Special Issue
The Many Fates of Legal Positivism

Comment on Petroski—On MacCormick's Post-Positivism

By Thomas Bustamante[*]

A. Introduction

In her thought-provoking paper *Is Post-Positivism Possible?*, Karen Petroski argues that there are certain institutional conditions in the "modern setting of scholarly activity" that make positivism the inevitable (or nearly inevitable) form of theoretical thinking about the law. Furthermore, she also claims that there is nothing in Neil MacCormick's post-positivism that should lead us to believe that his legal theory is qualitatively different from positivism, which according to Petroski constitutes the mainstream Anglo-American legal philosophy. Her argument is that there is a parallel between the "characteristics of law" and the "characteristics of the theoretical discourse about law."[1] Law, as the object of legal theory, shares with legal-theoretical inquiry (or, more broadly, with most academic discourses in the modern society) some institutional conditions that make legal positivism not merely a "defensible" mode of theorizing about the law, but an irresistible or inescapable one.[2]

Even though there are other interesting topics in Petroski's paper, I will concentrate on discussing these two claims. Although I am well impressed by some of the arguments in Petroski's paper, I cannot share her thesis that legal theory is constrained by some sort of institutional context, which rules out the possibility of post-positivism (Petroski's first thesis), and I also doubt her claim that Neil MacCormick fails to provide a real alternative to the current versions of legal positivism (Petroski's second thesis). In the following sections I argue that the first thesis derives both from too strict an understanding of the roles of philosophy and legal scholarship and from a questionable description of the necessary features of law. Moreover, I attempt to highlight some of the features of MacCormick's latest legal theory that demonstrate that he moves beyond the limited horizons of positivism.

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[1] Karen Petroski, *Is Post-positivism Possible?*, 12 GERM. L.J. 670 (2011).

[2] *Id.* at 673.

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My analysis is structured in the following way. In the first part of the paper, divided in two sections, I summarize Petroski's main arguments for the alleged predominance of positivism in the Anglo-American context and for the claim that post-positivism is not a real alternative to the contemporary efforts in the field of legal theory. In section B.I, I try to determine the best interpretation of Petroski's argument to explain the connection between the features of legal theory and the features of legal practice, which according to her explanation make positivism the most attractive type of legal theory. In section B.II, I criticize this view and attempt to elucidate the nature of the arguments that we can find in legal philosophy, as well as the relationship between such arguments and the practice of law. In Part C, in turn, I focus on the specific criticisms that Petroski addresses to Neil MacCormick's post-positivism. The first subsection re-states Petroski's points against the late version of MacCormick's institutional theory of law, and the remaining of the paper is dedicated to showing what answers in MacCormick's legal theory we could find to Petroski's criticisms.

B. Legal Scholarship and Legal Discourse

I. Petroski's Argument for the Predominance of Positivism

Petroski starts her argument for the first thesis by referring to an emerging literature which argues that, since early modern days, "the academic domain has been more and more characterized by the policing of membership through extensive discursive indoctrination and the evaluation of various forms of discursive performance."[3] She claims that the modern university has some distinctive material and formal features that impose a set of constraints in the forms of knowledge produced within its boundaries. Those acting within the institution of the modern university are depicted as depending on some external support which can only be achieved by the recognition of a special expertise that justifies their activities to social actors outside the institutions. At the same time, the institutional structure is described as "largely self-reproducing," and such self-reproduction occurs primarily through a special type of discourse.[4] These features "make the structure a competitive arena, and the resulting competition encourages academics to draw distinctions between their positions and those of their forebears and contemporaries."[5] The typical strategy of academics in the social sciences, and in law in particular, would be to make "fractal distinctions" which encourage rhetorical innovation "even when a theorist is not truly making a novel point."[6]

[3] *Id.* at 677.

[4] *Id.* at 678.

[5] *Id.* at 678.

[6] *Id.* at 678.

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In a similar way, the practical legal discourse is marked by the same type of indoctrination. "Like the academy," the argument goes, "the set of legal institutions is both materially and conceptually self-perpetuating." Materially, "lawyers' expertise in the discourse used to navigate the institutions regulating state powers ensures their continued support by non-lawyers."[7] On the formal level, in turn, lawyers adopt a theoretical perspective which helps them to exclude certain reasons for action from the set of materials available in legal reasoning. As in the academic domain, this self-referential character of law takes a fractal form and creates a status hierarchy for the experts that master the nuances of legal language.

In my reading Petroski argues that both the academic discourse and the modern legal domain are self-referential; dependant on some sort of indoctrination and fractal distinctions; in need of mastering a special discourse which justify their activities to actors outside their realm; exclusive or certain reasons; and self-perpetuating. But why are these common features relevant for the debate over post-positivism? How do these parallel features of each of these intellectual domains influence the other?

If we accept that there is more than a simple historical coincidence between the character of legal theoretical inquiry and the features of legal discourse, then there are two alternative interpretations available for this parallel between legal practice and academic scholarship.

The first interpretation explains the dominance of positivism on the basis of the features that Petroski attributes to the legal practice. At first sight, the author appears to be following this route in the beginning of the second section of her paper. Nevertheless, if we look closely enough we can see that any attempt to explain the features of legal theory's academic discourse on the basis of the features that Petroski attributes to the legal practice will be very fragile. This line of argument presupposes from the outset the correction of positivism, which is precisely what it intends to demonstrate. The argument would be circular, since the description of the legal domain as necessarily self-referential and exclusive of any non-legal reasons already coincides with the key assumptions of legal positivism. If we define positivism as the theory according to which the law is "self-referential" (in the sense that it regulates the process of its own creation and sets a test for clearly distinguishing between legal and non-legal rules) and "exclusionary of certain reasons" (whether this feature is interpreted in a strict sense according to which the sources of law are to be found in social facts alone or in a broader sense that would exclude only the set of reasons which are not incorporated by the rule of recognition), then it becomes obvious that this interpretation of the relationship between law and legal scholarship simply begs the question, for the features that are attributed to law or "legal practice" coincide with some of the theoretical theses about the law held by most

[7] *Id.* at 679.

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contemporary positivists. To follow this strategy would be saying something like "legal theory defines the law as self-referential and exclusionary because the law is self-referential and exclusionary," which seems like a tautology. It is questionable, thus, to claim that legal theorists tend to be positivists because of any empirical feature of the legal systems.

Nevertheless, to refute this first interpretation is not enough to dismantle Petroski's point. One can see from her text that Petroski is aware of this problem when she says that she is not actually advocating that legal theory is logically constrained to be positivist due to the empirical features she attributes to legal discourse:

> My point is not that legal theory inevitably adopts these features because it is impelled to take on the features of the subject-matter it is explaining (either because this is necessary for the complete explanation or because it is a kind of irresistible temptation). It is, rather, that because of the parallel social functions and historical paths of these two practices—legal practice and theoretical inquiry—they in fact share certain features, at least when they are regarded from a certain perspective.[8]

This quotation shows that the best way to read the thesis of the parallel between legal practice and academic discourse is by accepting not that the features of law influence the theoretical understanding of legal theorists, but rather that the features of academic discourse are projected in the way scholars describe the law. There would still be some sort of "irresistible temptation" for positivism, but its cause would not be any feature of the object of inquiry of legal theorists (the law), but rather a set of features of the inquiry itself. This is the second interpretation of the connection between the character of practical legal discourse and that of legal-theoretical inquiry. I can find support for this second reading in Petroski's own words, when she holds that "the institutional and conceptual dynamics *within each domain* provide strong incentives for those working in each to fixate on just these features."[9] The same phenomenon would thus occur in both institutional contexts: On the one hand, lawyers tend to interpret the law in a legalistic way because legal reasoning is embedded in an exclusivist discursive pattern; on the other hand, theorists tend to describe the nature of law in a positivistic way because of some institutional restraints over the sphere in which they operate. Does this second interpretation of the parallel connections between legal discourse and legal practice make Petroski's thesis more acceptable than the first one?

[8] *Id.* at 680.

[9] *Id.* at 680 (emphasis added).

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An argument for the second interpretation could be plausible if positivism were the only or the overwhelmingly dominant way of thinking about the nature of law. Nonetheless, the impact of such "institutional and conceptual dynamics" in contemporary legal theory is not that evident. No natural lawyer, pragmatist or non-positivist in general would define the law as entirely self-referential and exclusionary of all non-legal reasons in a strict sense.[10] No compelling institutional factor in the structure of the modern universities seems to be requiring such theorists to do so. Furthermore, I believe that Petroski's ideas about the social functions of law and legal theory are unconvincing, for at least two correlated reasons. On the one hand, the only social function one can identify for legal practice in her paradigm is to exercise an aristocratic domination over the mass of non-lawyers by means of an obscure discourse which is closed within itself. This seems to be more a pathology than a genuine social function. On the other hand, if this description of legal theory were correct, then the theoretical inquiry about law would suffer from self-imposed limitations which would keep it away from any interesting real-life problem. Legal theory would not be able to achieve what it purports to do, since it would neither be able to explain the normativity of law nor contribute to justify relevant decisions about the nature of law. As we will see in the next section, legal philosophy itself would lose one of its central functions.

II. The Critical Dimension of Legal Theory

Although Petroski intends to explain positivism in *sociological* terms, I believe that the debate between positivists and non-positivists is a *philosophical* one, and that it cannot be resolved without a proper understanding of the nature of legal philosophy. We can see from Petroski's description of the character of legal-theoretical discourses that she sees legal theorists as (at least in part) strategic actors who operate within a competitive environment that is closed within itself and excludes all the reasons that fall outside of the scope of its own discursive pattern. Instead of acting critically against this framework, legal theorists cultivate it and reproduce it because they can only achieve status, authority and expertise by sticking to such discourse and differentiating it from the competing discourses by means of fractal distinctions. To move out of this context would be against the interests of the theorist herself.

[10] A natural lawyer would have to say that the normativity of law is justified by some objective moral principles which cannot be entirely excluded from practical legal reasoning. *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1979). A pragmatist would never deny that reasons of policy and arguments from other non-strictly institutionalized materials play an important part in legal argumentation, although she would tend to be skeptical about the role of moral principles in legal practice. *See generally* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1993). A non-positivist like Dworkin or Alexy, finally, would argue that the key principles of political morality are in any case part of the materials that lawyers use in their practical activity. *See generally* ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM (2002); RONALD DWORKIN, LAW'S EMPIRE (1986).

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If Petroski's analysis of law and of theoretical thinking is correct, both the legal system and legal philosophy could be described in the same way that Jürgen Habermas described Niklas Luhmann's sociology of law.

> As so described, the legal system is a recursively closed circuit of communication that self-referentially delimits itself from its environment, with which it has contact only through observations. . . . [T]he system describes its own components in legal categories and employs these self-thematizations for the purposes of constituting and reproducing legal acts by its own means.[11]

The problem of Luhmann's[12] autopoietic theory of law, Habermas argues, is that its empiricist interpretation of the legal system assumes that it is detached from all *internal* relations to morality and politics. "The law is reduced to the special function of the administration of law," and the interpreter or the theorist loses sight of the connection between law and the "constitutional organization of the origin, acquisition, and use of political power."[13] If the law is understood as an autopoietic social system, one cannot account for its social normativity and its proper social functions in the context of a pluralistic and secular society which can no longer rely on metaphysical arguments from natural law. Striped of its normative connotations that once were backed by metaphysical natural law, but which can no longer find any room when the law is observed from the outside and characterized as an entirely autonomous social system, the law becomes "narcissistically marginalized" and can only react to its own problems. In short, a *mutual indifference* between the law and all other social systems is assumed by the interpreter.[14] This mutual indifference, Habermas would say, has the consequence that the law can no longer find a proper justification, for its normativity is heavily compromised.

Whoever is right in this point, Habermas or Luhmann, it must be stressed that this debate is more fruitful as a debate about the "law" than as one about the character of theoretical inquiry over its nature. In fact, one can make very good arguments to support, against Habermas, the claim that the law is a closed and self-referential system which can be identified by means of a strictly empirical analysis, without any consideration about the role played by politics or morality in its creation and administration. This is, in fact, how

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[11] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS—CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 49 (1996).

[12] *See generally* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (2008).

[13] HABERMAS, *supra* note 11, at 50.

[14] *Id.* at 51.

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one of the most powerful legal theories of our time explains the validity of a law. According to Joseph Raz, the valid law should necessarily be identified in a way that is free from any political or moral connotations, since its sources come from social facts alone. To include moral principles or any type of non-authoritative considerations in the tests used to distinguish legal rules from other social norms would undermine the authoritative character of legal norms, which is its distinctive feature. When legal officials are set out to apply the law, they are guided by "positive authoritative considerations" whose existence and content can be asserted without resort to moral judgment.[15] Law, in this theory, consists only of such positive authoritative considerations. When state officials identify and apply the law, their personal action is situated not on the deliberative stage of practical reasoning, but rather on the executive stage, in which the question what ought to be done is answered without resort to any type of moral or political argument.[16] As in Luhmann, we can notice in Raz a stress on an intrinsic form of rationality in legal reasoning, which is conducted in an entirely autonomous practical context. If that is the case, one might ask whether this autonomy applies also to the theoretical inquiry about the nature of law, as Petroski suggests. Can we conceive of legal theory as strictly separated from other fields of inquiry such as politics and morality? Do legal theorists need to confine themselves to any particular type of reason?

My view is that both of these questions should be answered in the negative. Even within the realm of legal positivism, few are the theorists who unequivocally agree with Petroski on this point. Austin, Kelsen, and Hart are possibly the best examples of this approach, but they seem to be in a minority (even though they are prominent thinkers within the positivist tradition), and I do not think that they are right in this. They seem to believe that theoretical inquiry should be entirely neutral. No moral, ethical or pragmatic argument should be used to back up a particular theoretical conception of law. In Kelsen's perspective, for instance, science is the only form of knowledge worth pursuing, and it must proceed either by means of empirical observation or by strict logical and mathematical analysis. The theorist is motivated solely by her faith in science and the pursuit of the truth. She has no ideological ambitions and is determined to free her analysis from the prejudices and preconceptions that are usually found in ethics, morality, politics, psychology, biology, and religion. As Kelsen writes in the opening page of the Pure Theory of Law, legal theory is a "theory of positive law," and as such it aims "solely at the cognition of its subject matter"; that is to say: Legal theory is "legal science, not legal policy."[17] By the same token, Austin's imperative theory of law is strongly committed to an empiricist approach, as is visible in one of his most famous passages, where he argues

[15] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN MORALITY OF LAW AND POLITICS 189 (1994).

[16] *Id*. at 190.

[17] HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 7 (1992).

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that "the matter of jurisprudence is positive law, simply and strictly so called."[18] Finally, Hart's view of jurisprudence as a form of "descriptive sociology"[19] is even more characteristic of this neutral methodological point of view.

In my view, Petroski seems to believe that it is feasible to analyze the legal phenomenon with the kind of neutrality that is advocated by the strand of descriptive positivism mentioned just above. If that were the case, it would appear reasonable to argue that legal theory is bound to be positivist because of the methodological attitude of the major legal theorists, who by large exclude political, pragmatic, and moral reasons from their theoretical inquiry about the nature of law. This is, in fact, the root of my deepest disagreement with Petroski. I am not convinced that any serious theoretical account of the legal phenomenon can free itself from the kind of reasons that are found in politics, ethics or morality. As a matter of fact, I can think of no Anglo-American positivist whose arguments in support of his or her own theory are neither moral nor political in nature. In these matters, I think that Dworkin is right when he claims that "any theory of law, including positivism, is based in the end on some particular normative political theory."[20] Law is a contested political concept which takes its sense from its use, "from the contexts of debates about what the law is, and from what turns on which view is accepted."[21] According to Dworkin, positivists who claim that their theories are merely a sort of linguistic study or descriptive sociology potentially do not understand their own arguments.[22] Every thesis about the nature of law is partly grounded in an argument of political morality.

If one looks at the five authors that Petroski quotes in support of her argument that legal theory is bound to remain positivist because of the key features of jurisprudential inquiry, one should be able to see that none of them excluded moral and political reasons in support of his theory. In my opinion, neither Hobbes nor Bentham, Austin, Hart, or Raz has produced a legal theory with all the features pointed out by Petrosky. None of these theories is self-referential or exclusive of all moral and political considerations.

Hobbes, for instance, is as much a natural lawyer as he is one of the founders of positivism. The "laws of nature" are descried in the *Leviathan* as "immutable and eternal," and the science of these laws is "the true and only moral philosophy."[23] Although he is skeptical

[18] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1 (1832).

[19] H. L. A. HART, THE CONCEPT OF LAW (2d ed. 1994).

[20] Ronald Dworkin, *A Reply*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 254 (Marshall Cohen ed., 1984).

[21] *Id*. at 256.

[22] *Id.* at 255.

[23] THOMAS HOBBES, LEVIATHAN para., I. 15 (1651).

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about any natural inclination of mankind towards these laws, for in the "state of nature" the "laws of nature" cannot determine human action, he shares with classical natural lawyers the view that people are able to discover what these laws of nature are by using their practical reason. When humans do that, Hobbes argues, they are likely to form a commonwealth in which men are no longer apt to act on the so-called "right of nature" or "the liberty each man hath to use his own power as he will himself for the preservation of his own nature . . . or his own life."[24] These views are more than enough to classify Hobbes as a natural lawyer, for he admits both that there is a natural law the existence of which does not depend on any positive or institutional act and that the positive laws created by the civil society find their justification in such natural laws. Hence, Hobbes can only be read as a positivist if one understands this label as not necessarily antagonist to what natural lawyers have to say. Moreover, Petroski's belief that Hobbes was under some sort of constraint because of the "basic conceptual vocabulary" that he uses does not seem to me entirely accurate from a historical point of view, since it misses the point about Hobbes' political motivations for the kind of theory he advocated. Hobbes lived through one of the most volatile moments in British history, and he wrote with a view to provide a practical and political justification for absolute Monarchy, which was in his opinion the only way out of the English Civil War. Hence, although Petroski is right when she argues that Hobbes and other positivists described the legal system as one which "suspends the operation of certain reasons for action and that has self-referential features,"[25] the same cannot be said about the inquiry or the research that these theorists undertook. Despite the initial appearances, the actual inquiry of Hobbes and his successors is neither self-referential nor exclusive.

To illustrate that point, one can think of the case of Bentham. Even though some scholars as important as Hart interpret his theory as a predominantly descriptive or neutral theoretical enterprise,[26] the best reading of his ideas is the one that recognizes that the role of his "analytical jurisprudence" is subservient to what he called the "art of legislation."[27] Bentham's positivism has moral roots. He defines a law in a positivistic way because he believes that in doing so he is following the principle of utility. As a form of utilitarian positivism, Bentham's conceptual theory is based on a particular view about the proper function of law, a function which cannot be understood in purely legal terms.[28]

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[24] *Id.*, para., I. 14.

[25] Petroski, *supra* note 1, at 682.

[26] H. L. A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY 21–39 (1982).

[27] Philip Schofield, *Jeremy Bentham and nineteenth-century English jurisprudence* 12 J. LEGAL HIST. 58, 60 (1991).

[28] The best defense of this interpretation of Bentham can be found in GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986).

Even Austin, who concentrated his legal theory on the so-called "expository jurisprudence," as opposed to the "censorial jurisprudence," may have hidden moral and political reasons for his allegedly descriptive positivism. Bentham's reformative utilitarianism can be contrasted with Austin's conservative use of the same principle. Whilst Bentham sees the principle of utility as a device for criticizing government and changing the law into something better, Austin adopted a "theological utilitarianism" which presumed that "it was the will of God that his creatures should be happy, and therefore the theory of utility and the will of God . . . coincided."[29] Unlike Bentham, Austin seemed to assume that the principle of utility *had* in practice commonly guided the legislator. As Schofield notices, "whereas Bentham's 'scientific' version of utilitarianism subjected existing practices and institutions to the scrutiny of the principle of utility . . . , Austin's theological utilitarianism tended to see those same practices and institutions as [already] embodying utility."[30] We can see, thus, that despite Austin's claim that his theory was neutral and purely descriptive, his jurisprudence could not be separated from the conservative moral-political context in which it was initially proposed.

Hart, likewise, regardless of his firm conviction that his "account is *descriptive* in that it is morally neutral and has no justificatory aims,"[31] has not managed to free his theoretical inquiry from arguments of political morality. I can think of two of his most central arguments as genuine examples of the moral-political commitments of his theory, which will be analyzed in the following paragraphs.

The first argument which exemplifies Hart's moral-political commitments appears in his reply to Radbruch's post-war papers against positivism. In one of his most celebrated essays, Hart heavily criticizes Radbruch and the German Constitutional Court for the decisions that applied the so-called "Radbruch's Formula" and thus denied legal character to a set of Nazi Laws which imposed racist measures on people of the Jewish religion. In particular, Hart was not satisfied with the reasoning provided by the Constitutional Court to justify, in a set of criminal cases, the conclusion that some statutes are too unjust to deserve any form of obedience. Instead of saying that the laws which legalized murder against the Jews lacked legal validity because of their extreme injustice, Hart argues, the court should have admitted that these statutes had indeed legal character, although the law in that case was too wicked to be obeyed. In order to correctly justify its decisions, the court should have recognized the legal character of the old statutes while creating a new legal rule with retrospective effects. In Hart's own words:

[29] Schofield, *supra* note 27, at 63.

[30] *Id.*

[31] HART, THE CONCEPT OF LAW, *supra* note 19, at 240 (emphasis in original).

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> Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it.[32]

It is clear, therefore, that one of Hart's most famous arguments in reply to non-positivism is a genuinely moral argument, which has very little neutrality in it. A positivist definition of law should be preferred to a non-positivist one because it would make plain the sacrifices and the choices that one has to make in order to impose legal obligations with retrospective effect.

The second argument, on the other hand, is even more expressive of the moral or political preferences of the author, for it clearly demonstrates that the allegedly descriptive theoretical account proposed in *The Concept of Law* has important normative elements built into it. Hart's central argument in support of the idea that a legal system must have not only "primary rules" according to which humans are required to do or abstain from certain actions, but also "secondary rules" which are concerned with the primary rules themselves, is grounded on a *reductio ad absurdum* that exposes the inadequacies of a political organization which uses only the former type of rules. An imaginary society where there are only primary rules of obligation would suffer from the problems of *uncertainty*, for there would be no procedure for settling any doubt about the validity of a rule; of having a *static character*, for there would be no means, in such society, for deliberately adapting these rules to novel circumstances; and of *inefficiency*, since there would be no procedure to keep the diffused social pressure by which rules are enforced and maintained.[33] It is because of this that we need secondary rules to provide a remedy for these three serious problems for any legal society. Nevertheless, as Dworkin correctly argues, such construction is far from being neutral or purely descriptive, as Hart claims it to be. Dworkin's words about this point are particularly illuminating:

> He [Hart] develops his own account of the main elements of law by showing how the device of a secondary rule of recognition responds to these

[32] H. L. A. Hart, *Positivism and the Separation of Law and Morals*, *in* THE PHILOSOPHY OF LAW 33 (Ronald Dworkin ed., 1977).

[33] HART, *supra* note 19, at 92–93.

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> particular defects by making possible a new set of rules that are flexible, efficient, and certain. This, I believe, does support my suggestion about the political basis of positivism.[34]

If Dworkin is right about this, then Hart's advocacy of neutrality in jurisprudence is inconsistent with his own theory, for the choice of his theoretical position is entirely determined by political considerations. As it happens with Hobbes, Bentham and Austin, Hart's theoretical inquiry is far from excluding all moral and political reasons.

Last but not least, Raz's philosophy of law appears to me as anything but neutral. First of all, he has never attempted to avoid moral reasons in his theoretical project. Although he holds that the law consists only of positive authoritative considerations, which implies that one cannot appeal to moral or political arguments in order to answer questions about the validity of a particular rule, he does not deny that there is some sort of connection between law and morality and that the normativity of a legal system should be explained by means of moral reasons. The Separability Thesis, for instance, is expressly denied by Raz: "[I]t is very likely that there is some necessary connection between law and morality, that every legal system in force has some moral merit or does some moral good even if it is also the cause of a great deal of moral evil."[35] Perhaps one of the keys to understand Raz's theory that the law is a system of authoritative rules is to look at the example of arbitration, which is one of his most famous. In that scenario, each of the parties has her own first-order reasons to determine her course of action, but these reasons may conflict. When two persons have conflicting views about a particular decision, they may agree to refer the dispute to an arbitrator. If they do that, two features stand out: (1) The arbitrator's decision is in itself a reason for action; and (2) The arbitrator's decision must be based on a set of first-order reasons which apply to the disputants (or, in Raz's terminology, "dependent reasons"). In Raz's perspective, the arbitrator has authority over the disputants because his judgment over the reasons that apply to them replaces their own balancing of reasons. "In agreeing to obey the decision [of the arbitrator], the disputants agreed to follow his judgment of the balance of reasons rather than their own."[36] This is what happens in the case of legal systems. When people join together to form a legal community, they agree to accept an authority whose judgment replaces that of the individual actors themselves. At this stage, we can see clearly the political root of Raz's philosophy of law. People accept the authority of law for prudential reasons. One of the central ideas to explain the normativity of law is what Raz calls the "normal justification thesis," which can be stated in the following terms:

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[34] Dworkin, *supra* note 20, at 255.

[35] RAZ, *supra* note 15, at 211.

[36] *Id.* at 196.

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> [T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[37]

Law's validity and bindingness can only be justified by means of prudential, political, or moral reasons. The authority of law is justified when people are better-off with the law's judgment rather than with their own. The whole argument, thus, is conducted by practical reasons. Furthermore, one of Raz's basic ideas is that the law claims legitimate authority, and such legitimacy means that the authority of every legal agent must seek for a kind of moral justification. To eliminate any doubts about the use of political and moral reasons in Raz's theory of legal authority, we can quote his own words about it. When talking about his own writings, Raz has recently said: "I maintain that necessarily the law claims to have legitimate authority, and that that claim is a moral claim."[38] We can see, thus, that Raz's philosophy of law also differs from Petroski's characterization of legal theoretical inquiry as an entirely neutral enterprise. This is enough to claim, contrary to what Petroski thinks, that jurisprudence as a philosophical discipline neither is self-referential nor excludes moral and political considerations. Even in the case of those who think that the law is an autonomous social system, theoretical inquiry over the law is hardly ever autonomous. Jurisprudence is philosophy applied to the law, and it plays a similar role to that of philosophy in general.

One of the most interesting questions about legal philosophy is to understand the kind of statements we find in it. Although one can think of many different methodological approaches to legal philosophy, which cannot be analyzed here, that which seems most interesting to me is the one advocated by Robert Alexy. For him, "[l]egal philosophy is argumentation about the nature of law," and any reflection about "legal philosophy is, therefore, a reflection about the nature of arguments about the nature of law."[39] Before we understand the nature of such reflection, however, we need some clarification about philosophy itself. How can we define philosophy? Again, this is one of the most difficult tasks of philosophical discourse. Alexy's answer is this: "Philosophy is general and systematic reflection about what there is [ontology], what ought to be done or is good

[37] Joseph RAZ, THE MORALITY OF FREEDOM 53 (1986) (emphasis removed).

[38] JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 315 (2d ed. 2009).

[39] Robert Alexy, *The nature of the arguments about the nature of law*, *in* RIGHTS, CULTURE AND THE LAW—THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 4 (L. H. Meyer et al. eds., 2003).

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[ethics], and how knowledge about both is possible [epistemology]."[40] This definition, according to Alexy, has three corollaries of capital importance: Firstly, the fact that philosophy is a reflection presupposes a *critical* aspect that constitutes a *normative* dimension for philosophical inquiry; "Philosophy as a necessarily reflective enterprise therefore necessarily has a normative dimension."[41] Secondly, the general and systematic character of philosophical reflection leads to an *analytical* dimension (which "is defined by the attempt to identify and to make explicit the fundamental structures of the natural and social world in which we live and the fundamental concepts and principles by means of which we can grasp both worlds)"[42] and, thirdly, to a *synthetic* dimension (which "is defined by the attempt to unite all of this into a coherent whole").[43]

We are now in a position to define legal philosophy. Legal philosophical inquiry is a philosophical inquiry about the nature of law. Its *differentia specifica* consists in its subject. It is, thus, a general and systematic reflection about what there is, what ought to be, and what can be known, but with specific reference to law.

Of course this concept of legal philosophy is different from that of some legal theorists who might restrict its scope to what Alexy has called the analytical dimension. Nevertheless, this is not how most contemporary philosophers (as opposed to *legal* philosophers) understand their own discipline, and the fact that the concepts and theories developed by legal philosophy are quite often *used* in practice, at least when it comes to pivotal cases, is an indicator that the legal theoretical accounts that restrict the scope of legal philosophy to analytical or empirical problems tend to misrepresent the function of the theoretical inquiry about the law.[44]

My main reasons for disagreement with Petroski are that if her description of legal theory is correct, then jurisprudence lacks what I consider to be one of its crucial functions

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[40] Robert Alexy, *The Nature of Legal Philosophy* 17 RATIO JURIS 156, 157 (2004).

[41] *Id*. at 158. The same argument is found in ALEXY, *supra* note 39, at 3.

[42] Alexy, *supra* note 40, at 158.

[43] *Id.*

[44] This is precisely what Dworkin means, for instance, when he holds that in any legal dispute there is always the possibility of a "theoretical disagreement" about the law. In hard cases, judges and lawyers may disagree not only about whether or not a particular act falls within the scope of a master rule such as Hart's rule of recognition, but rather about the content of the master rule itself. The criterion on which one relies to identify the law in a given case may depend on the theory one upholds to develop his conception of law. *See, e.g.*, DWORKIN, *supra* note 10, at 4–5. To pick up an example, in addition to the cases quoted by Dworkin in the first two chapters of his LAW'S EMPIRE, we can mention the decision of the House of Lords in *Jackson v. Her Majesty's Attorney General* [2005] UKHL 56. In this case, the Law Lords disagreed not only about the validity of a particular rule, but about the rule of recognition itself. For the particulars of this case, see Michael Plaxton, *The concept of legislation: Jackson and Others v Her Majesty's Attorney-General*, 69 MOD. L. REV. 249, 249–61 (2006).

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according to Alexy's account, which is the normative or critical one. Whatever defects Neil MacCormick's legal theory may have, the lack of a critical or normative standpoint for jurisprudential inquiry is not one of them. In my reading, his conception of law as an institutional normative order includes the idea that "the proper purpose of such an order is the realization of justice," and one of the consequences of this conception is that it justifies a "critical attitude" towards actual institutions of law and state.[45]

C. MacCormick's Post-Positivism and the Nature of Legal Argumentation

I. Petroski's Criticism on MacCormick's Post-Positivism

According to Petroski, Neil MacCormick is the only legal theorist to have applied to himself the label "post-positivist" or to have explained what this label actually means. She claims that the use of the prefix "post" implies that "the root tradition is no longer viable in its original form," and that this is the sense in which MacCormick uses the term.[46] After saying that, she explains why she thinks that a legal theorist might conclude that the tradition of legal positivism is no longer viable. She claims that there are two types of reasons one can adduce for a post-positivist position: conceptual and prudential reasons. On the one hand, the former could include either (1) a "dissatisfaction with the increasingly narrow questions addressed by positivists and their apparently increasingly trivial conclusions" or (2) "a conclusion that one or more of the premises or methods of legal positivism have been discredited or are irreconcilable." The latter, on the other hand, could include (3) "a desire to free the theorist's work from the pejorative connotations associated with" positivism; (4) "exhaustion with the volume of material produced under the positivist rubric;" or (5) "a desire to mark the theorist's work as original rather than derivative."[47] With this classification in mind, she claims that MacCormick's chief motivations for his post-positivist position can only be prudential in nature.

Petroski argues, firstly, that MacCormick "does not take the position that the premises of legal positivism have been discredited,"[48] and attempts to show this by mentioning his assertion that "law and morality are conceptually distinct."[49] Secondly, she claims that neither is MacCormick troubled by the "nit-picking details of legal positivist controversies, since he engages in and acknowledges the relevance of many of these quarrels."[50] And

[45] NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 264 (2007).

[46] Petroski, *supra* note 1, at 672.

[47] *Id.* at 672-3.

[48] *Id.* at 674.

[49] *Id.*, at 674, note 47.

[50] *Id.* at 674.

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thirdly, she says that although MacCormick claims to be a post-positivist because he believes that the "law is necessarily geared to some conception of justice," he "concedes that it is only the 'more austere and rigorous forms' of legal positivism that 'absolutely exclude the possibility that there is any moral minimum that is necessary to the existence of law as such.'"[51]

The conclusions Petroski draws are that (1) "none of the details of MacCormick's position in *Institutions of Law*, his final summation of his theoretical commitments, distinguishes those commitments from the core legal positivist commitments," and (2) that the author can only be using the "post-positivist" label for some of the prudential purposes she identifies, that is, as "a device for avoiding unwanted negative connotations or for asserting that his intellectual position is distinguishable from others."[52]

In the following I am going to attempt to defend MacCormick against these criticisms. My reasons are twofold. Firstly, my reading differs from Petroski's when she suggests that MacCormick does not hold that the premises of legal positivism are "discredited" or "incorrect," and when she states that the MacCormick's belief that "law and morality are conceptually distinct" implies any agreement with positivism. Some of the central theses of positivism are that (1) there is no necessary connection between law and morality and (2) it is possible that valid laws can be identified without resort to moral judgments.[53] As a post-positivist, MacCormick accepts neither of these claims. This fact does not entail, however, that law and morality should be confused or are not "conceptually distinct." Even an orthodox natural lawyer or an enthusiastic non-positivist will have to concede that law and morality are not conceptually equivalent, no matter how many necessary connections she finds between these two normative orders. Secondly, MacCormick's assertion that "the law is necessarily geared to justice" seems to me to be very different from the claim that "there is a moral minimum which is necessary for the existence of law as such." While the former implies that there is an *argumentative* connection between law and morality, so that moral arguments are embedded in any legal discourse and necessarily play a part in the interpretation and application of law, the latter means only that a legal system which does not comply with some minimum moral standards cannot be legally valid. Even if Petroski is right when she says that the former thesis can be accepted by non-orthodox positivists, this fact alone does not make Neil MacCormick one of them. We can see, thus, that even though MacCormick retains some ideas derived from the

[51] *Id.* at 675.

[52] *Id.* at 676.

[53] A contemporary positivist might reply that positivism no longer advocates the first thesis (Separability). This kind of argument is part of a general attempt to narrow down positivism in order to escape from objections raised by Dworkin and other post-positivists such as MacCormick. Nonetheless, I believe this does not affect my argument here, for it suffices to prove that MacCormick rejects the so-called Sources Thesis in order to claim that his theory is very different from positivism.

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positivist tradition, he departs from the most distinctive theses of such tradition. Differently from Petroski, I think that MacCormick's theory genuinely transcends the frame of thought which is common to legal positivists. In the following section, my job is to provide a few examples to demonstrate this point.

II. Law, Morality and Argumentation: The Nature of MacCormick's Post-Positivism

Although MacCormick had not adopted for himself the label "post-positivist" until late in his career, his relationship with positivism has never been unproblematic. Even in his earliest works he was not entirely satisfied with the mainstream positivist position about the nature of law. In spite of the great influence of Herbert Hart, there were relevant disagreements with the supposed neutrality of Hartian and Kelsenian positivisms. Perhaps the most expressive of these disagreements concerns the issue of the justification of decisions about the validity of a norm, considered from the *internal* point of view. As MacCormick has stressed several times, legal theorists should press Hart's insights about the internal point of view further than he did in his own theoretical project.[54] Once theorists take into consideration all the implications of the internal point of view, the problem of the justification of legal decisions becomes a central one, as we can see in the following excerpt from MacCormick's *Legal Reasoning and Legal Theory*:

> [A] positivistic description of the system as it operates *cannot* answer a particular kind of question which may be raised *internally* to a legal system: the question as it might be raised for a judge in a hard case: "Why ought *we* to treat every decision in accordance with a rule valid by our criteria of validity as being sufficiently justified?" and that is a question which can be, and from time to time is, raised. Nor can it answer the question yet more frequently raised for judges: "How ought we to justify decisions concerning the interpretation and application of our criteria of validity?"[55]

[54] To illustrate this point, we can quote the following excerpt from an interview that MacCormick gave to Manuel Atienza on the occasion of the publication of his *Institutions of Law*: "The most illuminating and lasting aspect of Hart's writings has to do with the need to understand any conduct regulated by rules from the 'internal point of view.' This is essentially to develop a clear and convincing theory of norms. But rules are just one type of norm. The analysis of Law as a system of primary and secondary rules, although a valuable intuition, is at the end incomplete and unsatisfactory. A fresh start is needed." Manuel Atienza, *Entrevista a Neil MacCormick* 29 DOXA—CUADERNOS DE FILOSOFÍA DEL DERECHO 479, 482 (2006) (trans. unknown).

[55] NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 63 (1978).

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This passage shows that MacCormick is worried about something that is usually neglected by contemporary positivists: the problem of the *justification* of legal decisions. He is especially concerned with the justification of legal decisions because he is aware of the subjective element that is always present, in greater or lesser extent, in the activities of interpretation and application of law. Furthermore, he assumes the point of view of the "norm user" when he takes up the task of constructing a theoretical explanation of the nature of law.

Although the institutional theory of law, which is MacCormick's legal theory in a strict sense, presupposes some sort of detachment from the part of the theorist, such theoretical inquiry "remain[s] nevertheless value-oriented" in the descriptions it makes of the legal institutions.[56] According to MacCormick, "a coherent account of the nature of law, and a coherent account of the character of any modern legal system, have to take seriously the very general values that are inherent in the character of the legal enterprise." The concepts that a legal theorist uses to explain the nature of law are thus "interpretative concepts" in the sense of Ronald Dworkin, for the theorist must adopt a hermeneutic approach which "seek[s] to understand the practices and institutions of human beings in terms of what makes them intelligible and worthwhile . . . to their human participants."[57]

Although the theorist has a certain degree of detachment when contrasted with the "front-line actors" of the legal practice, she must have, as a second-line actor, "a relatively high degree of engagement by contrast with purely external observers."[58] In spite of the fact that MacCormick claims that his jurisprudence is not aimed at the solution of particular current practical problems,[59] the understanding which it provides for the practical category of "law" presupposes a rational reconstruction of the legal institutions that "yields a *critical* account of the governing rules in the light of the principles and values which underpin them." Such a critical account, MacCormick proceeds, "may indicate the scope for future interpretations of law that will rectify anomalies in current understanding, including current judicial practice."[60]

The understanding of legal theoretical inquiry as predominantly critical and value-laden, adopted by MacCormick, is coupled with a view of the practice of legal argumentation as

[56] MACCORMICK, *supra* note 45, at 301.

[57] *Id.* at 295.

[58] *Id.* at 6.

[59] *Id.* at 302.

[60] *Id.* at 292. Like Alexy, MacCormick claims that legal doctrine has not only empirical and analytical dimensions, but also a normative one.

also a necessarily constructive or hermeneutic process, which seems to be at odds with the empirical essentialism that permeates most of the contemporary positivists.

For many positivists the law is some kind of real entity that is there to be "known" or "discovered" by the theorist. Theorists very rarely engage in an interpretative or hermeneutic activity when they attempt to "identify" the law. The law has a factual essence which can be observed or described *from the outside*. The theorist looks at the law from an external point of view, and she sees a static system of norms which can be theorized in a sort of Platonic way, since its contents are already fixed and their meaning does not depend on the subjectivities of the interpreter. This type of positivism, which is widely spread in Anglo-American jurisprudence, holds that there is a clear separation between the "creation" and the "application" of law. One can *identify* quite easily the "valid law" in any given society, although a legal official may eventually "create" new laws when she is not satisfied with the solution provided by the legal order or, more frequently, when she is dealing with a case not yet resolved by the set of valid laws. For this strand of positivism, it is possible to "apply" the law without any balancing of reasons. The so-called "application of law" is merely the executive stage of practical reasoning. All of the law can be found in its social sources, and the major task of the jurist is to identify these sources, since they give her an orientation about what one is legally required to do in a particular case.

Such clear distinction between the "creation" and the "application" of law leads to another distinction which is typical of contemporary Anglo-American positivism: the distinction between "theories of law" and "theories of adjudication." Theories of law are generally concerned with the identification of law. They answer to the question of what the law is, not what it ought to be. There must be a single test for differentiating legal rules from other type of social norms, and such test normally has to do with the pedigree or the process by means of which the rules are created (in other words, with its sources). In this perspective, the law is self-referential because it regulates the process through which legal norms are created. This distinction between "theories of law" and "theories of adjudication" presupposes some grain of positivism. In fact, it is hardly possible to find a non-positivist who would be willing to accept this separation.

The differentiation between a theory of law and a theory of adjudication is crucial for the debate about contemporary positivism, since it illustrates how this kind of theory characterizes the function of jurisprudence as a theoretical discipline. Once jurisprudence is classified as a theory of law, as opposed to a theory of adjudication, one can notice an increasing gap between theory and practice, which are conceived as autonomous discursive contexts which very rarely communicate with each other. It is not the task of a theorist to justify any practice or particular decision or to provide any guidance for the proper interpretation and application of law. The proper task of legal theory is merely to explain the law, rather than to develop or revise it. A good legal theorist must, therefore,

leave the object of her inquiry untouched. Legal theory and legal practice are separate domains, which should remain separate if they are to comply with their social functions.

I have no doubt that this is how Petroski conceives the task of legal theory: Legal theorists and judges operate within different institutional contexts. Hence, it seems puzzling to call a practitioner "positivist" or to apply to him the concepts and positions advanced in the jurisprudential discourse. For Petroski, when one classifies a judge as a "positivist," this can only mean one of these two things: (1) "that the judge speaks from an academic domain despite his or her role as a judge, or" (2) "that the judge adopts the rhetoric of the academic domain."[61] In both cases, however, the use of the vocabulary of legal theory by judges or other members of the legal profession is perceived as unnatural, if not illegitimate. For example, when an allegedly positivist judge like Justice Scalia classifies himself as a positivist, Petroski thinks that what he is doing is merely deploying some "interactive expertise" in order to adopt a rhetoric which would allow him to "stress on statutory and constitutional text and precedent as the only legitimate reasons to offer in support of a judicial decision" and to disavow any reliance on policy or moral considerations.[62] This "interactive expertise," however, is considered to be anomalous and interstitial, since the speaker is actually "master[ing] the language of a specialist domain in the absence of practical competence" for doing it.[63] When we find arguments from jurisprudence in a particular judicial opinion, this is explained not as something natural and immanent to the activity of adjudication, as Dworkin claimed when he said that "jurisprudence is the general part of adjudication,"[64] but rather as an intrusion into a different domain.

This way of conceiving the spheres of jurisprudence and legal practice, however, only becomes plausible if one presupposes a positivistic conception of legal theory. Hence, Petroski is perhaps giving way to certain positivist prejudices when analysing a non-positivist theory such as that of Neil MacCormick. She assumes that the functions of MacCormick's theory of law and the motives that he has to undertake his jurisprudential inquiry are the same as those of the particular type of positivism with which she impliedly identifies herself. We should also bear in mind that MacCormick is attempting to construct a legal theory which makes sense to the participants in the legal practice, even if it is not primarily aimed directly at solving individual problems. When we set out for ourselves the task of understanding a legal system, this involves both a description and a reconstruction of the legal practice and the principles which underlie it, and this is "not simply a matter of

[61] Petroski, *supra* note 1, at 686.

[62] *Id.* at 686-7.

[63] *Id.* at 687.

[64] DWORKIN, *supra* note 10, at 90.

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detached understanding from an observer's viewpoint. It is also a practical understanding from a participant's viewpoint."[65]

If one takes a different view of MacCormick's recent theory of law, without presupposing the positivist separation between theories of law and theories of adjudication, one is likely to see many points where he definitively breaks down with positivism. This would be my reading of MacCormick, which I shall consider in the following topics.

1. The Arguable Character of Law

The first point about Neil MacCormick's institutional theory of law is that the law comprises more than just a set of institutional facts which do not require any further interpretation. As a normative order, "and as a practical one," the law is "in continuous need of adaptation to current practical problems."[66] In this particular, MacCormick accepts Kelsen's idea that the law presents a hierarchical structure in which the higher-level norms are specified or concretized in the processes of legislation and adjudication. In European Law, for instance, the transposition process from the level of supranational law to the municipal legal orders "is a part of the *Stufenbau*, that is, the step-by-step process from abstract general enactment to particular decisions in concrete cases."[67] As MacCormick puts it with particular clarity, he sees the law as "an argumentative discipline," rather than an "exact science." His first commonplace about the law is that it is always arguable in nature.[68] Unlike the positivists who place legal certainty as the only value secured by the Rule of Law, MacCormick believes that the proclaimed "argumentative character of law" is something to be celebrated in democratic societies, for it is deeply entrenched in the ideal of the Rule of Law. The recognition of the Rule of Law as a political ideal implies the recognition of law's domain as the "*locus* of argumentation."[69] Although the principle of the Rule of Law is oriented towards the value of legal certainty, this value is not the only one. Rationality and justice also figure amongst the basic values which form the basic ideal of the Rule of Law.

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[65] NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 6 (2005). It is not a surprise, therefore, that MacCormick has recently confessed that his interest in legal philosophy developed from an attempt to reconcile philosophy and legal practice. When asked by Manuel Atienza about the roots of his legal philosophy, MacCormick answered in the following way: "M. A.: Why have you become interested in legal philosophy? N. M.: Because I was fascinated about philosophy, but wanted to dedicate myself to the practice of law." Atienza, *supra* note 54, at 480.

[66] MACCORMICK, *supra* note 65, at 6.

[67] *Id.* at 10.

[68] *Id.* at 14–15.

[69] *Id.* at 13 (emphasis added).

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In this interpretation, the indeterminacy of law is not always something to be deplored. It has to do with the ideal of the Rule of Law and with the procedural rules of argumentation that are presupposed in the institutional structure that it provides. The ideals of impartiality and equality between the parties in a legal dispute, as well as the fundamental principle *audiatur et altera pars*, are necessarily connected to the basic idea of the Rule of Law and to the arguable character of the legal system. In this sense, it is worth referring to MacCormick's words in the introductory chapter to his updated theory of legal argumentation:

> I do believe in the argumentative quality of law, and find it admirable in an open society. We should look at every side of every important question, not come down at once on the side of prejudice or apparent certainty. We must listen to every argument, and celebrate, not deplore, the arguable quality that seems built in to law.[70]

The Rule of Law itself, MacCormick would say, implies a certain degree of indeterminacy in the legal system. Such "indeterminacy," according to the author, "is not merely" "a result of the fact that states communicate their legal materials in natural ('official') language, and that these are afflicted with ambiguity, vagueness and open texture," like Hart would say.[71] "It also results from" "the due recognition of the 'rights of the defense' in every setting of criminal prosecution and civil litigation."[72] In short, the Rule of Law implies and in a way magnifies the arguable character of law.

If this interpretation of the political ideal of the Rule of Law is correct, then traditional legal theorists are wrong when they present the value of legal certainty as the only substance of the Rule of Law. Moreover, theorists are also mistaken if they claim, like Raz does in his positivist legal theory, that the law is to be "found" in a previously determinate set of "social sources," by means of an entirely empirical reasoning. The validity of a law cannot be merely a question of fact, but rather needs to be at least in a significant part a matter of argument. In MacCormick's view, the law is hardly ever "settled" and its rules are necessarily defeasible, for they are inevitably subjected to a constructive interpretation that might lead to revisions, reinterpretations, and even exceptions to their operative conditions. Legal rules are "regarded as stating only 'ordinarily necessary and presumptively sufficient' conditions for the arrangements they regulate," since the underlying principles that provide a general justification for the legal system interacts with

[70] *Id.* at 16.

[71] *Id.* at 26.

[72] *Id.*

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the more specific provisions that are found in statutes, precedents and in the secondary legislation.[73] Such interaction may activate some background factor covered by the justifying principle, which is likely to amount to the recognition of unstated exceptions to the rule initially considered by the interpreter. To put it in MacCormick's own words, "[t]he presence of unstated elements appears to be a general feature of law."[74]

2. The Interpretative Reading of the Sources of Law

At this stage, one can see why MacCormick's interpretative theory of law and legal adjudication, which is in an important measure influenced by Dworkin's conception of "law as integrity," is one step ahead of the positivistic formulation of the so-called "Sources Thesis," which seems to be the only common point to all positivists.

It is a common assumption of positivists that the decisive criterion to determine the validity of a legal norm, and therefore its distinctive legal character, is the pedigree or the source of that particular legal norm. When a rule can be traced back to a source which is legally recognized, jurists can identify it with a reasonable degree of certainty. Even the non-orthodox forms of positivism such as the "inclusive" theories of Coleman, Waluchow, and the late Herbert Hart have to agree that whatever comes out of a valid source of law has a proper legal character, provided that it satisfies the master rule established in a particular legal system as a test for the validity of its norms.[75]

MacCormick's recognition of the immanently arguable character of law, in turn, seems to imply a completely different doctrine of the sources of law. The materials found in the sources of law, such as statutes, precedents, treaties, and administrative acts are not "self-interpreting and self-applying."[76] Properly considered, they are "law" only in a pre-interpretative sense.[77] Perhaps MacCormick's views on the theories of precedent are a good example to illustrate this point. MacCormick argues that the theories of precedent based on natural law and on positivism have contributed not only to alternative

[73] *Id.* at 241.

[74] *Id.* at 244.

[75] In this particular, an inclusive or "soft" positivist would have to concede that it is at least theoretically possible to conceive a perfectly valid legal system that does not incorporate any moral principles to its rule of recognition. Whatever connections one can find between law and morality will be contingent, as opposed to necessary. *See generally* Jules Coleman, *Negative and Positive Positivism*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Marshall Cohen ed., 1984); WILL WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994).

[76] MACCORMICK, *supra* note 65, at 23.

[77] Neil MacCormick, *Precedent as a Source of Law*, *in* SOURCES OF LAW AND LEGISLATION: PROCEEDINGS OF THE 17TH WORLD CONGRESS OF PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY, BOLOGNA, JUNE 16–21 1995, ARSP—BEIHEFT 177, 183 (1998).

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interpretations of the doctrine of *stare decisis* in the United Kingdom, but also to different practical uses and applications of the case law. On the one hand, the so-called "declaratory theory of adjudication"—which presents itself as compatible with a natural law viewpoint and dominated the British scene until early in the 18th Century—"supports hostility to any doctrine of absolutely binding precedent, and tends towards a view of precedents as at most defeasibly binding, on the grounds that mistakes about law are logically possible, and precedents only declaratory or evidentiary, not strictly constitutive of law."[78] On the other hand, positivism, which stresses the human character of law, "necessarily denies the premises of the declaratory theory":[79]

> There is no essence of law beyond or behind what is decided as law by some competent decision maker. From this it follows obviously that, if precedents are evidence of the law, they can be so only because judges explicitly or implicitly accorded authority to make law through their decisions. Conversely, the very recognition of precedent as evidence of the law amounts to recognition of the power of the courts to make law.[80]

We can see, thus, that these theories produce serious normative consequences in the way a judicial precedent is received and applied in legal practice. It is because of such consequences that MacCormick, in his approach to precedents, holds that we need a theory that can overcome the dichotomy "natural law versus positivism," for this is the only way to transcend the limits of the declaratory theory and its positivist counterpart:

> It is no longer possible . . . to rest content with a simple contrast of natural law and positivism in the treatment of precedent. For this, particular tribute is due to the work of Ronald Dworkin, which has subverted the simple dichotomy of positivism versus natural law theory. In place of a model of law as a system of rules derived from predetermined sources, Dworkin invites us to re-conceive law as an essentially "interpretive" concept. The whole body of decisions by legislature and judges and others that positivism has conceptualized as making up "a legal system" Dworkin

[78] *Id.* at 182.

[79] *Id*. at 182.

[80] *Id.* at 183.

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> tells us to acknowledge as law only in a "pre-interpretive" way.[81]

As MacCormick explains, according to this conception the very notion of "sources of law" needs to be revised: "For a follower of Dworkin's view, if we treat precedent, or indeed Parliamentary or Executive enactment, as a 'source of law,' the conception of 'source' in play must be radically different from that assumed in the positivistic model . . . ."[82] By following the reasoning of Dworkin, MacCormick ends up with a theory of the sources of law according to which statutory provisions, precedents, case reports, and other legal materials "are not really themselves law, but rather are source-materials from which the law-making task of the moment must work." The specification of the meaning of a law depends on an interpretive process guided by the idea of "integrity," in Dworkin's sense,[83] or "normative coherence," which is the same idea in MacCormick's vocabulary.[84] In such constructive interpretation, the interpreter makes the law operative by applying these legal materials according to the moral principles implicit in the law, and this hermeneutic process is always guided by the idea to achieve the best possible interpretation of these pre-interpretive materials. We can see, thus, that MacCormick advocates a theory of sources of law and a theory of precedents that are incompatible with legal positivism and with the view that the authority of a source is the only factor that is relevant to determine the validity of the rule which can be extracted from a judicial precedent. The norms derived from precedent will be fixed in an interpretative discourse where arguments based on authority and arguments based on practical reason are balanced in a proper way.

3. MacCormick's Theory of Legal Argumentation

The arguable character of law and the conception of sources of law as "pre-interpretive" materials rather than definitive answers to the question of the validity of a rule are deeply consistent with MacCormick's ambitions to provide a normative theory of legal reasoning. If the law necessarily refers to some conception of justice and if its ultimate contents depend on constructive interpretations in the context of disputable validity claims to support the individual norms produced in the process of application of law, then it is reasonable to argue that one of the tasks of legal theory should be to provide a set of directives to help lawyers "discriminate between better and worse arguments, more and less rationally persuasive ones."[85] In this sense, part of MacCormick's strategy to reconcile

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[81] *Id.*

[82] *Id.*

[83] DWORKIN, *supra* note 10, at 95–96.

[84] *See generally* MACCORMICK, *supra* note 55; MACCORMICK, *supra* note 65.

[85] MACCORMICK, *supra* note 65, at vi.

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the argumentative dimension of law with the value of certainty—which are both presupposed and implied by the political idea of the Rule of Law—is to elaborate a theory of legal argumentation that claims to be capable of acknowledging the best criteria of rationality for legal decisions and the fundamental constraints on the process of legal reasoning.

Although much could be said about MacCormick's penetrating theory of legal reasoning, it is enough for our purposes to make reference to the Kantian universalism which is accepted in the latest version of his theoretical project. For MacCormick, any legal decision cannot be justified unless it passes a test of universalizability. This follows from the very idea of justification: "To justify is to show that it is right," and "to show that it is right is to show that, upon any objective view of the matter, the act ought to have been done, or even had to be done, given the characteristics and the circumstances of the case."[86] There is no justification without universalization in MacCormick's theory of legal reasoning: "For particular facts—or particular motives—to be *justifying reasons* they have to be subsumable under a relevant principle of action universally stated, even if the universal is acknowledged to be defeasible. This applies to practical reasoning quite generally, and to legal reasoning as one department of practical reasoning."[87] This is enough to show us that MacCormick's theory of argumentation strives towards some universality test in the spirit of Kant's categorical imperative, even if this test is adapted to the form of Perelman's ideal of the "universal audience"[88] or Habermas' regulative idea of the "ideal speech situation."[89]

In any case, MacCormick is very clear about the importance of the moral principle of universalizability when he expressly recognizes that the latest version of his theory of legal reasoning has departed from the Humean non-cognitivism found in his earliest writings in favor of a Kantian universalistic moral philosophy.[90] In this particular, MacCormick's theory of legal argumentation has to incorporate two theses put forward by Robert Alexy in order to vindicate his claim that the principles of Kantian universalistic morality are relevant for legal reasoning: the thesis of the "claim to correctness" and the "special case thesis." If the law is a *special case of practical discourse* and, as such, raises a *claim to correctness*, then the basic rules of argumentation which apply to practical discourses are

[86] *Id.* at 98.

[87] *Id.* at 99.

[88] *See e.g.*, CHAIM PERELMAN and LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 31–35 (1969).

[89] Jürgen Habermas, *Teorías de la Verdad*, *in* TEORÍA DE LA ACCIÓN COMUNICATIVA: COMPLEMENTOS Y ESTUDIOS PREVIOS 113–58 (1997). For a comprehensive analysis of Habermas discourse theory in English, see generally THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS (1978).

[90] MACCORMICK, *supra* note 65, at 30.

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also valid for legal discourse. The same principles of discourse that one can find in Kantian moral philosophy are also valid for legal discourse, since the latter is nothing but a case of the former with a set of institutional constraints.[91] Without these two theses, MacCormick would not be able to vindicate his claim, which is common to Alexy, that the principles of moral argumentation proposed by thinkers like Kant and Habermas are applicable to legal reasoning. Hence, it is not difficult to notice that MacCormick's theory of legal argumentation—at least in its latest form—presupposes a breakdown with the positivist tradition. As I intend to demonstrate in the final sections of this paper, the theses of the "special case thesis" and of the "claim to correctness," in the form that MacCormick interprets them, cannot be reconciled with any form of positivism.

4. The Thesis of the "Claim to Correctness"

One of the points in which MacCormick departs from positivism is when he claims that the law raises an implicit pretension to justice. In fact, MacCormick holds that legal discourse is characterized by the presence of certain implicit claims which are "necessarily bound up with the performance of the interactive roles of the law-making, judicial, and executive institutions or agencies of the state."[92] Every speech act which introduces a legal norm or exercises some sort of legal authority is connected with the illocutionary act of asserting the correctness of the general or individual norm which is produced thereby. Any speech act performed in the context of legal argumentation involves certain background assumptions or implicit claims, and in particular a claim to legal and moral correctness.[93] Considered as an institutional normative order, the law strives to justice and necessarily purports to resolve practical conflicts in a morally acceptable way: "[A] certain pretension to justice, that is, a purported aspiration to be achieving justice (even if this be the mask of a more partisan or sinister intent) is necessarily evinced in the very act of law-making in the context of a law-state."[94]

The claim to correctness includes, although it is not satisfied with, a claim to *moral* correctness, and not only a claim to correctness according to the positive laws of a given state. Such a claim, which plays a central role in Alexy's theory of legal argumentation and now seems to perform an analogous function with regards to MacCormick's latest version of his theory of legal reasoning, is intimately connected with the idea that the law has an

[91] This obviously does not mean, however, that law and morality are not distinguishable. The fact that legal discourse operates within a set of institutional constraints implies that legal decisions are limited by the exigency to respect the statutes, precedents, and other authoritative materials found in a legal system. It is this constraint in practical legal reasoning that makes it a special case of practical general discourse.

[92] MACCORMICK, *supra* note 45, at 274.

[93] *Id.* at 275.

[94] *Id.* at 276.

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argumentative character. The foundations of this thesis can be found in Habermas' philosophy of language. In his famous essay "Theories of Truth," originally published in German in the early 1970's, Habermas criticizes the philosophical theories which define the truth of an assertion as the "correspondence" with a certain thing or state of affairs that is proved to be existent in the world of physical objects.[95] In contrast to these theories, Habermas advocates a conception of truth as rational consensus, which can be summarized in the following excerpt:

> I can predicate something to an object if, and only if, all the individuals that *could* enter in a discourse with me *would* predicate the same thing to the same object. Hence, to distinguish the truth from the falsity of an assertion I make reference to the judgment of the others—in fact, to the judgment of all of those with whom I could eventually enter in a discussion (among which I counterfactually include all the hearers that I could meet if my lifetime were coextensive with the history of mankind). The truth-condition of a statement is the potential consensus of all the participants in the discourse.[96]

With this ideal discourse, Habermas seeks for the criterion of truth which he claims to be absent in the epistemological theories that identify the truth of an assertion with a mere correspondence, mediated by sensorial experience, to a certain state of affairs. Since we all have different experiences, a conception of truth based solely on sensorial perception would prove to be mistaken because it cannot guarantee the objectivity of the knowledge it provides. Since there is no reality objectively accessible to our senses, the rationality of the expressions used by A or B can only be assessed in terms of the discursive redeemability of the validity claims contained in the speech acts performed by each speaker. In other words, by understanding the discourse as an argumentative procedure, Habermas is claiming that in the linguistic interactions between A and B "both raise *claims* with their symbolic expressions, claims that can be criticized and argued for, that is, *grounded*."[97] A judgment—about the *truth*, in the case of constatative speech acts, or about the *correctness*, in regulative speech acts, where what is at stake is not the assertion of a fact, but rather the validity of a norm[98]—can only be "objective if it is undertaken on the basis of a *transsubjective* validity claim," in such a way that the "assertions and goal-

[95] Habermas, *supra* note 89.

[96] *Id.* at 171.

[97] JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 9 (1984).

[98] Habermas, *supra* note 89, at 130.

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directed actions are the more rational the better the claim that is connected with them can be defended against criticism."[99] Hence, Habermas needs to adopt a concept of *communicative rationality* which is based on a discourse whose formal properties are capable of generating an unconstrained and unifying consensus.[100]

Like assertions about facts, normatively regulated actions also contain signifying expressions which are connected to criticizable validity claims. The norms to which these actions refer also can be inter-subjectively recognized, and the discursive redeemability of the validity claims raised for these norms is what constitutes their rationality.[101] In the field of ethics, Habermas adopts a cognitivist position according to which practical or normative questions can be resolved by means of an argumentation put forward in a practical discourse where the correctness of the norm is scrutinized.[102] This type of discourse is a communicative process that can only be rational if it approaches the following "ideal conditions": (1) the speakers must be in an "ideal speech situation" which is basically characterized by the "general symmetry of conditions," so that each participant in the discourse can structure his speech acts in a way that there is no coercion other that the rational force of the better arguments;[103] (2) the argumentation, as a process of communication, must be understood as a "a form of interaction subjected to special rules"; and (3) the argumentation "has as its aim to *produce* cogent *arguments* that are convincing in virtue of their intrinsic properties and with which validity claims can be redeemed or rejected."[104]

Since I cannot move any deeper into this theory of rational discourse, I will limit myself to stress one of the points which appear to be central to Alexy and MacCormick: the idea that regulative speech acts always raise a claim to normative correctness. It is on the basis of this premise that Alexy argues that in every act of creation and application of law a claim that such act is correct is implicitly raised. In the core of this claim there would be: (1) The *assertion* that the legal act is substantially and procedurally correct; (2) The claim (which generates a *guarantee*) of justifiability of this assertion; and (3) The *expectation* of acceptance of correctness by all addressees of the legal norm.[105] But how can Alexy justify this thesis? He answers this question in the following way: "[A]n implicit claim can be

[99] HABERMAS, *supra* note 97, at 9.

[100] *Id.* at 10.

[101] *Id.* at 15–16.

[102] *Id.* at 19.

[103] *Id.* at 25.

[104] *Id.* at 25.

[105] Robert Alexy, *Law and Correctness*, 51 CURRENT LEGAL PROBLEMS 205, 208 (1998).

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made explicit by showing that its express negation is absurd."[106] He follows, thus, a formal-pragmatic strategy of showing that the explicit negation of the claim to correctness entails a contradiction between the content of the legal act (be it a statute, a judicial decision etc.) and the content of the claim implicit in its enactment. Alexy calls this kind of contradiction a "performative contradiction."[107] Every participant in legal discourse who expressly denies the claim to correctness commits a contradiction of this kind. It would be a performative contradiction, for instance, if in the enactment of a constitution the first article expressly asserted that "X is an unjust State." The same would happen if a judge pronounced a sentence stating something like "X is hereby convicted to life imprisonment, although this is an incorrect interpretation of valid law." This judge's decision could be classified as absurd because it would contain both an implicit assertion that it is a correct decision and an explicit assertion which contradicts the implicit part.

Alexy argues, in one of the main points of his argument to justify his definition of law, that the claim to correctness has the function of establishing a necessary connection between law and morality, which is described as a complex connection that has at the same time a qualifying and a conceptually necessary character: It is a necessary character because every legal system necessarily raises a claim to correctness (and thus there can be no legal system that does not raise the claim), but it is a qualifying character (unlike a classifying character) because the legal systems and legal norms that do not fulfill the exigencies of the claim to correctness may remain valid in a legal sense, despite being conceptually flawed.[108] The claim to correctness generates a weak duty to do justice according to the law, not an absolute one.

But a positivist jurist could still ask: What is the relevance of a claim to correctness, if it has only a qualifying character? Alexy contests this question by arguing that the claim to correctness is not only a moral claim, but also a legal claim. And this legal claim "corresponds with a legal obligation necessarily connected with judicial judgments to hand down correct decisions."[109] It attributes to law an ideal character that is especially relevant for those who analyze law from the point of view of the participants. Thus, when application of the law results in an injustice (and therefore does not fulfill the state of affairs required by the claim to correctness), we are facing not only a *moral fault*, but also a *legal fault*. In Alexy's own words, "[t]he claim to correctness transforms moral faultiness into legal faultiness. And this is by no means trivial. It is the conversion of positivism to

[106] Robert Alexy, *Derecho y Moral*, *in* LA INSTITUCIONALIZACIÓN DE LA JUSTICIA 21 (2005).

[107] Alexy, *supra* note 105, at 210.

[108] *See generally* ALEXY, *supra* note 10.

[109] Alexy, *supra* note 105, at 216.

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non-positivism. Law's claim to correctness is on no account identical with the claim to moral correctness, but it includes a claim to moral correctness."[110]

The claim to correctness attributes to law an *ideal* character that was not present in the positivistic accounts that defined the legal system as mere *facticity* or the result of the exercise of authority. This ideal dimension of law supports a general principle of morality which is valid as a *legal norm* implicit in every legal system. Along with this claim, Alexy recognizes a norm pragmatically presupposed that contains a duty of correctly interpreting and applying the legal norms. As a consequence of the claim to correctness, one can argue that there is a methodological argumentative connection between law and morality[111] which implies that legal officials have a *prima facie* legal duty to do "justice according to the law." This is precisely what MacCormick means when he holds that the law is "necessarily geared to justice," and such claim is obviously at odds with any form of positivism. To say the least, it attaches to law an aspirational character and introduces a distinction between the "actual positive law" and the "ideal positive law,"[112] as well as a discursive obligation for legal agents to attempt to reconcile the two of them in their constructive interpretations.

5. The Special Case Thesis

Furthermore, a few words can be said about the thesis that the legal reasoning is a special case of practical discourse. The special case thesis is relevant for the theories of legal argumentation because it makes it easier to see the formal-pragmatic presuppositions of legal discourse. When we say that legal discourse is a special case of practical discourse, we commit ourselves to the view that there are some discursive obligations for the participants in this type of discourse. Whatever constraints are applicable to general practical discourses are also valid for legal discourse, albeit with the additional condition that the speakers have to comply with the positive laws with which they operate. As MacCormick writes to express his agreement with Robert Alexy's original formulation of the thesis, "legal argumentation must be acknowledged to be one special case of general practical reasoning, and must thus conform to conditions of rationality and reasonableness that apply to all sorts of practical reasoning."[113]

[110] Robert Alexy, *On the Necessary Connection between Law and Morality: Bulygin's Critique*, 13 RATIO JURIS 138, 146 (2000).

[111] *See generally* Alexy, *supra* note 105.

[112] MACCORMICK, *supra* note 45, at 257.

[113] MACCORMICK, *supra* note 65, at 17.

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The special case thesis is thus relevant because it connects law, rationality and rhetoric. It implies some rhetorical duties[114] for anyone who enters a legal discourse or raises a legal claim. Hence, if Petroski is right when she holds that positivists agree that law and legal reasoning can be characterized by the fact that they "exclude" certain reasons—namely any kind of moral, political, or pragmatic reasons—from the set of arguments available for legal actors, then she must be wrong when she argues that MacCormick's post-positivism is not really transcending the theoretical background of mainstream contemporary positivism.

If I am correct, MacCormick's adherence to the special case thesis implies that moral, political, and pragmatic reasons that apply in general practical discourse are necessarily included in legal reasoning, which is precisely the opposite of what positivists say according to Petroski's account of their legal theories.[115]

6. The Ethical Life of the Legal Institutions

Last but not least, MacCormick's institutional theory of law is very different from positivism because it refuses to accept its description of the law as an inherently formalistic and monological system of previously given rules. In this sense, my impression is that most of the contemporary positivists tend to be so strongly committed to their methodological prejudices that they usually fail to address one of the most interesting points of MacCormick's institutional theory of law, which has to do with the ethical life of the legal institutions.[116] On the basis of a "selective" reading of MacCormick's works, they highlight a handful of common places in his institutional theory and end up claiming that they find in MacCormick an ally rather than an opponent.[117] When they do it, however, they tend to distort the theory that they are analyzing. In fact, MacCormick's institutional theory presupposes an element of mutual understanding among the members of the legal community that is intrinsically built into the law.[118] The law emanates from the social

[114] THEODOR VIEHWEG, TOPIK UND JURISPRUDENZ (1953).

[115] If we accept this argument, we will have to deal with new problems such as, for instance, that of the potential conflict between "positive" arguments in a strict sense and the principles of justice that can be vindicated by means of the rules of general practical discourse. Neither MacCormick nor Alexy accept that there is always a primacy of strictly positive reasons in such case. Nonetheless, I do not need to deal with this kind of problems here.

[116] *See generally* Zenon Bankowski, *Bringing the Outside in the Ethical Life of Legal Institutions*, *in* LAW AND LEGAL CULTURES IN THE 21ST CENTURY (Tomasz Gizbert-Studnicki & Jerzy Stelmach eds., 2007).

[117] For some examples of positivists trying to read Neil MacCormick as belonging to their camp of theoretical discussion see, e.g., Frederick Schauer, *Positivism as Pariah*, *in* THE AUTONOMY OF LAW: ESSAYS OF LEGAL POSITIVISM 32–56 (Robert George ed., 1996); Vittorio Villa, *Neil MacCormick's Legal Positivism in* LAW AS INSTITUTIONAL NORMATIVE ORDER 44–64 (Makysimilian Del Mar & Zenon Bankowski eds., 2009); WALUCHOW, *supra* note 75, at 1–4.

[118] Neil MacCormick, *Norms, Institutions and Institutional Facts*, 17 LAW AND PHILOSOPHY 301, 305 (1998).

interaction of the members of such community, which is mediated by a discursive procedure in which these members influence each other and are transformed by the experiences that they gain from such interaction. This "mutual understanding" cannot be of any unspecified kind whatsoever, since what makes a rule institutionally recognizable is not only the conformity with a certain "constitutive rule" that determines its meaning—as it happens, for instance, in Searle's model of constitutive rules[119]—but rather the "underlying principles" that constitute the "final cause" of a certain institution.[120] Similarly to Dworkin, MacCormick believes that the meaning of the social practice called "law" derives in part from the principles that provide the general coherence of the legal system and that belong at the same time to morality and to positive law.[121]

The difference between MacCormick's position and that of mainstream Anglo-American positivism appears to be very neat when we contrast the positivist claim to treat the law as a "self contained and autogenerative system which needs to be kept distinct from politics in order to organise our lives"[122] with the *constructivist* idea, which MacCormick explicitly accepted, that the law is open to discourses of application that may lead to its adaptation and eventual reinterpretation on the basis of moral and ethical considerations.[123] According to the best interpretation of MacCormick's institutional theory, the law and its institutions create a sort of ethical space where coordination for the common good becomes possible and the individuals living in a political community can participate in the formation of the values and principles which apply to them.[124] The legal institutions have a value in themselves and the members of the political community recognize their laws not merely as a set of certain and predictable orders issued without their participation, but rather as a normative system that expresses a form of life to which they belong and which is constitutive to their identify and their self-understanding. As Zenon Bankowski convincingly argues, the positivist camp of this debate tends to alienate the individuals in a capitalist society and to reduce them to the condition of players in a rule-based game where their creativity and their critical faculties are narrowed down.[125] Again in the words

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[119] *See generally* JOHN SEARLE, SPEECH ACTS—AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1970).

[120] MacCormick, *supra* note 118, at 305.

[121] Nevertheless, MacCormick criticizes Dworkin's claim to reconcile his legal constructivism with the moral thesis (which is difficult to reconcile with constructivism) that there is only one correct answer for each and every legal problem. As MacCormick argues, there is an ambiguity in the heart of the Ronald Dworkin's, legal theory. Neil MacCormick, *Dworkin as Pre-Benthamite*, 87 PHIL. REV. 585–607, (1978).

[122] Bankowski, *supra* note 116, at 198.

[123] *See generally* KLAUS GÜNTHER, THE SENSE OF APPROPRIATENESS—APPLICATION DISCOURSES IN MORALITY AND IN LAW (1993); MACCORMICK, *supra* note 65.

[124] Bankowski, *supra* note 116, at 202.

[125] *Id.* at 199.

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of Bankowski, who is one of the most important interlocutors that MacCormick ever found in his lifetime, we can say that:

> The implications of this social attempt to make the fantasy of control and certainty real are that you begin to "act without thinking about it" since the reason to value the institution or arrangement is that it helps construct a manageable order in one's life. The hope is that this might carry over to the legal system as a whole. In that case, it could be reasonable to follow the law for its pedigree. It is law because it has been validly enacted. . . . We might say then that in striving so hard to make the normative [order] predictable by ensuring that we "do not think about it," we start turning the normative into the descriptive so that we act like automata running in a pre-programmed way. In order to be free we become slaves.[126]

None of these negative implications, however, appears in the book that Petroski is criticizing in her paper about Neil MacCormick's post-positivism. MacCormick's *Institutions of Law* is indeed a critical attempt to reconcile legal theory and legal practice, law and its moral justification, politics and the ethical life of the community in which the law is constantly reconstructed. The core of this theoretical project, in my perception, is to transcend the limits of legal thinking that positivists set for themselves.

D. Conclusion

In the frame of a comment, the current analysis of MacCormick's post-positivism does not claim to be a fully comprehensive one, since it does not intend to cover all the far-reaching implications of MacCormick's post-positivism. It does not even attempt to explain all the points in which MacCormick departs from positivism. To name a couple of them, much could be said about MacCormick's particular opinion about the proper methodology for jurisprudence—which stands somewhere in the middle between Dworkin and Alexy's participant viewpoint and the point of view adopted by Hart and his fellow positivists—and about MacCormick's thesis that any legal system necessarily comprises some "moral minimum without which purported law becomes un-law."[127] Although these issues are of fundamental importance for contemporary legal theory, I cannot address them for reasons of time and space. My ambition here was much more modest. I do not claim more than to offer an alternative view to Petroski's conclusions that post-positivism is just a new label

[126] *Id.*

[127] MACCORMICK, *supra* note 45, at 278.

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for old ideas and that MacCormick is still a positivist who has prudential reasons to differentiate his theory from that of his fellow academics. When Petroski claims that MacCormick is making "fractal distinctions" motivated by purely prudential reasons, she seems to me to underestimate the relevance of the challenges that he poses to mainstream positivism. If I am right in my interpretation of MacCormick's post-positivism, his point is not that all the criteria of identification of law advanced by positivism should be abandoned. Neither is it that the institutional theory that he advocates is entirely free from the methods of positivists like Hart and his followers. It is rather that the frame of thought of positivism is too narrow, since it cannot answer many questions which figure amongst the key problems that are still open for legal theory. How legal decisions can be properly justified and what weight is to be attributed to moral reasons or other non-strictly institutionalized reasons in legal argumentation are among these. What MacCormick is advocating with his post-positivism is much more than a conventional critique or a repetition of arguments against an old but enduring idea: it is rather a new paradigm for jurisprudential inquiry. In this new paradigm, which connects law, morality, ethics, and politics, the current positivist legal theories cannot survive unless they are radically reinterpreted—up to the point where they tend to lose their positivist credentials.[128]

Petroski's paper is indeed very innovative within the positivist tradition. In its final sections, for instance, it offers some new paths for jurisprudential inquiry and explores some of the possibilities that are open to make legal theory a bit more interesting without departing from positivism. For those who believe that jurisprudence should remain a purely theoretical inquiry, undertaken from the point of view of the external observer, her account is still a sound one. If one interprets Neil MacCormick's theory of law as also a purely theoretical inquiry from the same point of view, Petroski's criticisms against his post-positivist position might be accepted. If, however, one understands MacCormick's theoretical project as both connected to the legal practice and intrinsically critical, as I do, one can see that his legal theory is connected to his theory of argumentation, and that the theses that he needs to vindicate such theory of argumentation bring him away from positivism.

[128] Jeremy Waldron, for instance, agrees with Neil MacCormick that legal philosophy cannot be understood apart from its connections to the rule of law and its intrinsic relations to rationality and argumentation. As he wrote in a recent essay, "a philosophy of law is impoverished as a general theory if it pays no attention to the formalized procedural aspects of courts and hearings or to more elementary features of natural justice like offering both sides an opportunity to be heard." Jeremy Waldron, *The Concept and the Rule of Law* 43 GA. L. REV. 1, 55–56 (2009). A legal philosophy that fails to capture the arguable aspect of law (as well as its implications for the idea of the rule of law) is depicted as "empty and irrelevant." *Id.* at 56. Hence, Waldron expressly relies on MacCormick to hold that law is indeed an argumentative discipline and that modern positivism is guilty of the "fallacy" of putting its emphasis exclusively on the "command-and-control aspect of law." *Id.* Whether or not *normative* positivists such as Waldron will remain positivist once they accept this new paradigm that MacCormick is advocating, one thing is sure: Even if positivism endures, it needs to be radically modified if its upholders manage to provide a reasonable answer to the problems that MacCormick is bringing to the front with his post-positivism.

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