

Therefore, in the course of preparing the ground for rational adjudication, legal scholarship runs the risk of becoming strangely complicit with this substance. The considerations that scholarship needs to adduce in order to determine the appropriately applicable norm indirectly invest a whole set of norms with an aura of reasonableness. While the validity of these norms cannot be disputed, a rational determination of their scope of application will have to suppose that they are an expression of practical reason. Assuming that a law-applying official is confronted with the question of having to choose among different "interrogation methods" in the context of the implementation of anti-terrorism policies, this official will have to draw out the relative merits of, say, either water boarding or electroshocks. In the course of a determination of the types of case where the former ought to be used rather than the latter the practice of torture is likely to look normal and, even worse, based on principles of rational conduct.

The substantive engagement with the substance of source-based law explains why hermeneutics is not only relevant to legal scholarship but essential to our practical reason as such. The legal relation is based on yielding to a determination of other persons without evaluating, or engaging with, the substantive reasons underpinning their choice. Indeed, in speaking of a "choice" we resort to a hieroglyphic referent in order to leave possible reasons for action unexamined. In virtue of recognizing that reasons may remain hidden, the law holds out a promise of reconciliation. We either do what other persons make us do (for example, by paying our dues) or tolerate what they have a right to do (for example, acquire and even read silly books). Our recognition of their choices reconciles us with what they *may* have reason to do, even if the reconciliation is only indirect, for we are reconciled with their reasons only by rendering them obscure. Cast in the terms of hermeneutics, our understanding is, if at all, *de dicto*, that is, we take note that it is this or that that they want.[38] Nevertheless, however idiosyncratic or unexamined an individual's reasoning may be, it is given entry to the domain of the practical reasons that we share inasmuch as we accord normative relevance to a choice. More importantly perhaps, in that others recognize what we want because we want it we are liberated from the rigor of moral self-examination and free to develop a legal relation with ourselves. We are free to enjoy our own inconsistency and whimsicality.

[38] More precisely, a *de dicto* interpretation attempts to reconstruct the historical horizon from within which a speaker has spoken or is speaking. See Brandom (2002), pp. 99–102.

11 Irony

The legal relation reconciles us with those whom we perceive to be wired differently. This reconciliation is merely held out as a promise. The legal relation depends on rules the validity of which is based on the mute reality of custom or on decisions, that is, on the existence of law-creating facts. The factual element of the sources is a replica of the hieroglyphic "choice". Again, the reconciliation remains indirect, in particular if legal scholarship makes it a point to let the sources speak for themselves.

We would be fully reconciled with these forms of indirect reconciliation, if the rules providing the basis for legal relations were substantively correct. Engaging with these rules in a substantive manner is—as was pointed out above—what legal scholarship is invariably about. This means, however, that the reconciliation inherent in the legal relation is deferred until legal scholarship goes about its hermeneutic business *de re* and engages in various attempts to make sense of the foreign reason, that it encounters in the legal materials.[39] Interestingly, the work of practical reason, which is at bottom a work of reconciliation, is unfinished until legal scholarship puts it all together and attempts to straddle the gap, dividing the materials and the horizon of contemporary scholarship. Any residual "merely factual" disappears within the medium of a theory (Dworkinian style) that underpins the existence of formal powers with good practical reason. This explains why the practical reason of law would not be finished if it were not for systematic legal reasoning.

Legal scholarship, therefore, is capable of overcoming the decisionism inherent in sources. The danger that emerges, in turn, is that it becomes far too reconciliatory and loses its respect for the authority of the factual. That which is distinctively legal would disappear if that respect vanished.

This explains why any great legal scholarship must partake of the irony inherent in the interpretation of the works of great masters such as Kant, Hegel or Wittgenstein. The interpreter seeks to make the best possible sense of the legal materials, by retaining, however, the reservation that, at the end of the day, it can all turn out to be utter nonsense.[40]

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[39] See ibid.

[40] See Williams (2004), p. 98.

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