

ESSAY

TURNING THE TABLES ON “LAW AND . . . ”: A JURISPRUDENTIAL INQUIRY INTO CONTEMPORARY LEGAL THEORY

Shai Lavit†

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INTRODUCTION

The growing dominance of “law and . . . ” scholarship, especially in highly ranked law schools, should not be taken for granted.¹ The movement has led to the flourishing of legal research,² but it has also called into question the distinct contribution of purely legal scholar-

† Senior Lecturer, Buchmann Faculty of Law, Tel Aviv University. The author would like to thank participants in *The Future of Legal Theory* conference, participants in the *Critical Analysis of Law Workshop* at the University of Toronto, as well as Roger Berkowitz and Marianne Constable for their helpful comments. Further gratitude is owed to Amit Deutscher for his excellent research assistance.

¹ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) (lamenting the prevalence of interdisciplinary scholarship in law schools and the disjunction between legal theory and legal practice); Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615, 620 (1992) (noting that while “[t]raditionally allied in the strongest fashion with the internal practice of law, law schools are now for the first time seriously tempted by forms of scholarship that are external to that practice”).

² See, e.g., Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 570–71 (1992) (arguing that although other academic disciplines have had a significant impact on legal scholarship, their impact on the practice of law is not as pronounced); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 766–77 (1987) (noting that the integration of philosophy, political science, and economics into the study of law has resulted in the widespread growth of interdisciplinary legal scholarship).

ship. In matters of theory and methods, “law and . . .” subordinates legal scholarship to other disciplines like economics, political science, history, sociology, statistics, philosophy, and literature. These disciplines provide the methods of analysis and the theory, while law becomes merely the subject matter of investigation.³ Law, to use a morbid metaphor, is akin to a patient who has donated her body to science. Doctors from different disciplines assemble around the bed and hover over the body to study it using the most advanced tools at their disposal. The corpse is still warm, but experimentation has already begun.

What would law, if it were unexpectedly to awake, say back to the scientists surrounding it?

This Essay outlines a means to study law that will, instead of subordinating it to the logic of other disciplines, bring the logic of other disciplines under the critical scrutiny of jurisprudence. To be sure, the aim is not to defend law’s autonomy at the price of confining it to the secluded wards of legal formalism or positivism.⁴ The latter—the internal modern sciences of law—share much more in common with “law and . . .” scholarship than may be apparent at first glance. Thus, turning the tables on contemporary legal theory, I shall ask: What lesson, if any, can “law itself” teach legal theory (including the social, human, and legal sciences) about not only law but also the limitations of these theoretical perspectives?

To clarify the question and begin to outline an answer, this Essay revisits and revises two of the fundamental presuppositions that guide contemporary legal scholarship, which are shared by both “law and . . .” scholarship and by recent attempts to reestablish law’s autonomy. The first, the *epistemological* premise, concerns the implicit assumption that law is accessible only through the lens of a certain “school” (formalism, realism, positivism, natural law, and so forth) or “perspective” (law and economics, law and literature, law and history, legal science). Schools and perspectives thus gain primacy over the legal phenomenon. The second, the *modernist* premise, concerns the way most scholars tend to take for granted certain modern characterizations of law and identify law only by its modern conception. These two presuppositions limit the understanding of law and have led, among other things, to the subordination of law to the theoretical perspective of the social sciences, the humanities, and the legal sci-

³ Philippe Nonet, *In the Matter of Green v. Recht*, 75 CALIF. L. REV. 363, 363 (1987) (lamenting that the social sciences have “invaded” the law).

⁴ See, e.g., Charles Fried, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 331, 331 (1988) (advocating the return of law as an autonomous discipline and suggesting that the return would be “a hopeful and an appropriate response to legal realism”).

ences. The two premises reinforce each other, as most current perspectives on law rest in a modernist understanding of law.

As an alternative to the first presupposition, this study seeks to uncover the plurality that lies within legal phenomena and awards priority to ontology (the study of the nature of things) over epistemology (the study of how we know).⁵ In concrete terms, this means taking as one's starting point the legal phenomenon itself rather than any theoretical perspective on it.

To be sure, the reference to ontology here does not imply the existence of historical and universal truths about law, nor does it imply the objective existence of legal phenomena and their independence from the human observer. Quite to the contrary, the following ontological inquiry reveals the plurality and historical contingency of the legal phenomenon, as opposed to the epistemological approach, which either assumes the unity of diverse legal phenomena or attributes plurality and contingency *solely* to the human observer. My interest lies, in other words, in what Ian Hacking recently defined as "historical ontology," "the interaction between what there is (and what comes into being) and our conceptions of it."⁶

In response to the second presupposition, this study lays out several of the modernist premises of contemporary legal theory and searches for alternatives in legal history. Specifically, the study identifies three main currents within contemporary legal theory: law as science, law as policy, and law as culture. It points to the historical contingencies underlying science as a way of knowing the world, policy as a way of ordering the world, and culture as a way of belonging both with one another and to the world. It then draws on contemporary scholarship to show how law can know and be known through ways other than science, order the world through ways other than policy, and open possibilities for us to belong to each other and to the world through ways other than culture.

The proposed approach contributes to a better understanding of the nature and limitations, of both internal and external theoretical perspectives on law. Thus, instead of repeating the old battles between different kinds of legal theories (such as law versus law and . . . , formalism versus realism, soft human sciences versus hard social sciences), the Essay critically explores the inherent limitations shared by three of the most dominant trends in legal scholarship: formalism, which views law as science; realism and the hard socio-legal studies,

⁵ For an insightful discussion of the difference between ontology and epistemology and its relevance for law, see Mark Antaki, *Leading Modernity (to) A-Ground*, 19 AUSTL. FEMINIST L.J. 115 (2003).

⁶ IAN HACKING, HISTORICAL ONTOLOGY 2 (2002).

which view law as policy; and the humanities and the soft sociolegal studies, which view law as culture.

The limited space of this Essay only allows for a schematic outline of a relatively elaborate research agenda. To help clarify the proposed method and demonstrate its productivity, the Essay relies heavily on a number of like-minded contributions to legal scholarship that share similar concerns and have employed, either implicitly or explicitly, a similar approach.

Part I of this Essay discusses the primacy of epistemology over ontology in contemporary legal scholarship and clarifies the need for, as well as the method of, studying legal phenomena without first committing to a specific perspective. Part II discusses how the primacy of epistemology and the modernist premise play a role in contemporary legal scholarship by identifying a tripartite division of law into science, policy, and culture. Part III of this Essay demonstrates how the proposed jurisprudential inquiry may overcome these limitations and broaden our understanding of law.

I

THE STUDY OF LEGAL PHENOMENA FROM LEGAL THEORY TO FUNDAMENTAL JURISPRUDENCE

We are accustomed to thinking of legal scholarship in terms of “theoretical perspectives,” and it is quite common for legal scholars to frame their analyses within a theoretical framework. Different and competing theories of law exist, ranging from law and economics through sociolegal theory to feminist theory; but despite this diversity, what most contemporary legal theories share is an underlying assumption that thinking about law does and should take place from within a theoretical perspective. Although this observation may seem tautological, it is not. Attention needs to be paid to “perspectivism” as a specific form of thinking and as only one among others possibilities. But how else could one think about law? And even if it were possible to think in alternative ways, what could possibly be wrong with theoretical perspectives?

To be sure, all abstract thinking may be termed theoretical. But what this Essay wishes to reconsider is “theory” in a more restricted sense—one that can be characterized as perspectival. Theoretical perspectives tend to be grand, seeking to understand the entire legal realm from a specific perspective, and to comprehend concrete legal phenomena by placing them within a general conceptual framework. For law and economics theory, all law is regulation and should be understood (i.e., justified, criticized, or explained) from this perspective, for example, on the basis of cost-benefit analysis, internalization, ex-

ternalization, or welfare maximization.⁷ Similarly for formalists, all law can and should be understood from an internal legal perspective and within a given set of legal concepts, which include corrective and distributive justice, the public and private realms, and formal rights and remedies.⁸ And for critical theory, all law is power and can only be understood and studied within relations of power such as class domination, gender and racial inequality, or other constellations of power relations.⁹ Whatever lies outside the scope of the theory does not exist (for the theory) or is not law properly speaking. The same legal phenomenon—tort law, for example—can be viewed from a variety of theoretical perspectives and thus understood differently by different legal theories. Theory thus assumes the primacy of epistemology¹⁰ in that what determines a legal phenomenon is the theoretical perspective through which it is observed. One chooses a perspective and only then approaches what consequently counts within it as the legal phenomenon.

Theoretical perspectives are only one possible way of approaching law. Here I wish to outline a different approach—one that challenges the primacy of theoretical perspectivism and turns to the legal phenomenon itself. The underlying assumption of this approach is that the world of legal phenomena is comprised of different ways in which law *is*, or different ontologies. Ontologies are not different perspectives that the observer brings with her to the study of law. The plurality of legal phenomena lies in law itself and not in the multiplicity of perspectives from which law is observed. The world of legal phenomena is, in other words, richer than any one perspective may suggest. Perspectival accounts of law are therefore misleading abstractions, for they impose on the entire legal arena characteristics that, at best, can be found only in specific legal phenomena.

To be clear, despite emphasis on the plurality of the legal phenomena, this account has little to do with theoretical eclecticism or pluralism. Although the latter lacks the ambition to be comprehensive and grand, they are no less perspectival. To the contrary, they maintain that any one theory offers merely one perspective and, thus, emphasize the importance of viewing law from a variety of different theoretical points of view. Rather than acknowledge the inherent plu-

⁷ Cf. Posner, *supra* note 2, at 766–77.

⁸ *Id.* at 762.

⁹ More nuanced distinctions can be drawn between different conceptualizations of power, such as repression, ideological subjugation, and subjectification. For a general overview of critical theories, see *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982).

¹⁰ Since the time of Descartes, epistemology took the place of ontology as the fundamental question of philosophy. It is difficult to overestimate the importance of this transformation.

rality of legal phenomena, eclectic theories find plurality in the creativity of the human observer.¹¹ Put differently, eclecticism builds on a selection of existing theoretical perspectives, each of which was designed to account for law as a whole, whereas the ontological investigation begins with the specificity of the legal phenomenon at hand.

Because the notion of a “legal phenomenon in itself” and questions concerning the way law *is* are unfamiliar, it may be helpful to introduce these concepts in several stages, starting with some familiar jurisprudential questions. The first and most fundamental jurisprudential question is: What is law? The question, to be sure, does not concern the content of law but is a more fundamental question concerning what makes law what it is. Theories of jurisprudence offer different answers to this question. Law may be identified as the sovereign’s will, a normative order grounded in the basic norm, an original contract, social conventions, or natural law.¹² Although the current study too asks what law is, it does not offer a single, unifying answer to this question or another theoretical perspective; rather, it opens a new way of pursuing the question.

A second jurisprudential question may further help clarify what is at stake in the study of the plurality of legal phenomena and their ontologies. It concerns the study of the sources of law. All classic jurisprudential theories of law recognize that there are different sources of law, which may include legislatures, courts, juries, regulators, custom, constitutions, and legal scholarship.¹³ Usually, an attempt is made to ground the different sources of law within one overarching theoretical perspective. Hans Kelsen’s pure theory, to take one example, explains how different sources of law are valid because they are grounded in the basic norm.¹⁴ Other theories offer different answers yet share the same logic.

Contrary to grand and perspectival legal theory, the ontological study of law suggests that we see in different legal sources different answers to the question “What is law?”—or, more accurately, to the

¹¹ Whether the theories are complementary (e.g., claiming certain aspects of tort law should be understood from the perspective of law and economics and other aspects from the perspective of distributive justice) or overlapping (the same legal conclusion can be justified both on utilitarian grounds and as a matter of corrective justice), they remain perspectival. While theoretical eclecticism abandons the ambition to systematize, it continues to identify thinking with theorizing and theorizing with perspectivism.

¹² For a general overview of jurisprudential theories, see M.D.A. FREEMAN, *LLOYD’S INTRODUCTION TO JURISPRUDENCE* (7th ed. 2001).

¹³ *See id.* A generation or two ago, scholars of jurisprudence seem to have been much more concerned about the plurality of legal sources and their distinct character. *See generally* JOHN WILLIAM SALMOND & P.J. FITZGERALD, *SALMOND ON JURISPRUDENCE* (12th ed. 1966) (1902).

¹⁴ Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 *HARV. L. REV.* 44, 63 (1941) (arguing that the “basic norm is responsible for the unity of the legal order”).

question "how is law?" Accordingly, if different legal phenomena are law in a different way, it is a mistake to assemble different sources together under one overarching theory. One indication of the fallacy of legal theory is that it takes the part—a particular way in which law is—for the whole. The ontological study of law operates as a sort of reverse engineering. It seeks to return to the legal phenomenon, which was used as a mold for shaping the theoretical perspective, to explore the varieties of ways in which law is law.

What the ontological study of law offers is neither a philosophy of law nor a statement about law's true nature or metaphysics. Rather, it opens a new way of studying law and of seeing certain aspects of the legal world, which contemporary legal theory has overlooked due to its emphasis on theoretical perspectives. It is best understood as a method or a way of asking questions. There is a wide spectrum of legal phenomena on which the proposed method can shed light. Because we tend to take for granted the legal phenomena most familiar to us (namely those characteristic of modern Western law), it is easier to recognize the plurality of law outside of our immediate environment. Estrangement (or defamiliarization) is, in other words, a helpful method for identifying alternative answers to the question of what law is. The anthropological study of non-Western law and the historical study of nonmodern law are powerful sites of estrangement. Both appear in what follows, although history will be of special importance because it makes change more easily visible and allows one to see how modern law (or modern legal ontologies) has emerged over the course of history. Approaching law through history allows us to recognize legal worlds that have been lost in time and to better appreciate the contingency of their modern incarnations.¹⁵

A concrete example may be helpful. In an important contribution to the history of common law, legal historian A.W.B. Simpson has argued that the dominant attempts to conceptualize the common law have failed to see its distinct structure.¹⁶ Specifically, the common law has been mistakenly theorized and conceptualized as a set of judicially established rules. Simpson claims that such an understanding assumes that all law, including common law, is positive law and that it is best understood with the model of legislation.¹⁷ Under the positivist account, the common law is a set of legal propositions that owe their status of law to the fact that they have been laid down by judges. Simpson argues that the positivist understanding of the common law

¹⁵ For a remarkable study along these lines, see KARL SHOEMAKER, *SANCTUARY AND CRIME IN THE MIDDLE AGES, 400–1500* (2010).

¹⁶ A.W.B. Simpson, *The Common Law and Legal Theory*, in 1 *FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF Lex Non Scripta*, 119, 125–29 (Alison Dundes Renteln & Alan Dundes eds., 1994) (debunking the predominant positivist view of the common law).

¹⁷ *Id.* at 122–25.

is mistaken and that common law would be better understood as customary law.¹⁸ Custom, as opposed to positive law, is not laid down; rather, it grows up.¹⁹ At no moment can one identify in traditional common law a set of binding rules or doctrines that are positively obligatory.

Simpson goes a step further and suggests that the positivist misunderstanding is not merely a mistake; it eventually becomes a self-fulfilling prophecy when judges and legal scholars accept the positivist understanding of common law.²⁰ This reality is most apparent with the rise in the nineteenth century of the doctrine of *stare decisis*.²¹ The effort to establish secondary rules that will determine the conditions under which a law becomes valid belongs to what may be called the “positivization” of the common law.

To a historian at least any identification between the common law system and the doctrine of precedent, any attempt to explain the nature of the common law in terms of *stare decisis*, is bound to seem unsatisfactory, for the elaboration of rules and principles governing the use of precedents and their status as authorities is relatively modern, and the idea that there could be binding precedents more recent still.²²

Simpson’s account of the transformation of the “common law” into positive law is telling in several ways. First, it shows the fallacy of perspectival-theoretical thinking, which takes one kind of law (in this case, positive law) for the whole. Second, it shows the importance of historical research in questioning prevalent beliefs about the positive nature of common law. Third, Simpson’s account suggests that contemporary assumptions about the positivist nature of the common law are not entirely false but have their ground in a transformation of law itself. Grand theory mistakenly takes the particularly modern for the whole. Historical misunderstandings arise from anachronisms—the application of contemporary jurisprudential perspectives to the past.

Simpson’s account challenges the positivist understanding of common law, but the method that guides him can be extended to other jurisprudential theories and other legal phenomena, as we shall see in the next Part. Furthermore, if the past can be misunderstood

¹⁸ *Id.* at 131–34; see also Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 934 (arguing that socially constituted perspectives of the law compete with positive law).

¹⁹ See Simpson, *supra* note 16, at 132.

²⁰ *Id.* at 122.

²¹ See SALMOND & FITZGERALD, *supra* note 13, at 141–48 (explaining the strong authoritative role of judicial precedent in the English common law).

²² Simpson, *supra* note 16, at 120. On the first stages in the emergence of the modern English doctrine of precedent during the seventeenth century, see Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 444–50 (1996) (noting that the doctrine of precedent, while existing for centuries, began to gain doctrinal significance in the seventeenth century).

due to an anachronistic projection of the present onto the past, revealing this fallacy will help us to both see alternative, nonmodernist ways of thinking about law that otherwise would have gone unnoticed and better understand the peculiarities and contingencies of modern law.

Turning to history for jurisprudential insight may raise a challenging question: In what sense is the history of law not merely another perspective on law that subordinates law to an external discipline? Why should the history of law (or anthropology of law, for that matter) be any different than the economic, psychological, or literary perspectives on law? The answer is that historical research as such is no better than any other discipline, but one may nevertheless distinguish among different ways of historical inquiry.²³ One such way, let us name it *historicism*, gives priority to the historical method and to history as a discipline over law; but a different way, which might be named *jurisprudential history*, privileges law and sees history as a venue for thinking about law.²⁴ Of course, giving priority to law over history (or anthropology) cannot in itself settle the matter. As long as one projects modernist perceptions of law upon history, the turn to history will be of no avail.

A further objection may be raised: In what sense is the method offered here not merely another theoretical perspective on law? To be sure, there are many different ways of studying law, and the one offered here is indeed merely another way. And yet, while theoretical perspectives assume a fixed answer to the question of what law is, the way offered here seeks to leave this question open and calls on us to explore the different answers that can be given to it. This way may be described as grand because it approaches all law with this question, but it is not perspectival.

To conclude this Part, the turn to law itself is an alternative to perspectival legal theory. Legal theory is both overly abstract and not abstract enough. On the one hand, theory is overly abstract because it seeks to extract from specific legal phenomena a characteristic that all law shares in common. The study of legal ontologies, in contrast, focuses on specific legal phenomena and denies the existence of a common ground they all share. Theory is not abstract enough because it

²³ See, e.g., Shai Lavi, *Euthanasia and the Changing Ethics of the Deathbed: A Study in Historical Jurisprudence*, 4 THEORETICAL INQUIRIES L. 729, 730–31 (2003) (demonstrating how a historical examination of regulatory law explains how the once unthinkable notion of legal regulation of the deathbed has become a reality).

²⁴ The German language distinguishes between two senses of history, naming the first *Historie*, the scientific study of history for the sake of history itself, and the second *Geschichte*, the telling of a story. The latter is the basis for historical jurisprudence. See Philippe Nonet, *Time and Law*, 8 THEORETICAL INQUIRIES L. 311, 312–13 (2007).

takes for granted a specific understanding of law and thus fails to notice that there are other ways in which law can be.

What the study of law itself is to legal theory in the realm of legal scholarship, ontology is to epistemology in the realm of foundational philosophy. Ontology, here, is not the study of the immutable essence of law but the way in which law is—its being.²⁵ Every kind of law has its own way of being law. This difference (between a law and the way in which it is law) is known in philosophical parlance as the ontological difference, as a distinction between a being (ontics) and its being (ontology).²⁶

Legal phenomena (like all phenomena) can be properly understood both ontically and ontologically. The following jurisprudential inquiry is concerned with the ontological understanding of law, whereas ordinary legal research is concerned with ontic questions yet always presupposes an ontological answer to the question of what law is.

II

THE FOUNDING BLOCKS OF CONTEMPORARY LEGAL THEORY: SCIENCE, POLICY, AND CULTURE

The previous Part outlined an alternative way of thinking about law that prioritizes ontology over epistemology and critically reflects on modernist assumptions about law. The example of the limitations of the positivist interpretation of common law was taken from within traditional jurisprudence, which is comprised of different schools (such as positivism, formalism, and realism) that each offer a different answer to the question: “What is law?” This Part, together with the rest of the Essay, seeks to broaden the critique and include within its scope “law and . . .” perspectives. The relevance of the latter to our discussion is not obvious because we rarely think of “law and . . .” scholarship as offering an answer to the fundamental jurisprudential question of what law is. But, as we shall see, it does.

Instead of addressing specific legal schools, I offer a tripartite mapping of legal scholarship that corresponds to three different on-

²⁵ It is important to distinguish between two different senses, or grammatical uses, of the English word *being*—as a verb and as a participle. In English, for example, the hoping of those who hope is the hoping of the hoping. Similarly, “the being of that which is” is “the being (gerund) of that being (participle).”

²⁶ MARTIN HEIDEGGER, *BEING AND TIME: A TRANSLATION OF *Sein und Zeit** 50–57 (Joan Stambaugh trans., State Univ. N.Y. Press 1996) (1953). Heidegger teaches that different things *are* in different ways and consequently appear to us differently. The mode of being of an instrument such as a shoe is different from the mode of being of a painting, such as Vincent van Gogh’s famous painting of a peasant’s shoes. The shoes we wear are unnoticeable to us as long as they fulfill their function, whereas the painting of the shoes makes visible not only the shoes but also the entire world of the peasant.

tologies of law. In broad strokes, the theoretical legal landscape can be divided into three categories: law as science, law as policy, and law as culture. The mapping roughly corresponds to the division between an internal perspective—law as science—and two external perspectives, one based on the social sciences—law as policy—and one grounded in the humanities—law as culture.

This tripartite mapping of legal theory is deficient in certain ways. First, it does not exhaust the entire field of scholarly research. As readers of Jorge Luis Borges will remember, a map, if it is not to be as large as reality itself, must leave out many details.²⁷ No doubt, there are other theories that this mapping does not capture.²⁸ Second, the borders on the map are quite blurry. Certain studies of law as culture, for example, could easily be classified under the heading of law as policy and vice versa. But these concerns are secondary because what is important in this mapping is neither its comprehensiveness nor its distinct boundaries. Limited as the map may be, it is important for our purposes because it demonstrates both the epistemological and modernist presuppositions of contemporary scholarship.

Indeed, science, policy, and culture are not simply three provisional headings in an ad hoc map of legal scholarship. They constitute three different answers to the ontological question: "What is modern law?" "Law as science" identifies the way law is with the way science is; similarly, "law as policy" and "law as culture" equate law's being with that of policy and culture, respectively. Furthermore, the three are fundamental characterizations of the modern world. It is no coincidence that these three fundamental categories also lie at the root of our attempt to ground law.

But why the modern law and modern world? Are science, policy, and culture not fundamental, transhistorical categories of human existence? Indeed, they are not. Although it is true that human beings have always strived to know the world, order it, and belong both to each other and to the world, science, policy, and culture are distinctly modern formulations of these endeavors. Indeed, different thinkers (most importantly, for the current discussion, Martin Heidegger) have discussed the place of science, policy, and culture in the

²⁷ JORGE LUIS BORGES, *Of Exactitude in Science*, in A UNIVERSAL HISTORY OF INFAMY 139, 141 (Norman Thomas di Giovanni trans., 1972).

²⁸ On "law as craft," see ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 295 (1993) ("[L]aw is a craft demanding a cultivated subtlety of judgment whose possession constitutes a valuable trait of character, as distinct from mere technical skill . . ."); Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2243, 2274–322 (2001). For an early reference, see KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 213–35 (1960).

fundamental transformation of the modern world.²⁹ We should not presuppose the truth or accuracy of any of these studies, but we should allow for the possibility that there is a contingent element in these categories that a close study of nonmodern legal phenomena and their ontologies might reveal. The question is thus whether law can know and be known by ways other than science, order by ways other than policy, and open possibilities of belonging by ways other than culture.

But before we attempt to go beyond science, policy, and culture, we should first clarify the specific sense of these legal ontologies. We may begin chronologically with Christopher Columbus Langdell's declaration that "law is a science."³⁰ Thinking of law as science is different from the much broader category of legal scholarship as science. While the latter includes all scientific endeavors to study law (from legal formalism to law and economics), the former refers to a much narrower set of theories—commonly grouped under the heading of "legal formalism"—and sees law itself as a scientific practice.

Much injustice has been done to legal formalism, which has often been caricaturized rather than characterized. It will not be possible to do it justice here, since our concern is limited to one, albeit fundamental, aspect of the theory—the way legal formalism presupposes the scientific structure of law itself.³¹ Suffice it to say that formalism does not naïvely claim that all legal problems have a single solution that can be proven with certainty.³² Legal formalism does, however, presuppose that law is a distinct justificatory practice that is independent from political, economic, and social considerations.³³ Underneath the ensemble of authoritative legal materials, one can discover a systematic logic, which formalism claims is internal to law itself.³⁴ Although the system of reason is never perfect, it is the best way to capture the essence of the legal phenomenon. Law as a system of reason strives to be coherent and comprehensive—to minimize its internal contradictions and extend its internal logic to the entire legal realm.³⁵

²⁹ See, e.g., MARTIN HEIDEGGER, *The Age of the World Picture, in THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS* 115, 116–18 (William Lovitt trans., 1977) (discussing the essence of science); MARTIN HEIDEGGER, *Modern Science, Metaphysics, and Mathematics, in BASIC WRITINGS* 247, 247–49 (David Farrell Krell ed., 1977) (discussing the mathematical and nonempirical essence of modern science).

³⁰ See Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421, 461 (1999).

³¹ Excluded from this discussion are theories that adopt a formalist stance for instrumental reasons.

³² For the most lucid characterization and defense of legal formalism, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949 (1988).

³³ See *id.* at 953–55.

³⁴ See *id.*

³⁵ Thomas C. Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1, 7–8 (1983).

Sir Edward Coke called this the "artificial perfection of reason" of the common law.³⁶ Under formalist accounts, the common law is a source of first principles that can be induced from the legal texts and out of which new doctrines can be deduced.

At the heart of contemporary legal formalism lies the wish to know law and make sense of law as a whole. Legal formalism, at its best, presupposes that law is grounded in reason, that law is just if and only if it can be justified in accordance with reason, and that the science of law can master these reasons and, thus, make sense of law as a whole.³⁷

Law, according to legal formalism, is an artifact of the human mind and, as a result, has the underlying structure (or ontology) of human reason. It is indeed one of the most telling characteristics of science as a distinctly modern way of knowing that it presupposes that its subject matter has the structure of abstract reason and thus can be known scientifically. By the same token that Newtonian physics can know the laws of the physical world with mathematical equations (only because the physical world is at bottom mathematical), so too modern legal science can know the legal world through abstract principles (only because it preconceives law as rational).

A second, much larger strand of legal theory presupposes that law is policy. The fundamental idea is that law is an instrument for achieving social order or, to say the same, that law is a way of bringing certain aspects of the social world under human control. Law-as-policy theories include both descriptive works, which study how law affects individuals, groups, and society at large, and normative analyses that study how law can and should shape society. Because the study of law as policy concerns the interrelationship of law with individuals and groups, law as policy commonly relies on insights from the human and social sciences including economics, sociology, and psychology.³⁸ Law as policy may also incorporate moral philosophy to the extent the latter studies how to design law to best meet the moral needs of society.

If there is one principle that is essential to law as policy, it is that law is an instrument of human ordering and control. Law as policy differs from other, nonmodern ways of ordering. It presupposes that

³⁶ Schweber, *supra* note 30, at 427.

³⁷ This is not to ignore the important differences between (modern) formalism and (classical) natural-law theory. Specifically, legal formalists recognize the validity of positive law even if it contradicts abstract reason and the ideal concept of rights. Still, formalists would insist that whatever priority positive law may have within the theory is a necessary consequence of the internal rationality of the legal system. See generally ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 182–231 (2009).

³⁸ A century later, Holmes's classic address remains the most lucid account of this movement. See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

law is free from metaphysical constraints such as tradition, science, and transcendental notions of justice and further presupposes that the world that it seeks to order is similarly free (or can be freed) from such constraints.³⁹ Law as policy, like other modern regulatory tools (e.g., bureaucracy) becomes a means of regulation independent of any given end. Unlike nonmodern ways of ordering, law as policy takes the form of ordering for the sake of ordering itself. To be sure, in any concrete case, law as policy will assume an end it seeks to promote, but as an instrument of regulation it is compatible with any number of ends.

A third prevalent approach views law as culture.⁴⁰ “Culture,” we are told by Raymond Williams, is “one of the two or three most complicated words in the English language.”⁴¹ Scholars often distinguish between “culture” and “society.” Whereas society refers to the hard facts of common life (primarily social structures like institutions, the economy, and social roles), culture refers to soft facts such as attitudes, beliefs, knowledge, habits, and art.⁴² For current purposes the distinction is not significant, and we may talk of the sociocultural study of law. Understood in this broader sense, law as culture is studied not only in cultural studies but also by historians, sociologists, political scientists, and anthropologists.⁴³ Whether hard or soft, culture signifies the elements from which a common world is built up—elements that distinguish one group from another and thus give each its distinct identity.

More specifically, the study of law and culture commonly refers to one of three things: the influence of culture on law, the influence of law on the shaping of culture, and the study of law as a cultural system.⁴⁴ In all three approaches, culture is distinguishable from science and policy. Unlike science, which is grounded in universal reason, culture is particular and belongs to a specific group of people. Unlike

³⁹ Thus, law as policy, contrary to its own self-understanding, is not free of metaphysical presupposition but merely replaces otherworldly metaphysics with this-worldly metaphysics and, unlike other conceptions of law, remains blind to its own metaphysical presuppositions. Cf. Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633 (2011) (implicitly suggesting that “disenchanters” unlike “reenchanters” have succeeded in freeing themselves from metaphysics).

⁴⁰ See, e.g., Günter Bierbrauer, *Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism Between Kurds, Lebanese, and Germans*, 28 LAW & SOC’Y REV. 243, 243 (1994) (“Law and legal systems are cultural products like language, music, and marriage arrangements.”); see also LAW AND THE ORDER OF CULTURE (Robert Post ed., 1991); Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997).

⁴¹ RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (rev. ed. 1983).

⁴² Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 41–42 (2001).

⁴³ See *id.* at 58.

⁴⁴ See Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).

policy, which is functional, culture can never be fully exhausted by its function.⁴⁵ Culture is about embedded customs or practices that play a constitutive role in the life of a community.⁴⁶

Law as culture presupposes that culture offers the most general answer to the question of who we are. It provides the building blocks from which social worlds are created, and it mutually constitutes and is constituted by the legal world that we inhabit.⁴⁷ We shall soon see how the modern understanding of culture is merely one way people belong together in a shared world.

III

LAW BEYOND SCIENCE, POLICY, AND CULTURE: CASE STUDIES

Having identified science, policy, and culture as three main ways of conceptualizing modern law, this Part seeks to broaden our jurisprudential horizons by revealing the contingency of these approaches as uniquely modern ontologies of law. To accomplish this task, this Part relies on existing scholarship, which offers a critique of the underlying presuppositions. Specifically, the studies under examination demonstrate ways of knowing the world other than science, ordering the world other than policy, and belonging to each other and to the world other than culture.

Each of the following subparts is devoted to a critical analysis of one of the three components in this tripartite division. The path outlined in all three subsections is the same, although not all the studies that will be discussed adhere to it in every detail. The path, distilled to its essentials, consists of the following steps. The first is to refrain from accepting science, policy, or culture as given perspectives from which all law is observed. The second is to single out a specific legal phenomenon that has the unique ontology of science, policy, or culture. The chosen phenomenon is then juxtaposed with another (usually nonmodern) legal phenomenon that has a different ontology. Next, a historical analysis shows the way in which the modern ontology of law became the dominant one and has led either to the reinterpretation or abandonment of alternative legal ontologies. In the final analysis, the point is not to implement outdated legal ontologies but to deepen our understanding of who we have become.

A. Law as Science and Codification

What does thinking of law as science entail? As mentioned above, a good example of a legal theory that views law itself as science is legal

⁴⁵ Certain theories of society, most notably the functional approach, view society and culture through their functions.

⁴⁶ See Roger Cotterrell, *Law in Culture*, 17 *RATIO JURIS* 1, 6–8 (2004).

⁴⁷ See Mezey, *supra* note 42, at 46–47.

formalism. Its underlying presupposition is that law has the structure of reason. As a perspectival and grand theory, formalism views all law, especially the common law, through a formalist lens.⁴⁸ Ernest Weinrib, a prominent thinker of legal formalism, believes that the history of the common law reveals the underlying logic of legal formalism. The task of the legal scholar, according to Weinrib, "is to identify the most abstract unifying conceptions implicit in the law's doctrinal and institutional arrangements, and to enquire into the rationality that inheres in the law's processes."⁴⁹

In contrast, the move from epistemology to ontology requires seeing that science captures not law as a whole but only specific legal phenomena. The challenge is to identify a legal phenomenon, the ontology of which corresponds to law as science. Roger Berkowitz's *The Gift of Science* takes on precisely this challenge. According to Berkowitz, the legal source that best captures this idea is legal codification or, more accurately, the European sense of a legal code. It is through a close examination of the history of modern legal codes that he seeks to gain insight into the radical transformation of law entailed in thinking of law as science.⁵⁰

Modern codifications, as Berkowitz points out, are not merely collections of existing law. Collections of law can be found throughout history, handed down by great rulers such as Hammurabi, Solon, and Justinian.⁵¹ Although these collections share the same name, they differ in fundamental ways from modern codification.

Even if we take modern legal codes and limit our discussion to Germany (the cradle of some of the more impressive codifications projects), we would still encounter a great variety. As Berkowitz shows, there are important differences between Leibniz, Svarez, Kant, and Jhering, and any serious account would have to distinguish and compare Leibniz's early codification proposal, those of the Prussian Statute Book (*Das Allgemeines Landsrecht*, ALR) of 1794 and the German Civil Code (*Das Bürgerliches Gesetzbuch*, BGB) of 1900. Still, they all share a very specific modern view of law as science.⁵²

The modern notion of a code is best exemplified by what was known, and is still known today, as the General Part of civil and crimi-

⁴⁸ Formalists would acknowledge that not all law has a formal structure and that some law is, for example, regulatory or positive. Yet, formalism would not be able to say much about these alternatives.

⁴⁹ Ernest Weinrib, *Private Law and Public Right* (unpublished manuscript) (on file with author).

⁵⁰ See ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* 1-7 (2005).

⁵¹ *Id.* at 2.

⁵² See *id.*

nal law.⁵³ The General Part is distinguishable from the Specific Part and spells out the general principles that underlie all the specific provisions that follow. As opposed to other legal sources, which may be determined by judges and legislators, the General Part is the designated accomplishment of legal scholars.⁵⁴ The codification of the General Part presupposes the scientific ontology of law. It does not derive general rules by way of induction; instead it presupposes the internal reason of law and, only then, discovers this structure within empirical legal materials. "[T]he rise of codes in the wake of the scientific revolution," writes Berkowitz, "is an outgrowth of the scientific compulsion to secure the knowledge of law through scientific calculation."⁵⁵

Codification is scientific in the sense of being systematic, and it is systematic not in the sense that it is coherent and lacks internal contradictions. This logical sense of coherence fails to go to the heart of the scientific project. Systematization first and foremost grounds law in fundamental principles, ideally in one principle from which all else follows (for Leibniz, that principle was justice as the "charity of the wise"⁵⁶). Unlike geometric axioms, however, the point is not to derive consistent statements from taken-for-granted truths but to lay the foundations for these truths. To understand any point in the system, one would need to have a basic understanding of the foundations of the system as a whole.

To understand the modern code one must understand the kind of law that it is and the ontology of modern science. Though we are accustomed to think of modern science as empirical, the scientific project of codification reveals a very different, more fundamental understanding of science. Modern science, including modern legal science, presupposes the scientific ontology of the world (be it the physical, economic, or the legal world) and interprets empirical facts only on the basis of this presupposition. For law to become a science, a certain abstraction needed to take place. The abstraction is not a perspective, which legal scholars bring when they attempt to comprehend law, but a constitutive feature of law itself, as our discussion of the General Part suggested.

The next stage is to offer alternative ways of viewing law as knowledge beyond science. It follows from what has been said so far that there is no single alternative to law as science, but that there is a plurality of legal ontologies that do not fit into the scientific ontology of

⁵³ *Id.* at 55–56.

⁵⁴ Clearly, many contemporary codes (such as the Model Penal Code) have been written by nonformalist legal scientists. They are simply laws of a different kind.

⁵⁵ BERKOWITZ, *supra* note 50, at 2.

⁵⁶ *Id.* at 64 (emphasis omitted).

law. Still Berkowitz hints at one striking alternative. “Against this ahistorical acceptance of the naturalness of positive law,” he writes, “this book argues that the rise of legal science and the rise of positive law are corollaries and that they are manifestations of the same basic phenomenon: namely, the loss of insight as the source of law.”⁵⁷ Although Berkowitz says very little about the notion of law as deriving from insight, his book opens up the possibility of seeing what that could possibly mean: a law that would not be systematic but would respond to the singularity of a given case. From the point of view of science, such a law would be arbitrary and irrational, but only because science identifies itself as the only proper way to know.⁵⁸

Before concluding this subpart, it is worth noting that codification is not the only legal phenomenon that has the ontology of science. Historians who have studied early modern common law have singled out other legal phenomena, such as the legal treatise, which developed in the common law system.⁵⁹ Others have claimed that certain developments in legal doctrine stem from the common law’s being turned into a legal science.⁶⁰ Aspects of this transformation are closely related to the rise of law as policy, but the latter has a different legal ontology.

B. Law as Policy and Regulation

Law as science is only one theoretical perspective on law grounded in one way in which law is. Another theoretical perspective is law as policy, which views law as an instrument for ordering society. Examples of theories that view law as policy include some of the writings of the legal realists and much of the work of law and economics. As a grand and perspectival theory, law as policy sees all law as policy.

The first step in thinking of law beyond policy is to acknowledge that not all law is policy and, equally important, that legal phenomena (some more than others) have the character of policy. The move back from legal theory to legal ontologies allows us to identify regulation as such a phenomenon. Regulation as distinct from common law, codification, jury verdicts, or clemency stands out as an instrument of social ordering. What codification is for law as science, regulation is for law as policy.

A common definition of legal regulation has been offered by Colin Scott:

⁵⁷ *Id.* at 6.

⁵⁸ *Cf.* Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 *Geo. L.J.* 647, 652 (1998) (arguing that “[t]he openness of practical reason is cause for celebration, not devaluation”).

⁵⁹ *See* Berman & Reid, *supra* note 22.

⁶⁰ *Id.* at 444–84.

[W]e can think of regulation as any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism).⁶¹

This definition, though plausible, tells us very little about the nature of law as policy and may seem at first compatible with almost all legal phenomena, including traditional common law.⁶² Our interest, however, lies in a uniquely modern notion of regulation, grounded in policy as a distinctly modern way of ordering.

In his work on the history of American common law, *The Peoples Welfare: Law and Regulation in Nineteenth-Century America*, William Novak distinguishes between two different ways in which law orders. The first, which he names the "well-regulated society," is characteristic of nineteenth-century common law.⁶³ The second, referred to as either the police power of the centralized state or as the regulation proper, is characteristic of early twentieth-century America.⁶⁴ Although both are distinctly modern (and Novak rightfully warns his reader against confusing nineteenth-century common law with a stagnant past), it is clear that nineteenth-century common law belongs to a bygone world; in contrast, twentieth-century regulation marked the rise of modern law proper. This becomes especially clear when we examine the way Novak portrays the characteristics of each of the two.

Common law, or the well-regulated society, Novak argues, was grounded in consent. "[L]aw's obligatory force," he writes, "came not from theory or from power but from the 'rightness' that flowed from a consonance with the 'habits and thoughts' and the 'genius and manners' of the people."⁶⁵ Thus, his first move is to distinguish the well-ordered society from both science and policy. In their stead, tradition played an important role: "Skeptical of the power of reason and fearful of the power of hubris, theorists of the well-regulated society honed instead a common law historical sensibility."⁶⁶

⁶¹ Colin Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, 2001 PUB. L. 329, 331; see also Bettina Lange, *Regulatory Spaces and Interactions: An Introduction*, 12 SOC. & LEGAL STUD. 411, 411–12 (2003) (quoting and augmenting Scott's definition of legal regulation).

⁶² On the distinction between common law and regulation, see generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). For a critical discussion of law as regulation, see Markus D. Dubber, *Regulatory and Legal Aspects of Penalty* (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333970.

⁶³ See NOVAK, *supra* note 62, at 35–36.

⁶⁴ See *id.* at 240–43 (explaining that the Civil War marked the end of the well-regulated society and the beginning of centralized state power).

⁶⁵ *Id.* at 39.

⁶⁶ *Id.*

In contrast to the well-ordered society of the nineteenth century, we find the administrative state of the twentieth century. Novak says very little about the regulatory state, but from his general descriptions, the latter appears to be the flip side of the former—confident in its ability to regulate and ambitious in its scope.⁶⁷ Novak emphasizes the break between the old and the new and offers further evidence of the way that “law as science” and “law as policy,” despite their apparent differences, belong to the same modernist conception of law.⁶⁸ He argues:

Although historians have spent much time debating the shift from legal instrumentalism to legal formalism, it is clear that the rationality of late nineteenth-century private and public law was both more formalist and more instrumental than the customary and historical jurisprudence of the common law tradition. Late nineteenth-century law was simultaneously more committed to the logic and precision of legal form, category, and rule and more attuned to law’s effectiveness as a tool for advancing external societal goals like economic efficiency. . . . None of these things were conducive to the old common law tradition. It was discarded, and a new law was invented.⁶⁹

My own work, *The Modern Art of Dying: A History of Euthanasia in the United States*, offers further insight on the unique ontology of modern regulation. The book examines one sphere of regulation, that of end-of-life decision making and the legal regulation of medically hastened death.⁷⁰ The history of euthanasia begins in the United States at the turn of the twentieth century, when the first euthanasia bills were drafted and long before the technological advancements so commonly associated with them, such as life-support systems and advanced surgery.⁷¹ Whether and to what extent euthanasia should be permissible is a highly controversial question, but since the late nineteenth century, the need to regulate end-of-life decision making has been taken for granted. The regulation of death was not a late (1960s) response to the prolongation of life, as many scholars have claimed, but

⁶⁷ *Id.* at 241–48 (explaining how the regulatory state transformed state power, individual rights, and constitutional law).

⁶⁸ For a historical account that addresses similar questions of jurisprudence but emphasizes the historical origins of police power, see MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005).

⁶⁹ NOVAK, *supra* note 62, at 247.

⁷⁰ See generally SHAI J. LAVI, *THE MODERN ART OF DYING: A HISTORY OF EUTHANASIA IN THE UNITED STATES* (2005) (providing a history of euthanasia legislation and regulation).

⁷¹ See *id.* at 93–97 (describing the first euthanasia bill of 1906 and euthanasia bills of the 1930s).

a much earlier concern closely linked to the rise of law as regulation and the transformation of the deathbed into a site of regulation.⁷²

Regulation as a modern way of ordering is most easily contrasted with traditional common law. Under traditional common law, the premeditated hastening of death was banned as murder.⁷³ For euthanasia (here broadly conceived to include physician-assisted suicide) to emerge as a possible—even if highly controversial—solution to the problem of dying, law had to change not only in content but also in its ontology. The new legislation required more than merely removing the common-law barrier that prohibited physicians from hastening death. Mistaking regulation for decriminalization misses the mark on several accounts. First, as I have argued,

it perceives [regulation] in *negative* terms, as an impediment, and overlooks the constructive role of law in the regulation of euthanasia. Second, it thinks of law as a *binary* system—either permitting or prohibiting the practice of euthanasia—ignoring the new and more intricate ways in which legal regulation operates. And finally, it views law as *external* to the medical practice of euthanasia, neglecting the ways in which the treatment of the dying patient became infused with legal concerns.⁷⁴

Regulation thus played a constructive role in ordering the hastening of death, and the common law question, "Is the taking of human life permissible?" was replaced by a regulatory regime that asked, "How can the law guarantee the unbiased, carefully supervised, informed and consented treatment of the dying?" Proposed regulation created an administrative process of decision making, guidelines, supervision, and monitoring.⁷⁵ The new laws did not merely impose a prohibition but sought to manage human activity.

As in Novak's book, the first step in *The Modern Art of Dying* is to clarify the difference between traditional common law and regulation, though the nature of this difference is by no means the same in both books.⁷⁶ My book takes a further step of laying out the transformation of the regulated phenomenon itself, in this case the deathbed. This prior transformation is necessary for the phenomenon to become subject to regulation. We encountered a similar question in our previous discussion of law as science when we saw how law had to first to take on the specific structure of reason and only then could be compre-

⁷² See *id.* at 90–93 (describing the emergence of a need, especially among physicians, to regulate euthanasia as a medical procedure).

⁷³ *Id.* at 76.

⁷⁴ *Id.* at 75–76.

⁷⁵ See *id.* at 76 (describing how proposed euthanasia laws resembled bureaucratic or administrative guidelines).

⁷⁶ Compare NOVAK, *supra* note 62, at 35–50, with LAVI, *supra* note 70, at 75–98.

hended as science.⁷⁷ But because law as policy, unlike law as science, concerns the actual world and not merely reason, a prior transformation of the actual world must take place for regulation to occur. Therefore, a proper understanding of legal regulation cannot remain within the confines of law but must lay out the preconditions that make regulation possible. By the same token that legal regulation of the economy is only possible in (relatively) developed markets, so too legal regulation of the deathbed first required a transformation of the deathbed scene itself. The book describes the gradual transformation that took place in the nineteenth century and the creation of the necessary conditions for legal regulation, including the medicalization of the deathbed and the changing of the guard between the medical physician and the religious clergy in accompanying the dying patient in her last hour.⁷⁸

It was only once dying became a medicalized experience that law could step in and regulate end-of-life decision making. I have argued that “[a]ll techniques enable humans to partially master a limited domain of their world. . . . Under the rule of technique, [however,] human beings are dominated by the desire to master their world for the sake of mastery alone.”⁷⁹

One may counter that the legal regulation of medical euthanasia is, in obvious ways, a means to an end and not an end in itself. For example, the legal regulation of euthanasia may be a means for alleviating pain or for securing death with dignity. Although this is true, it is only part of the truth. Implicit in legal regulation are the ideas that law can serve whatever end is posited and that regulation is beneficial independent of its content. Thus opponents and proponents of euthanasia may debate the content of regulation but frequently agree that regulation must occur.

Common law offers one alternative to regulation, but it is not the only one. The book contrasts technique with the *ars moriendi*, the art of dying, as two different ways of ordering the deathbed. *Ars moriendi* were popular ethical manuals in Europe until the eighteenth century.⁸⁰ They offered guidance to the dying person and her surroundings on how to prepare for the last hour. These manuals offer a different understanding not only of dying but also of law, understood broadly to include religious and medical ethics at the deathbed. As opposed to regulation that seeks to order for the sake of ordering, *ars*

⁷⁷ See *supra* Part III.A.

⁷⁸ See Lavi, *supra* note 70, at 48–49 (“[E]arly in the nineteenth century, young physicians were reprimanded for such behavior and were reminded that not only were they capable of caring for the dying but also that they might be even more suitable for the task than the clergy.”).

⁷⁹ *Id.* at 169–70.

⁸⁰ *Id.* at 15–40 (providing a history of the *ars moriendi*).

moriendi manuals viewed dying as a peak of human life and a spectacle that was worth contemplating.⁸¹ Not much more can be said here about this contrast; it will suffice to note the way that the notion of *art* offers a different sense of order and a different way for law to order than the regulatory techniques.⁸²

C. Law as Culture and Personal Law

Finally, we come to the notion of law as culture. Theories of law as culture import insights from the humanities and cultural studies into the study of law. A good example of a theoretical perspective that views law as culture is legal anthropology. Anthropology or, more precisely, cultural anthropology presupposes that the ontology of law is that of culture and views law as just another subject matter of cultural analysis.⁸³ Turning the tables on "law and anthropology" places jurisprudence in the position of the interrogator rather than the interrogated, exposes the fact that not all law is culture (in the anthropological sense), and requires anthropology to reexamine its presupposition that culture is the only way through which human beings belong together and to the world.

A good example of such a move can be found in James F. Weiner's article, *Culture in a Sealed Envelope: The Concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair*.⁸⁴ Weiner first identifies a distinct legal phenomenon that presupposes the cultural ontology of law—in this context, indigenous law. The cultural character of indigenous law comes up in state laws that protect the cultural heritage of indigenous people and provide them with ways to regain ownership and control of their traditional lands.⁸⁵ Such was the South Australian Aboriginal Heritage Act 1988,⁸⁶ which stirred a major controversy between the state and the indigenous people.

In the Hindmarsh Island Bridge Affair, a private company requested approval for the development of a marina and tourist facili-

⁸¹ See *id.* at 9–11 ("Death was a moment of truth in which the dying person and those attending the deathbed faced the ultimate truths of Christendom: immortality of the soul, sin, and God's saving grace.").

⁸² Heidegger, who distinguishes between the two, also notes the difficulty: "It has often enough been pointed out that the Greeks, who knew a few things about works of art, use the same word, *techné*, for craft and art and call the craftsman and the artist by the same name: *technites*." MARTIN HEIDEGGER, *The Origin of the Work of Art*, in BASIC WRITINGS, *supra* note 29, at 149, 179.

⁸³ See, e.g., Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 YALE J.L. & HUMAN. 95 (2001).

⁸⁴ 5 J. ROYAL ANTHROPOLOGICAL INST. 193 (1999).

⁸⁵ *Id.* at 193.

⁸⁶ *Id.* at 199 (describing the act as one of the broadest definitions of Aboriginal cultural heritage).

ties on the island, including the construction of a bridge that would connect the Hindmarsh with a neighboring island.⁸⁷ The local inhabitants, the Ngarrindjeri, strongly opposed the construction. They claimed that the construction of the bridge, by connecting the island to other land, would violate their traditions and custom. Specifically, the Hindmarsh Island was a site significant to fertility, or “women business” as the Ngarrindjeri called it, and its sanctity could not be compromised.⁸⁸ Because the Heritage Act required evidence that the construction would counter indigenous traditions and culture, the state commissioned the expert opinion of a cultural anthropologist. The anthropologist, however, ran into unexpected difficulties when it turned out that the knowledge of the land and its significance in the Ngarrindjeri cosmology was a secret that, according to custom, could not be made public. The anthropologist was eventually made privy to the knowledge, but only after agreeing that the confidential parts of the report would be delivered to the court in a sealed envelope that would be opened by no one else.⁸⁹

Culture in a Sealed Envelope raises the problem of viewing indigenous law as culture while studying it by means of cultural anthropology. Weiner explains, “[W]hat in fact is tested judicially is not strictly speaking ‘Aboriginal culture’ but some relational product of indigenous Aboriginal exegesis and Western notions of tradition.”⁹⁰ This leads Weiner to ask whether “the very notion of culture that anthropologists have operated with for so long [is] finding itself at odds with that of the Heritage Legislation and therefore an obstacle for both claimants and anthropologists in these cases?”⁹¹

Weiner’s article takes the first step in problematizing the anthropological notion of law as culture. But the article stops short of discussing alternative ways of thinking of belonging other than modern anthropology’s concept of culture. To further pursue this line of inquiry, we now turn to Marianne Constable’s book, *The Law of the Other*,⁹² which studies the history of the jury and examines the transformation of notions of law and belonging.

As is well known, contemporary American law is concerned with the composition of the jury and specifically seeks to secure the fairness of jury selection. Under contemporary doctrine, the jury should

87 *Id.* at 195.

88 *Id.* at 196–97.

89 *Id.* at 197–201 (providing a detailed account of the anthropologist’s pursuit of the secret custom and the problems that it caused in regard to the Heritage Act).

90 *Id.* at 195.

91 *Id.* at 194.

92 MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994).

represent a "fair cross-section" of the community.⁹³ Thus, the belonging of the jury to the law is determined by social-science categories, reflecting the modern notion of cultural identity (based on race or sex), and it is this specifically modern sense of belonging that is constitutive of membership in modern law. Constable explains this modern crossroads of belonging and law in terms that can be described as "social." To free our jurisprudential imagination from the limited horizons of "social law," Constable tells the story of the rise and fall of the mixed jury in medieval England, contrasting it with contemporary sociological notions such as "a fair cross-section jury."⁹⁴

The mixed jury is a legal phenomenon that offers a different understanding of the relationship between law and the way human beings belong together and share a world. Early juries embodied a principle of personal law "whereby both non-alien and alien persons are entitled to be judged *secundum legem quam vivit*—by the customs of the community to which the person belongs."⁹⁵ The mixed jury is grounded in the premodern notion of "personal law,"⁹⁶ under which one was judged in accordance with one's own law.

Early cases of a mixed jury included Jews, merchants in central courts, and visitors from foreign lands; they also included local residents, such as representatives of immigrant communities.⁹⁷ When persons from two communities were involved in a dispute, both communities would be represented as jury members. Half of the jury came from the native community and half from the alien community. Thus, when Jews were brought to trial, half of the jury was Jewish and the other half Christian; only when the trial concerned an internal Jewish affair were all members of the jury Jewish.⁹⁸ For Constable, the history of the mixed jury epitomizes the idea that the "judgment of a person must be according to the law or customs of that person's community."⁹⁹ With the development of the modern state the legal institution of the mixed jury gradually changed, and aliens were identified vis-à-vis their citizenship rather than their personal custom.

One important point Constable makes concerns the way modern historians of English law have failed to recognize the existence of personal law in English history. This blind spot, Constable argues, is

⁹³ See *id.* at 31–33 (explaining the evolution of the "cross-section" terminology and noting that the Supreme Court first used the phrase in 1975).

⁹⁴ See *id.* at 7–48 (providing a comparison of early mixed juries with the modern American jury).

⁹⁵ *Id.* at 2 (citation omitted).

⁹⁶ See *id.* at 1–2, 7 (providing the definitions and principles of personal law).

⁹⁷ See *id.* at 16 (describing the composition of early mixed juries).

⁹⁸ See *id.* at 21 (summarizing the role of mixed juries in suits between Jews and non-Jews and in suits among only Jews).

⁹⁹ *Id.* at 25.

symptomatic of the way legal historians assume that all law is positive law—namely an officially authorized system of rules. Because the first positive law to recognize the mixed jury was enacted as late as 1353, many scholars simply ignored the earlier history.¹⁰⁰ Others failed to consider as law the “respect for the customs of others embodied in the practice of mixed jury.”¹⁰¹

But the blind spots of contemporary legal scholarship are a minor concern in comparison to the more significant transformation of law itself. The movement from the mixed jury to the “fair cross-section” substitutes fairness for substantive justice and—what is most relevant to our discussion of culture and identity—physical and social markers such as race and sex for custom and legal identity. Constable concludes, “The ‘other’ who emerges from such texts is not the foreigner or the alien, but the nonwhite, or occasionally non-male.”¹⁰²

The mixed jury has been replaced by a modern rendition of the concept of a “jury of one’s peers,” grounded in statistics and random selection from a representative pool. These transformations mark not only the (ontic) end of a specific legal institution but also the demise of an alternative way for people to belong together under law.

The modern notion of cultural identity is an impoverished one, as Constable concludes:

The history of the mixed jury points to the disappearance of difference. . . . On the jury, in place of alien and native who are the same, each a member of a different community, sharing in its laws and customs, appear impartial individuals, equals of all members of the population. The “loss of difference” articulated in . . . nineteenth-century legal texts is not the “sameness” of [the] early mixed jury, which treated both foreigners and natives as members of their own communities. On the contrary, this loss of difference points to an *absence* of community in which, the twentieth-century texts . . . suggest, all threaten to become outsiders to one another and themselves as well.

A strange inversion has occurred: where once all were insiders of communities who knew their own law, all are now observers of a world that posits truth of fact.¹⁰³

CONCLUSION

The aim of this Essay has been twofold. First, directed inward, it criticized some of the dominant trends in legal scholarship and offered an alternative research agenda. It started off by observing that

¹⁰⁰ See *id.* at 4–5 (summarizing this blind spot in modern English history).

¹⁰¹ *Id.* at 26.

¹⁰² *Id.* at 28.

¹⁰³ *Id.* at 147.

the most important characteristic of the "law and . . ." movement is not its rejection of the autonomy of law and legal theory but the primacy it awards to theory over phenomenon or to epistemology over ontology. One important corollary is this study's rejection of the common opposition of "law" and "law and . . ." To the extent that both are modern theories of law, they have much in common.

Further, and still within its first aim, the Essay offered a new way to study jurisprudence. Whereas most studies of jurisprudence offer an answer to the question of what law is, this study offered a new way to understand and pursue that question. The challenge of legal ontology, or simply jurisprudence, is to identify the different ways in which law *is*—the plurality of law's ontologies. Specifically, the Essay singled out three modern legal ontologies: science, policy, and culture. With respect to these ontologies, it outlined two interrelated research questions. The first deals with exploring the specificity of each of these ontologies and its contingency, asking for the specificity of science as knowledge, policy as ordering, and culture as belonging. The second seeks to identify legal phenomena that offer a different answer to similar questions, that is, to discover how law (which is a specific legal phenomenon) can know the world not through science, order not through policy, and belong but not through culture.

The second aim of the Essay was directed outward toward the disciplines of law turning the tables on the attempt to "discipline" law through the human and social sciences and questioning the underlying presuppositions of these disciplines. Even before these disciplines begin to observe a legal phenomenon, they have already determined its nature as science, policy, or culture. Law cannot only do without the disciplines but it can also teach the disciplines a lesson that they can take with them to other fields of research.

The final question that remains open is whether the other disciplines truly need law. Even if we assume, as argued above, that the disciplines are often blind to the underlying assumptions they bring with them to the study of human experience, would it not suffice for the disciplines to engage in self-reflection and self-critique? Is law's contribution for such a critical endeavor unique? Admittedly, the study of law is not the only place in which the limitations of the sciences can be exposed, but it is a privileged site for critical reflection. This is due to the fact that most of the disciplinary studies of law, such as economics, sociology, psychology, and anthropology, are products of the eighteenth and nineteenth centuries. They emerged in an era in which knowledge, order, and belonging had already begun taking the form of science, policy, and culture, respectively. Law, in contrast to the modern disciplines, dates back centuries and may offer a critical perspective on the disciplines. Law carries with it the power to

reveal old ways of being that are no longer open to modern humanity or, to put the argument more mildly, no longer have a privileged place in our world. Law too has taken on the modern forms of science, policy, and culture, but one can still detect within the legal world alternative ways of being.

Finally, the question that has not been raised is whether the modernization of law and legal thought discussed in this Essay is a positive development. In the final analysis, this is an absurd question to pose; it is the law of our times. More important is to acknowledge the magnitude of this transformation and how it continues to play a central role in our ability (and inability) to understand law.