
The Chronology of the Legal

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The most influential legal philosophies—notably legal positivism—tend to draw a sharp epistemological distinction between the concept of time and the concept of law. The author provides a legal pluralist account of law, understanding it to consist in a shared idea of justice and the shared normative experience of participants in a legal discourse. A common assumption by participants of their ability to grasp and control time—what the author terms “*chronos*”—forms one aspect of their shared experience of the legal. A normative understanding of time is thus fundamental to a normative understanding of law.

Les philosophies du droit les plus influentes, notamment le positivisme juridique, ont tendance à établir une distinction épistémologique importante entre les concepts de temps et de droit. L’auteur propose une vision du droit propre au pluraliste, concevant le droit comme consistant en une idée partagée de ce qu’est la justice et une expérience normative commune à ceux qui participent au discours juridique. Une supposition communément partagée des participants quant à leur capacité à saisir et contrôler le temps — ce que l’auteur nomme «*chronos*» — reflète un aspect de leur expérience commune de ce qu’est le juridique. Une conception normative du droit nécessite dès lors une conception normative du temps.

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Introduction: A Methodological Aporia

The philosophical study of time must face up to a methodological aporia from the outset, the very aporia that made St. Augustine famously concede his inability to define time explicitly, although he *felt* he knew what it was.¹ Just as famously, Wittgenstein explained Augustine's failure to grasp the meaning of time in terms of the use of the wrong language game. Augustine, Wittgenstein tells us, was mistakenly looking for an object the dimensions of which he was trying to define.² Similarly, Waismann felt that reference to time as a noun can be rather misleading:

It is true, we can make a person understand the word "time" by producing examples of its use: but what we cannot do is to present a fixed formula comprising as in a magic crystal the whole often so infinitely complicated and elusive meaning of the word.³

But the task I set for myself in this paper is simpler and more modest than trying to grasp the essence of time. What I shall try to do is examine whether and how time is built in the concept of law. Major legal philosophies tend to avoid discussing the law's temporality explicitly, although they inevitably raise claims concerning the law's historicity. In the first part of this article, I shall argue that those legal philosophies tend to treat the law as ontologically autonomous and belonging exclusively in the realm of practical reasoning, thus making questions of speculative reasoning, such as that of time, external and largely irrelevant in the discussion of the essence of the legal. The few specific theories of law and its connection with time come closer to grasping the law's temporality rather than merely its historicity. I shall argue that, valuable as that approach may be, it remains incomplete to the extent that it does not provide an account of what it is that lends coherence to these manifestations of time in the law.

In the second part of this article, I shall put forward an argument concerning the connection of law with time. First, I shall place that argument in the context of a more general project and argue that the distinctness of the legal should be understood in terms of the tacit commitment of the participants to their *shared normative experience*, that is, the way they perceive themselves collectively in the world and their ability to transform it through their normative commitments. The perception of time or, more precisely, making sense of the ability to grasp and control time normatively, which I shall term as the *chronos* of the law, constitutes part of that shared normative experience. *Chronos* is built in the normative content of the law and is inextricably linked to it. Thus the legal pluralistic extension of my argument will become apparent. If the law and its institutional distinctness are understood in that light, it will be possible to recognize sources of legality outwith and beyond the state

¹ St. Augustine, *Confessions* (London: Hodder and Stoughton, 1999) book XI, c. 14.17.

² Ludwig Wittgenstein, *Philosophical Investigations*, trans. by G.E.M. Anscombe (Oxford: Basil Blackwell, 1968) at 42.

³ Friedrich Waismann, *How I See Philosophy* (London: Macmillan, 1968) at 142.

or similar political formations that the concept of the law has been consistently identified with by legal theory. We shall also be able to discern the ways in which state law, with the corroboration of centralist legal philosophy, silences and does violence to those other legal orders partly by extending its imperium over alternative ways of perceiving normativity in time.

I. The Need for a Richer Understanding of the Law/Time Relationship

The law is *prima facie* fraught with temporal expressions that seem inextricably linked with their normative content. Examples can be drawn from various areas of law and, indeed, various legal systems: imminence in criminal law; the statute of limitations; usurpation over time; sentencing in time units. What exactly is revealed in all of those instances?

Perhaps under the influence of the Humean thesis from the disjunction of the *is* and the *ought*, the major and most influential contemporary legal philosophies, namely legal positivism and theories advocating the necessary connection between law and morality, tend to draw a sharp divide between conceptions of time, and indeed other epistemological assumptions too, and the concept of law. They locate the latter firmly in the realm of practical reasoning and they reserve a place for the former in theoretical, speculative reasoning. As a system of *ought* statements, the law gives statements of fact their normative meaning but does not depend on them for its existence. When legal norms regulate time, as in the examples I mentioned above, it merely ascribes normative texture to reality, as it is authoritatively described by theoretical, scientific discourses. So according to those theories, the concept of law can be grasped independently of the epistemological assumptions existing in parallel with the normative ones incorporated in the law.

To be sure, all these theories have something to say about the historicity of the law, that is, how the law exists in time, depending on which historical moment they promote as the relevant one for the emergence of the law. For positivists situated in the Hartian tradition, that instant would be the moment at which the social practice embodied in the Rule of Recognition was consolidated, and for legal rules specifically, the moment of their formal enactment.⁴ For epistemic positivism, such as that put forward by Kelsen, the validity—that is, the mode of existence—of legal norms has a historical aspect in the sense that it has a specific duration, which is determined intrasystemically.⁵ Natural law theories as well as other legal philosophies that see the law in a continuum with morality do not offer a clear ontological way to distinguish the law from its normative environment. Their concern is to emphasize the necessary connection of law with morality, but in concentrating on this they do

⁴ H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1994).

⁵ Hans Kelsen, *A Pure Theory of Law*, trans. by Max Knight (Berkeley: University of California Press, 1967).

not enlighten us as to why it is specific sets of norms and institutions that we call “law” instead of others. While they draw some distinction, albeit a loose one, between “human” or “positive” law on the one hand and “natural” or “divine” law or morality on the other, we are none the wiser as to what the former may be. Thus it is more difficult to infer how exactly they place the law in history. The least that can be said is that legal normativity is not temporally co-extant with the convention that a society may call positive “law”, whatever that may be.⁶

Despite the fact that it is peripheral to their overall project, a useful conclusion can be drawn from this treatment of the law’s historicity by major legal philosophies. It appears that both positivistic and substantive legal theories adopt a very specific conception of time.⁷ They understand it as an entity observable in an objective way, as an object the ontology of which can be grasped definitively. As far as the form and structure of time are concerned, time seems to be understood in terms of the distinction between past, present, and future. History is the *flow* of events and facts through these three points in time.⁸ This flow is linear and forward-facing.⁹ The movement is from the past to the future in the way of the movement of an arrow. What was the future becomes the present and is finally stored in the infinite database of the past. The future, the present, and the past are experienced respectively as a bundle of aspirations, plans or hopes, current experience through our senses and,

⁶ Perhaps due to the influence of Dworkin’s critique of Hartian jurisprudence, the debate soon turned to one concerning adjudication. Seen from the point of view of time, the question is whether legal reasons are to be found in the past or in the present/future: in other words, whether judges *declare* or *create* law. The former option presupposes the use of principles as the foundation of legal reasoning and the latter is resigned to the fact of judicial discretion. For a discussion of that problem, see Richard H.S. Tur, “Time and Law” (2002) 22 *Oxford J. Legal Stud.* 463. On the question of coherence and its temporal dimension, see Neil MacCormick, “Time, Narratives, and Law” in Jes Bjarup & Mogens Blegvad, eds., *Time, Law, and Society: Proceedings of a Nordic Symposium Held May 1994 at Sandbjerg Gods, Denmark* (Stuttgart: F. Steiner, 1995) 111 [Bjarup & Blegvad, *Time, Law, and Society*]; Gerald J. Postema, “Melody and Law’s Mindfulness of Time” (2004) 17 *Ratio Juris* 203.

⁷ Adam Czarnota comes to the same conclusion about the law’s epistemology of time in his article “Law as Mnemosyne and as Lethe: Quasi-judicial Institutions and Collective Memories” in Emiliios Christodoulidis & Scott Veitch, eds., *Lethe’s Law: Justice, Law and Ethics in Reconciliation* (Oxford: Hart, 2001) 115.

⁸ On time as flow, see George N. Schlesinger, “How Time Flies” (1982) 91 *Mind* 501; see also Murray Macbeath, “Clipping Time’s Wings” (1986) 95 *Mind* 233.

⁹ On the directionality of time, see W.H. Newton-Smith, “Space, Time and Space-Time: A Philosopher’s View” in Raymond Flood & Michael Lockwood, eds., *The Nature of Time* (Oxford: Blackwell, 1986) 22; see also W.H. Newton-Smith, *The Structure of Time* (London: Routledge & Kegan Paul, 1980) on time as not being linked to change. For excellent comprehensive collections of philosophical writings on time, see Charles M. Sherover, ed., *The Human Experience of Time: The Development of Its Philosophic Meaning* (New York: New York University Press, 1975) (including texts ranging from the Bible to Heidegger); Richard M. Gale, ed., *The Philosophy of Time: A Collection of Essays* (Garden City, N.Y.: Anchor Books, 1967); Robin Le Poidevin & Murray MacBeath, eds., *The Philosophy of Time* (Oxford: Oxford University Press, 1993) (mainly analytical texts). See also Roger Teichmann, *The Concept of Time* (New York: St. Martin’s Press, 1995).

finally, as memories.¹⁰ It is against this background that the law develops as an historical event.

More importantly, this conception of time is objectified and incorporated as an assumption in the law. Returning to my previous point, the law emerges as a normative order, which comes from above to regulate the objective world as described by the natural sciences. Thus, the *concept* of law can be described independently of any epistemological statements. Even when it is grasped with reference to a social practice, as is the case in Hartian jurisprudence, this social practice refers to what the relevant community of people perceive as obligatory and that alone, and we get no account of the conditions that give rise to that practice (I return to this later on in this paper).

But this still leaves unexplained the numerous instances in which time is incorporated in legal language. There seems to be a coherent and consistent mode of making sense of time normatively or, seen from a different perspective, a way in which a commonly accepted perception of time determines the content of the law in a necessary manner. If that were not the case, why and how the law is connected to conceptions of time would remain unexplained and wholly contingent. So, a suspicion persists that there is a special connection between legal normativity and time, and not simply the boundaries of existence of legal norms or the time interval that the pool of reasons admissible in legal reasoning occupies.¹¹

¹⁰ The philosophical problems of this perception of time are endless. In large part the philosophy of time is concerned with the shortcomings of such a simplified and commonsensical epistemology of time. Most prominent among the shortcomings is McTaggart's claim that time is unreal: J. Ellis McTaggart, "The Unreality of Time" (1908) 17 *Mind* 457. McTaggart distinguished between two sequences with which we seem to make sense of time: that of past-present and future ("A" series), and that of earlier and later relations between points in time ("B" series). He came to the analytical conclusion that time cannot exist without the presence of the "A" series. The predicates past-present-future are clearly incompatible, for nothing can be past-present and future at the same time. McTaggart pointed out, however, that they can nevertheless be attributed to the same event: something can be in the future, become the present, and finally be in the past. The alternative that McTaggart and others have to offer is a different perception of temporal sequences—namely, what is habitually referred to as the "B" series, according to which events are earlier or later in relation to each other. The opponents of McTaggart's thesis that time does not actually exist, i.e., the advocates of the "A" series, sought to find a way out of the paradox that he introduced. But by claiming that time actually exists, they created—and therefore had to give solutions to—other problems about time, such as its directionality, its dimensionality, the question of causation and so on. See also K. Rankin, "McTaggart's Paradox: Two Parodies" (1981) 56 *Philosophy* 333; Denis Corish, "McTaggart's Argument" (2005) 80 *Philosophy* 77; Arthur N. Prior, *Papers on Time and Tense*, 2d ed. by Per Hasle *et al.* (Oxford: Oxford University Press, 2003). Essential reading for the reality of time is D.H. Mellor, *Real Time* (Cambridge: Cambridge University Press, 1981).

¹¹ Kevät Nousiainen makes the same point: "Problems of time are met everywhere in legal dogmatics. ... A legal act, a crime and an act of judging all seem to presuppose a concept of time that involves the experience of the acting person" (Kevät Nousiainen, "Time of Law—Time of Experience" in Bjarup & Blegvad, *Time, Law, and Society*, *supra* note 6 at 23). He then goes on to discuss the distinction between objective and subjective time, the former being the linear conception

II. Three Specific Accounts of Law's Temporality

A. *Time and Law Intertwined but Fragmented*

Although the philosophy of time is rich and varied, and although time has been theorized in relation to other concepts and phenomena both in the humanities and social sciences, there is not much in the legal philosophical market in the way of theorizing the connection between law and time. A reason for this is possibly the very fact that, as I argued above, the most prominent legal theories discuss the time/law relationship incidentally but, nonetheless, in a way that seems authoritative and conclusive. In any case, the result is a theorization of the specific connection between law and time that is rather limited in volume.

One such theory was offered in 1955 by Gerhart Husserl. His *Recht und Zeit*¹² is an attempt to systematize and organize the possible connections between law and time around three questions: How is the law placed in historical time? What is the intrinsic time structure of legal objects? What are the time perspectives of the legislature, the executive, and the judicature?¹³

The answer to the first question is a positivistic thesis about the possibility of the law having concrete history. Not unlike Kelsen, Husserl understands time as the past-present-future sequence, of which legal systems occupy a well-defined portion. Therefore, past, present, and future in the law are understood in an intrasystemic way, and do not refer to universal time in exactly the same way that the law does not depend on some extra-legal normativity. However, and this is the answer to the second question, legal concepts do not belong to the same historical time. They are part of an abstract, objective time and, therefore, are not synchronic with the actual behaviours that they ascribe legal meaning to.¹⁴ Thirdly, Husserl distinguishes between past-orientated, future-orientated and present-orientated times, which are used respectively by the judge, the legislator, and the executive.

More recently, Ost and van der Kerchove¹⁵ gave a systems-theoretical¹⁶ account of the connection of law and time as part of their account of the systemic autonomy of

of time, which, as I point out in this paper, seems to be what the law bases its operations on, and the latter being time as experienced by legal actors. His thesis is that the law shows a tendency to take experienced time more seriously. He illustrates the argument with the example of battered wives and the relevance of time frames for the substantiation of self-defence.

¹² Gerhart Husserl, *Recht und Zeit: Fünf rechtsphilosophische Essays* (Frankfurt am Main: Vittorio Klostermann, 1955).

¹³ *Ibid.* at 10.

¹⁴ *Ibid.* at 31-32.

¹⁵ Michel van de Kerchove & François Ost, *Legal System Between Order and Disorder*, trans. by Iain Stewart (Oxford: Clarendon Press, 1993).

¹⁶ In Luhmann's version of systems theory, time is understood not as a past-present-future sequence but rather in terms of intrasystemic earlier/later relationships. See Niklas Luhmann, *Social Systems*, trans. by John Bednarz Jr. & Dirk Baecker (Stanford: Stanford University Press, 1995).

the law. Depending on the jurisgenerative sources of each legal system, the authors distinguish between respective temporalities.¹⁷ These temporalities are:

- The constitutional time of foundation. This refers back to the time of origin of the legal system, the one event that marked its emergence—a divine mandate, a revolution, a social contract;
- The atemporal quality of legal dogma:

While [legal dogma] does not appeal explicitly to a fable of origin, it is none the less deployed in the form of an ‘omnitemporal presence’ designed to suggest the constant self-evidence of the principles appealed to and to shelter them from any historical context that could relativize their significance;¹⁸

- The customary time of the *longue durée*, which refers to the historical development and determination of the meaning of the law;
- The Promethean time of legislation, the conscious voluntary time of law-following;
- The time of case law or the cyclical “time of alternation between advance and lag.”¹⁹

B. Ost and the Contrat Temporel

In 1999, Ost gave a more detailed and specific account of law and time in his *Temps du droit*.²⁰ Here he speaks of the law as measure (*mesure*)—a measure in the sense of it “taking measures”, or determining public policy, but also a measure to the extent that it sets evaluative standards, draws the limits of correct action, of rights and wrongs. At the same time, it is a measure in the sense of equilibrium, proportionality, and prudence. Finally, the law is measure as temperance (*tempérament*):

[D]ans son travail d’ajustement permanent, la mesure juridique est rythme—le rythme qui convient, l’harmonie de durées diversifiées, le choix du moment opportun, le tempo accordé à la marche du social.²¹

So the law sets the rhythm, the pace at which we organize the governance of our social actions, our existence in common. And this rhythm is set by the four temporalities of the law in their amalgamation: memory, pardon, promise, and revision or reproblemization (*la remise en question*). Memory and pardon complement each other—the latter being the possibility of undoing the past (*delier le*

¹⁷ van de Kerchove & Ost, *supra* note 15 at 163.

¹⁸ *Ibid.* at 164.

¹⁹ *Ibid.* at 165.

²⁰ François Ost, *Le temps du droit* (Paris: Odile Jacob, 1999).

²¹ *Ibid.* at 334.

passé), thus being released from its burden, and the former being what facilitates pardon in the first place: a sense of origin and institution that gives rise to a sense of continuity. Reproblematization expresses radical critique, which puts the act of promising—that is, the act of normatively anticipating the future in the right perspective by releasing it from the asphyxiating embrace of tradition. These four temporalities, Ost goes on to argue, are merged in the present, the most elusive and enigmatic aspect of time. Echoing Ricoeur, Nietzsche, Benjamin, and also in a sense Derrida,²² Ost tells us that the present introduces itself as an integrating and paradoxical force, in which everything is in the realm of the possible and the not-yet-possible.

Then Ost makes a remarkable point expressing an intuition or the beginning of a new project, which I shall use as one of the points of departure for the rest of my analysis in this paper. In discussing responsibility as the “third movement of the interlude” (as he calls the closing chapter of the book), he writes:

Plutôt cependant que de mobiliser la catégorie éthico-juridique de responsabilité, n’aurait-on pu, demandera-t-on peut-être, utiliser celle du contrat, et envisager les rapports du droit et du temps sous les modalités de la convention? *Le contrat temporel*, tel aurait pu être le titre de cet ouvrage. Après le *contrat social*, qui scelle les rapports politiques entre les hommes, après le *contrat naturel* de M. Serres qui établit les rapports écologiques entre les sociétés et la nature, pourquoi pas le *contrat temporel* pour dire les rapports juridiques entre les hommes et le temps?²³

Ost quickly goes on to explain why he didn’t entitle his work “The Temporal Contract”. The contract, it seemed to him, is bound to the instant; its momentary nature renders it incapable of capturing the diachronicity of ethical responsibility. It is the cross-temporality of ethics paralleling the cross-temporality of humanity, as opposed to the finitude of the individual, and the subsequent intergenerational character of responsibility and justice, that Ost thinks is important to recover and take seriously.

I find the idea of the temporal contract fascinating and promising, albeit in need of qualification. But allow me to suspend the discussion of why this notion is of particular importance until after I have made some critical remarks on Husserl’s and Ost’s accounts of the link between law and time.

²² Derrida speaks of the law as present and morality as elusive and deferred, and sees a sort of violence in the pretence of the law to be able to declare here and now the rightness or wrongness of an action. See Jacques Derrida, “Force of Law: The Mystical Foundation of Authority” in Drucilla Cornell, Michel Rosenfeld & David Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3.

²³ Ost, *Le temps du droit*, *supra* note 20 at 339 [footnotes omitted].

C. *The Need for a Unifying Theme*

The value in the way Husserl and Ost approach the connection between law and time lies in that they come close to explaining an intuitive feeling that the law's normativity is determined necessarily by a specific perception of time. However, there are two shortcomings that need to be addressed.

First, in both accounts the concept of time as well as that of the law seem to be fragmented in a way that potentially strips them of their exegetic and operative value. Husserl, Ost, and van der Kerchove try to combine all the possible *prima facie* temporal perspectives of the law, thus losing sight of the fact that doing so necessarily results in our inability to say anything meaningful and coherent about either the concept of law or the perception of time that legal normativity reveals. If the law comprises all these temporal vantage points, there must be something lending them coherence. It is that elusive element of cohesion that will explain how synchronization in law is possible despite all those different temporal orientations. By themselves, each of these viewpoints can be useful as tools for the sociological or even psychological study of legal actors and a specific, context-bound legal system. It is, indeed, useful to wonder how legislators or judges perceive time or what perceptions of history and historical information are incorporated in the law. However, that does not reveal anything about the law itself and how it is connected to time.

Ost seems to acknowledge this need for integration, which is why he persistently argues that the four temporalities of the law are merged (*mélangées*), and it is through their interconnections and the forceful integrative mediation of the present that the law emerges and forms the horizon of possibility. But it is only in the interlude of his *Temps du droit* that he expresses the intuition of the *contrat temporel*, which could explain how memory, pardon, promise, and revision can be merged and how they can form the *mélange* that constitutes the legal. It is unfortunate that Ost seems to abandon the notion of the *contrat temporel* and prefers to merge law and ethics by implying that intergenerational justice may be achieved through the law. It is unfortunate because the notion of the contract captures, I believe, the relation of the law to the general idea of justice as its instantiation in light of the epistemological and experiential conditions of the legal community. Therefore the idea of the contract—or, to be more precise, an idea akin to that of the contract—can explain the differentiation of the law from other normative orders. This is because there is nothing else that can make these four temporalities specifically legal, nothing that can show that memory, pardon, promise, and revision are not part of the temporality of *any* ethical order apart from their connection to the specific form of socialization that marks the differentiation of the law from other normative orders.²⁴ This is precisely what the *contrat temporel* hints at: there is a bedrock, some sort of common ethical

²⁴ See Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994) for an argument distinguishing thick and thin conceptions of justice.

and epistemological understanding underlying the legal, of which the *contrat temporel* is one aspect complemented by other similar *contrats* referring to various aspects of the possibility of being bound by law in common. It is the aggregate of those *contrats* (and I use Ost's term provisionally, because as I shall show in the next part of this paper, they cannot be contracts in the strict sense of an exchange of promises based on the freedom of will) that lies at the heart of the concept of the law.

The second shortcoming of Husserl and Ost's approach to the connection between law and time is related to the previous one: those specific theories of law and time seem to be just as bound to state law as the major legal theories that I discussed earlier. To refer to Ost again, if there is a *contrat temporel* between participants in a legal order, then in a way much akin to the *modus operandi* of contractual freedom, the content of that contract is contingent upon the agreement or, more accurately, the common understanding of the parties. Therefore the temporalities of memory, pardon, promise, and revision as well as the links between law and time that Husserl singles out might well hold for Western state legal systems as we know them, or at least some abstraction of their commonalities, but they are not necessary connections between the concepts of law and time. That necessary connection must be articulated in a more abstract manner, so as to be applicable to phenomena of legality irrespective of their connection to the state. In other words, it is important to refine the intuition of the *contrat temporal* by examining what place it occupies in the concept of the legal and, after the question is answered on this metatheoretical level, to go on to see how the conditions of that common understanding of the legal are manifested in different real contexts.

III. The Conception of Time as Part of the Legal

A. *The Context: On Shared Normative Experience as Constitutive of the Legal*

As I stated in the introduction, this article forms part of a wider project of reconceptualizing the legal, in a way that will reveal the contingency of its connection to the state or other forms of authority and bring to the fore the embeddedness of the concept of law in the form of life of the community that endorses it as such.

That the law must be vested with the commitment of those participating in it is a recurring theme in legal philosophy. The Hartian internal point of view and the critical reflective attitude of the participants, which is the only vantage point from which the law can make sense as normative, seems to refer precisely to a shared understanding of what counts as law and binds participants as such. Hart's main concern was to reach a bedrock upon which to base the law both ontologically and normatively, which would avoid the Scylla of reductionism and the Charybdis of merging legality with other instances of normativity. However, Hart did not provide an account of what that commitment consists in. What exactly is it that participants commit to and, more importantly, how does that shared commitment come about?

Cover²⁵ seeks to unpack that notion of commitment when he argues that at the jurisgenerative instance the participants in a *Nomos* show a commitment to a shared narrative, which encompasses the real conditions of their existence. It is those social bonds, the common beliefs about the world and cultural possessions, that allow for the possibility of the emergence of normative commitments. Without subscribing to crude naturalism, Cover puts forth the fundamentally legal-pluralistic argument²⁶ that the legal should be understood bottom-up in the light of the material bonds that keep a community together, rather than top-down by starting from authority or sovereignty. Thus it will be possible to decentralize the legal and recognize the existence of legal communities beyond state law, as well as the violence that the latter does by silencing them. Cover does not seem to think that there is another jurisgenerative instance preceding the emergence of those common narratives. However, a suspicion persists. In order for narratives and symbols of the commitment of participants to their shared experiences to emerge, there must be something else underpinning them and lending them coherence. Narratives that constitute, according to Cover, or reveal, according to my reading, the *legality* of the normative commitment of participants, must be joined together by something immanent in the way the participants in a legal discourse experience their place in the world and not merely in the contingent manifestations of that experience. If we are to uphold the idea that the concept of law enjoys some ontological autonomy and does not collapse into other normative categories and, at the same time, we wish to decentralize that concept of law and dissociate it from the state, then we are in need of an understanding of the legal that is abstract and will, therefore, enable us to locate and explain legal phenomena so as to map and make sense of the legal territory.²⁷

The idea that normative commitment to a legal order relies on the commitment of the participants to their shared experiences is extremely valuable. I will therefore take it on board and, at the same time, qualify it and pitch it at a higher level of abstraction. I want to suggest that the commitment of participants in a legal discourse should be understood as their shared but tacit way of experiencing the world through and in combination with their normative commitments. In other words, the law relies on the *shared normative experience* of participants and their tacit commitment to that.²⁸ Allow me to explain this idea further before going on to show how time fits into this analysis.

²⁵ Robert M. Cover, “*Nomos* and Narrative” (1983) 97 Harv. L. Rev. 4; Robert M. Cover, “Violence and the Word” (1986) 95 Yale L.J. 1601.

²⁶ For a discussion of how Cover’s work can be made use of in a project of legal pluralism, see Emmanuel Melissaris, “The More the Merrier? A New Take on Legal Pluralism” (2004) 13 Soc. & Legal Stud. 57; Emmanuel Melissaris, “Diversity and Order in the Legal Universe: Robert Cover and the Philosophical Groundwork of Legal Pluralism” Issues in Legal Scholarship [forthcoming in 2006]; Margaret Davies, “The Ethos of Pluralism” (2005) 27 Sydney L.R. 87.

²⁷ *Ibid.*

²⁸ I introduced this idea in a different context (Emmanuel Melissaris, “The Limits of Institutionalised Legal Discourse” (2005) 18 Ratio Juris 464 [Melissaris, “Limits”]) and argued that the

Normativity—that is, the possibility of determining which actions ought to be pursued as correct or valuable—must be preceded and underpinned by an understanding of what those actions entail and how they will fall into place in the world. This, in turn, requires an understanding or, at least, a coherent impression of the world, its structure, and the possibilities of transforming it. The need for this background, in which epistemology and normativity are merged, becomes even more urgent in the law, which is not exhausted in judgment as to the moral merit of actions but builds into its operations the need to take positive, coordinated, and justified action in order to confirm the moral merit or demerit of other actions. The law—all law, and not only that sanctioned by the state—raises two interconnected claims. On the one hand, law claims to be able to evaluate past actions. On the other, it claims to be able to mediate between the *phenomenon* and the *noumenon*²⁹ by authorizing action that will be uniform, accurate, and just for all. In order for both of these claims to be upheld, it does not suffice to create a normative universe of duties and rights; what is also necessary is an idea of how these obligations and entitlements will be located in and affect the world of objects.

Before I explain what that necessary background is, let me explain what it cannot be. It cannot be empirical, in the sense that it is not an observation of facts in the physical world. If that were the case, a number of problems would arise. First, it would be cognitively falsifiable or ascertainable and thus reducible to other statements about facts. Therefore, it would be impossible to determine the ontological limits of a legal order. Second, a claim that the background is empirical would trigger the perennial objection of reductionism. How can the norms at play in legal discourse be reduced to facts? To be sure, that would amount to committing the fallacy of collapsing the descriptive and the normative. For the same reason, they cannot be *beliefs* of the participants.

participants' commitment to their shared normative experiences is revealed in all legal utterances as underlying assumptions that make communication possible. It might be thought that my argument echoes Brian Tamanaha's work on legal pluralism (B. Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 J.L. & Soc'y 296), so I should clarify here that the two analyses differ in an important respect, although this is not the appropriate context to provide a more extensive analysis. I too think that the concept of the legal should be broadened so as to include normative phenomena that participants refer to as law. However, the beliefs of participants cannot be the ultimate criterion for the identification of the legal. Our linguistic conventions do not determine in and of themselves the truth of our statements about the world. The problem becomes even more acute when one considers the essential normative character of the law and its potential conflicts with moral norms. In order to address those problems, I believe that Tamanaha's pragmatism must be coupled with critical intersubjectivism, which will allow for the possibility of revising people's beliefs about what is law and what is not. Moreover, my appeal to the use of language is nothing but a heuristic device, which can give us an insight into the necessary presuppositions that in turn underlie our knowledge of the law. In that respect, my methodology is much closer to Kelsenian neo-Kantianism than linguistic analysis. Steven Winter advances a similar thesis, although he relies on cognitive theory more than I would feel comfortable doing: see Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago: University of Chicago Press, 2001).

²⁹ It should be noted that I am using the terms loosely, and not in the strictly Kantian sense.

The commitment of participants in a legal discourse to their shared normative experience cannot itself be normative. There are two sides to this. On the one hand, the commitment is not the outcome nor does it conform to pre-existing norms or values. If it did derive from a prior norm, a fundamental question—what accounts for the obvious differentiation of legal discourse from other practical discourses including moral discourse?—would still remain unanswered. If it is only a pre-existing moral value or norm that lies at the basis of the possibility of communication in legal discourse, legal discourse is indeed indistinguishable from moral discourse. But that would clearly lead to the paradox of speaking about and from within something that we have already called “the law” or “legal discourse”, while at the same time denying its autonomous existence. It therefore makes little sense to talk about a contract, whether it be temporal, social, or otherwise.

So, if neither empirical nor normative, what exactly is this experience that participants in a legal order share a commitment to? I propose that it should be understood as part of the *experiential make-up of the participants*. It is connected to the way the participants relate to the world, the way they understand themselves in their environment and how they interact with others. It is normative not in the sense that it has action-guiding force, but rather to the extent that it concerns the idea of justice and the possibility of transforming the world with reference to that transcendental and acontextual idea by imposing constraints on freedom of action.³⁰ At the same time, it is *shared*; that is, it is necessarily social. This differentiates it from the way an individual rational agent understands and applies the moral law by exercising his or her autonomy. Finally, and more importantly, it is *experiential*: it is part of the form of life of a specific host of people who share an epistemological understanding of the world.

The shared normative experience of participants in their legal discourse forms their *legal common sense*, which develops and regulates their coexistence.³¹ I understand common sense as having two central qualities. First, it is common in that it is shared; it is necessarily social and cannot be specific to the individual. Second, it is common to the extent that it does not form part of theoretical or practical discourse. It is there to underpin that discourse and provide a bedrock of basic understanding, which forms the starting point of any discursive process. The shared normative experience of participants is commonsensical in precisely those two fundamental

³⁰ I shall not insist in this context on the idea that the requirements of justice are universal and transcendental and that the law is merely the instantiation of the idea of justice; this would allow the possibility of communication between various legal orders on one level, but also invite criticism with reference to transcendental standards.

³¹ For an excellent study of the normative implications of common sense, see Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003). Valverde, though, understands the common sense rather differently as that knowledge that remains unproblematized but plays a crucial part in determining the operations of the law and the actions of legal officials; this, however, describes a knowledge that can be discussed and that can change, whereas what I call the participants' normative experience or “legal common sense” remains tacit.

ways. It is the fundamental assumption that the idea of justice can be implemented and applied in the real world given the state of the latter as well as the way the participants perceive their place in it.

Legal orders *supervene* on that shared normative experience. This is not to say that legal norms supervene globally on the physical state of affairs.³² That may well be true but my suggestion is different. I am claiming that a legal order can be identified with reference to the outer limits of the commitment of participants to their shared normative experience, that is, the combination of their experiences of the world and their ability to prescribe ways of transforming the world collectively. Understanding the law in that light, it is possible to differentiate it from morality, as we take seriously the facticity of the law and its boundedness to the real conditions of existence of the participants in a legal order. At the same time, it is possible to differentiate the legal from regulatory phenomena to the extent that, first, the element of normativity, which entails an appeal to justice, is maintained as part of the concept of law and that, second, mere regulation will not be vested with the commitment of participants in their shared normative experience.

Moreover, it is possible to distinguish between various legal orders without needing to resort to political authority or sovereignty. Since institutionalization is now understood bottom-up rather than top-down, it will be possible to recognize legal orders that exist in dissociation from the state or other similar political formations. Thus the possibility of legal pluralism will be established in the very descriptive sense of recognizing the existence of legal orders beyond the one sanctioned by the state but within the boundaries of the same state or nation. Each of these legal orders, including the law of the state, occupy a small portion of the legal territory and cannot claim exclusivity over the notion of legality. The only claim they can raise is that they instantiate the requirements of justice adjusted to the facticity, which can now be understood as the shared normative experience of the host of participants.³³

³² Dworkin admits that global supervenience is true yet trivial:

Now I think it will be agreed by everyone that a concrete proposition of law is not a bare fact but is rather a supervenient fact; I mean this, informally: it's not part of the ultimate structure of the universe that I am permitted to take a bicycle into the park. That's the informal way to put it, the metaphorical way to put it. The technical way I prefer is to use the concept of supervenience and to say, "It is not possible that everything else could remain true about the world and the world could be different only in the single fact that I was not permitted to take a bicycle into the Bois" (R. Dworkin, "On Gaps in the Law" in Paul Amselek & Neil D. MacCormick, eds., *Controversies about Law's Ontology* (Edinburgh: Edinburgh University Press, 1991) at 85).

³³ I hold that claim raised by legal orders to be open to criticism. The question as to how this criticism is possible cannot be provided in this context due to considerations of space and, paradoxically, time. It does however form part of my general project on legal pluralism.

B. Chronos

So far, I have shown that the major legal philosophies as well as those few specific theories of law and time largely fail to give an account of the necessary connection of the concept of law with time. I also provided an account of the way in which I propose we should theorize the legal, namely as the combination of the shared idea of justice and the shared normative experience of participants in a legal discourse, that is, their shared but tacit way of understanding the world and the possibility of transforming it normatively. In this part, I would like to move back to the chronology of the legal and argue that the normative experience of time is one of those elements that form the boundaries of a specific legal order and account for its differentiation from its normative environment.

In one way or another, and however we decide to theorize it, we exist in time. At the very least, this means that we draw connections between events, both those that we access with our senses, and those that we cannot access as they lie in the future or in the past. Our language is “tensed” even if only in the very weak sense of including certain indices that draw the distinction between the intuitive categories of past, present, and future.³⁴ This is how we intuit change as well, irrespective of whether it makes more analytical sense to understand change in terms of time or time in terms of change. There is also no doubt that the concept of time itself, if there is such an autonomous concept, differs from the way we *experience* it. This discrepancy can be and has been explained in a variety of ways, which are not always compatible with each other, covering a wide range of theories of consciousness. Kant explained the unity of consciousness and the meaningfulness of representations in terms of the connections between events that are brought together into a whole with the agent’s transcendental imagination. Phenomenology explained time only through apprehensions and the a priori rules governing them.³⁵ Lévinas explained time relationally with reference to the Other.³⁶ In Freudian psychoanalytic theory, there is a wealth of ways in which time has been theorized, ranging from the timelessness of the unconscious to the temporal multidirectionality of dreams and primal phantasies.³⁷ Indeed, discourses or systems develop their own temporality, which frames their operation.³⁸ All this does not necessarily prove the “unreality” of time nor does it constitute an extreme fragmentation and relativization of the concept of time. It merely proves the apprehension of time is *one* of the constitutive factors of the consciousness of the agent or the identity of a social system.

³⁴ It should be noted here that the debate on time and tense is rather complicated and directly related to the “A-” and “B-” series theories (*supra* note 10).

³⁵ See especially Edmund Husserl, *On the Phenomenology of the Consciousness of Internal Time*, trans. by John Barnett Brough (Boston: Kluwer Academic Publishers, 1991).

³⁶ Emmanuel Lévinas, *Time and the Other and Additional Essays* (Pittsburgh: Duquesne University Press, 1987).

³⁷ For a recent overview of all those disparate ways, see André Green, *Time in Psychoanalysis: Some Contradictory Aspects*, trans. by Andrew Weller (London: Free Association Books, 2002).

³⁸ Luhmann’s version of systems theory is central here: see *supra* note 16.

I approach the issue from a specifically legal-philosophical point of view. I have already shown by way of a general analysis of the foundations of the legal that each legal community develops a specific way of envisaging itself in the world. Legal communities create legal universes, which are the result of the interplay of their normative bonds and their collective intuitions about the world; this is what I have called the shared normative experience of the participants in those communities. Allow me to now term the temporal aspect of that shared normative experience *chronos*.³⁹ Put roughly, *chronos* refers to the assumption shared by the participants in those legal communities of the possibility to grasp and control time, to synchronize the imaginary temporality of the normative world with the time of the real world. Not only is this a shared and tacit assumption as to the nature, form, and structure of time and the way it determines or at least affects the ontology of the community, it is also an assumption as to the way normativity is placed in time.

Chronos refers first to the ability to define the temporal limits of the (legal) community. The constitutive instance of jurisgenesis, as Cover described it, or Ost's "Promethean" time, is not merely the placement of a legal community in time as a continuous sequence of events; rather, the temporal parameters of that jurisgenerative instant are constitutive in a much more substantive and pervasive way. The emergence of a legal order marks the consolidation of the participants' understanding of the normative maintenance of the historicity of their links, and the merging of that with the teleology of their existence in common, their shared aspirations, and their aims. Imagery of genesis, evolution and demise, metaphors of parenthood (the Motherland, the Founding Fathers), images of birth and death of a community signify the metaphoric emergence of a new consciousness as well as a new subconscious, one that is social and shared, but is still determined by its experience of time, whichever content we decide to give it.

The *chronos* of the legal is also manifested within norms themselves. Let me explain this by using examples drawn from law as we know it, that is, from state-sanctioned law, irrespective of the particular jurisdiction. This might seem not to square with my thesis on legal pluralism, but there are two good reasons explaining my choice. First, state law provides a *prima facie* legal order, in the sense that it comprises rules instantiating the idea of justice in a particular community. The question is not whether state law is law at all, but rather who belongs in the community which that legal order purports to represent and bind. This will corroborate the argument that the legal is not necessarily associated with the state or other such political formations. Second, since the law of the state misrepresents its jurisgenerative instance, it raises an unwarranted claim to universality collapsing even the boundaries between the legal and the moral. Thus, examining state law in this

³⁹ I introduce this terminology in Melissaris, "Limits", *supra* note 28. There I single out four such dimensions of shared normative experience: *topos*, the possibility of containing normativity in space; *logos*, the possibility of transforming word into deed; *aletheia*, the possibility of transforming deed into word; and, finally, *chronos*.

context allows us to reveal the violence it commits in silencing other legalities, as Cover pointed out so insightfully.

Let us use an example from English jurisprudence with implications both for tort law and legal philosophy, namely *McLoughlin v. O'Brian*,⁴⁰ a case used by Dworkin to illustrate his theory of law-as-integrity.⁴¹ The facts of the case are these: Mrs. McLoughlin's husband and three children were involved in a road accident at about 4 p.m. on 19 October 1973, when their car collided with a lorry driven by one of the defendants. Mrs. McLoughlin's youngest daughter was killed in the collision, while her husband and other children suffered severe injuries and were taken to a hospital. The claimant learned about the accident and saw her family two hours later, after she was notified by a neighbour, who drove her to the hospital. She alleged that the impact of what she heard and saw caused her severe shock resulting in psychiatric illness. The court of first instance found that the defendants did not owe a duty to care to Mrs. McLoughlin, as the temporal interval between the accident and her gaining knowledge of it made the psychological trauma that was inflicted on her unforeseeable. The Court of Appeal dismissed Mrs. McLoughlin's appeal, but on different grounds. They held that, although it was foreseeable that the claimant would be psychologically harmed (it was, after all, her husband and children who were injured), the consequence of upholding the appeal would be to open the floodgates and broaden the scope of compensation for psychological injury far too widely. The claimant appealed to the House of Lords. One of the problems that each of the courts had to tackle was that in all previous cases bearing a similarity to the one at hand, the claimant was either present at the scene of the accident or went there immediately after. In Mrs. McLoughlin's case, how was she to establish the foreseeability of the injury and justify damages after a two-hour delay?

Their Lordships rejected the reasoning employed by the Court of Appeal. They ruled that reasons of principle enjoy priority over reasons of policy, and that it would therefore be inappropriate to reject a meritorious claim simply in order to prevent a wave of future litigation. As Dworkin puts it:

[O]nce it is conceded that the damage to a mother in the hospital hours after an accident is reasonably foreseeable to a careless driver, then no difference in moral principle can be found between the two cases.⁴²

Dworkin uses the case as an example of his rights thesis as well as his central thesis of law-as-integrity. He focuses on the reasoning employed by the judges. He tells us that despite the fact that neither decision could pass the test of "fit", as there was no precedent and no clear rule that could have justified either granting or denying damages to Mrs. McLoughlin, the substantive test of justification could only yield a favourable result for her. It is only thus that the decision would fall into place in the seamless web of principles permeating or rather constituting the legal system.

⁴⁰ [1983] 1 A.C. 410 (H.L.) [*McLoughlin*].

⁴¹ Ronald M. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986).

⁴² *Ibid.* at 28.

Dworkin looks for coherence between all the prima facie reasons for action: using the facts of the case—described as an identifiable event—as a starting point, we then proceed to classify that event under the relevant principle.

But what this approach seems to fail to ask is what it is that makes the event description immune to problematization or, to be more precise, what it is that makes the possibility of describing the event in law in the first place immune to problematization. This is not only a question concerning the meaningfulness of history, or of our faculty to come to conclusions as to whether a certain event took place or not. There probably are ways of testing the truth value of a statement along the lines of “Mrs. McLoughlin visited the site where her family had had an accident and where one of her daughters died two hours earlier, and had a nervous shock as a result.”⁴³ It is also not merely a question of the normative relevance of the circumstances of events and the limits of that relevance. What is crucial is to ask what are the conditions making event individuation in law possible in the first place, as well as what facilitates the calculability of the event in norms and principles. I would suggest that what lends coherence to the way such cases are treated is the background of a shared normative experience.

McLoughlin v. O’Brien is particularly helpful because it can be used to illustrate what I have termed as *chronos*. The case revolves around the temporal relation between two events: the accident and the instant at which Mrs. McLoughlin gains knowledge of the event and its consequences. In order for us to grasp what the law exactly does in this case, it does not suffice simply to understand the convention by which the time interval was calculated, describe the event, and then examine whether the event meets the conditions for activating a principle. There is nothing *within* the general principle prescribing something along the lines of “the infliction of harm gives rise to a claim to compensation,” which might determine the move from the generality of the principle to the factual specificity of the rule in which it will be incorporated. Even after having determined the principle, there are at least two questions that remain outstanding. I will return to *McLoughlin* to illustrate those questions. First, what is it that determines that a two hour period can still justify foreseeability whereas a longer delay would not? Second, and more importantly, what is it that allows this kind of discourse concerning the normative relevance of time intervals to take place?

Even if we accept that the first question can be answered convincingly—or at least plausibly—with reference to some conception of normative coherence, such as Dworkinian integrity, the latter question poses many more problems. As I argued earlier in this paper, the answer to it does not form part of the normative discourse itself, as that would lead to infinite regress. It can also not be discussed merely empirically, as it does not ask simply whether it is possible to find a common measure for temporal gaps between events. I argue that the only way the rule or principle can

⁴³ Although many thinkers, especially postmodern ones, would refute even the very possibility of attributing any truth value at all to statements about the past.

be applicable to the situation is against the background of the tacit assumption concerning the translatability of time intervals into normative language. It is only because of that pre-existing commitment to the possibility of normatively grasping, controlling, and transforming time, and therefore finding a normative meaning to the time difference between the two central events in *McLoughlin*, that it is possible to reconcile with the crippling contingency of the decision, to attach some normative importance to it, and to instantiate the relevant rule.

The point can be illustrated by another example taken from state law.⁴⁴ Take sentencing and, in particular, imprisonment. In England and Wales, theft carries a maximum penalty of seven years in prison.⁴⁵ The questions that I asked about the decision in *McLoughlin* can be adjusted appropriately. First, how can we explain away the contingency in setting the maximum penalty to seven years and not more or less? One answer, as I suggested above, could perhaps come from an argument of normative coherence. Some crimes carry a greater moral demerit than others, for they deny values that are considered more important. On that level, offences are commensurable. Let us assume as a working hypothesis that this holds, as it is indeed not plausible to suggest that murder, for example, is just as reprehensible as theft. This is how this line of reasoning goes: Since our legal practices are guided by the requirements of fairness and justice, then punishment ought to be meted out in the light of proportionality, both cardinal, which sets upper limits to the punishment that can be imposed, and ordinal, which prioritizes and ranks offences and the prescribed penalties in relation to each other. So, if a legal order is mapped out as a coherent system of norms and principles, which is underpinned by a set of metaprinciples, then it is possible to justify the differences in punishing various offences with imprisonment of varying duration. Thus time becomes quantifiable and calculable, and it can be related to the moral demerit of acts and our legal response to them.

As I have shown, most legal theories leave the discussion there and they rest content that the connection of law and time has been adequately addressed. But the pressing question is how the discourse concerning issues such as cardinal and ordinal proportionality, the justifiability of punishing crimes by imprisonment of varying duration and also, perhaps most importantly, the temporalization of freedom, can become possible in the first place. There is nothing within that discourse itself that can explain the connection of time and normativity, the possibility of calculating the moral demerit of an act in time units. The justificatory legal reasoning can only begin after the shared normative experience of the participants has been formed. It is on that level that a shared perception of time is consolidated, not merely as an epistemological presupposition but also in its conjunction with legal normativity. This tacit element of *chronos* answers the very question of the calculability of time in

⁴⁴ I should emphasize here that the same argument can be illustrated with reference to any legal rule that invokes time for its operationalization, whether implicitly or explicitly.

⁴⁵ The *England and Wales Theft Act 1968* provides the following: "A person guilty of theft shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years" ((U.K.), 1968, c. 60, s. 7).

norms at a foundational level, at the very jurisgenerative moment of the emergence of the legal system. A legal system, which is not reducible, or at least not necessarily so, to the political formation of the state, can only be made sense of and be demarcated from other normative, regulatory, or legal phenomena with reference to the shared normative experience that underpins it. Different conceptions of the way time is tied up to the notion of justice, in combination with the other aspects of a legal community's shared normative experience, constitute the institutional boundaries of that legal order. It is therefore possible that state law is either one among many coexisting legal orders within the territory that it marks for itself or that, indeed, it is not a legal order at all, because it does not hinge on a shared normative experience.

C. *A Brief Note on the Temporal Imperialism of State Law*

As I announced early on in this paper, my argument has a legal pluralist extension in that the understanding of the law as part of the shared normative experience of the participants in a community necessarily leads to a thesis about the dissociability of law from the state, and a belief that this dissociation can be achieved. It is time now, then, to embark in the customarily relentless (if a little brief in this context) legal pluralist critique of state law.

What claim does the English law raise when it sets the maximum penalty for the offence of theft to seven years? Could one argue before a court that the penalty of seven years in prison should not be applicable to an individual, because the very calculation of the normative response to his or her action in time units is impossible? Even if one agrees that the loss of freedom is an appropriate response to crime, could one argue that this loss does not have to be extended over time, but rather a momentary deprivation would suffice in the way that shaming and the loss of one's dignity, for example, are effective momentarily? Any such argument before a court would ring absurd. This is because it would turn against the presupposition of the shared normative experience underpinning the law of the state. Presuppositions set the epistemological limits of the normative reach of the law. But this does not mean that the case of the defendant who denies the calculability of the offence and of his or her freedom in time units will be admissible by the court. The law of the state extends its dominion according to the way people experience territory and sovereignty, rather than by reference to their shared normative commitments.

Thus state law raises a twofold claim to universality. On the one hand, it claims normative universality. The law of the state purports to treat like cases alike and to apply the same normative standards by classifying the particular circumstances of a case under principles and rules that are context-neutral. On the other hand, the state claims epistemological universality. The conditions of applicability of state law are set by the teachings of science, which speaks the language of objectivity and provides the only objective knowledge of the natural world. Thus time becomes calculable and provides the yardstick for calculating the differences between cases. For state law, epistemology and normativity are radically separated. By not recognizing that it itself

can be nothing but the combination of normativity and epistemology in the experience of the participants' normative commitments, the state transcends its boundaries and abilities and represents itself as an objective order in the same manner as the moral order that it purports to instantiate and the scientific knowledge that it claims to be incorporating. Objectivity goes hand in hand with exclusivity and exclusivity necessarily leads to a violent monism. That is how violence is done to those who cannot make sense of why and how their freedom or actions can be calculable in time units, because they have different legal commitments that rest on a different normative experience.

Is state law unique in raising this violent claim to exclusivity? No. Arguing that there is a plurality of legal orders out there and that they are defined by the shared normative experience of their participants is by no means tantamount to saying that they instantiate the idea of justice in any better way than the law of the state. That is why my version of legal pluralism is purely descriptive and not prescriptive. But state law differs significantly from other legal orders in that it has a powerful ally that the rest lack, namely legal theory.

Mainstream legal theories invariably show an adherence to a project of legal centralism. At the heart of the problem is their failure to provide a convincing account of the institutional differentiation of the legal. They set out from the premise that the legal is differentiated from other neighbouring (so to speak) normative orders to one degree or another. Positivism clearly advocates the radical separation between law and morality and, similarly, substantive theories of law do not go so far as to collapse the law into morality. They recognize the institutional autonomy of the law, at least *prima facie* or at the Dworkinian pre-interpretive stage, and then they go on to establish the normative affinity between law and morality. However, what remains unexplained is what accounts for that differentiation in the first place. More often than not, major legal theories provide top-down accounts, based on notions of authority or sovereignty. Austinian positivism, some natural law theories, and the Dworkinian idea of the legal imperium would belong here. On the other hand, those legal theories that explain the legal from the bottom up by focusing on the sense of obligation that complements a certain social practice, are exhausted in a description of the foundation of the legal without explaining how the emergence of that foundation becomes possible in the first place.⁴⁶ So, it appears that those accounts of the legal rest on the assumption that the law is associated with and monopolized by the state, the outer limits of which usually coincide with those of a nation or some such construct.

In light of state-centred legal monism, it becomes easier to make sense of the way the same legal philosophical strands theorize the connection of law and time. The two fundamental assumptions are: first, that there is only one way to understand time and that is the commonsensical, (pseudo)scientific, therefore definitive representation of time as a linear, dynamic sequence of events; second, that the law is

⁴⁶ Hart's writing would be chief within this field of thought.

epistemologically neutral, in that its existence and distinctness does not depend on its association with a specific form of life and understanding of the world, but rather on the distinctness of the state or other political formation to which it is bound. Therefore, the law exists as an identifiable object in time and interacts with the latter but is not determined by it. The law has its own history, which more often than not coincides with the history of the specific political formation to which it is tied, but which has no bearing on its normative content. The combination of all these assumptions is what enables the unique and exclusive law of the state to raise a claim to objectivity as far as the prescription of action in time is concerned.

Conclusion

My discussion of the connection of law and time in this paper is part of a larger project on legal pluralism. That project begins by asking anew the question concerning the ontological standing of the law in relation to the state, its association with which is nothing but a historical contingency of little conceptual value. At the same time, it relies on the intuition that the legal has some degree of facticity, that is, it is bound in some way to the here and now, but at the same time it is connected to the idea of justice and can be normatively assessed on a metalevel. The temporality of the law, its “chronology” as I chose to entitle this paper, is part of that boundedness of the law to its real context. I put forth an understanding of the legal as an instantiation of the idea of justice as experienced by the participants in common, as their tacit and shared understanding of the possibility of transforming the real world of objects through their normative commitments. The normative conception of time, *chronos*, is part of that shared normative experience. It is the way that participants in a legal discourse make sense of time and their ability to ascribe it normative meaning and control it in common. *Chronos* is thus constitutive of the legal and not, as major legal theories assume, objective knowledge about time imported from the natural sciences. A reconstruction on a metatheoretical level of the parameters of shared normative experience alongside *chronos* will give rise to a new conceptualization of the legal as dissociated from state law. Of course, one fundamental question will remain, namely the possibility of communication between legal orders and their assessment in light of the requirements of justice. But that discussion, which also bears on the methodological problem of whether legal pluralism is or ought to be prescriptive or descriptive, has to be suspended and resumed in a different context.
