

COMING HOME (AGAIN): A JURISPRUDENTIAL EXPLORATION

Allan C. Hutchinson\*

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### **Abstract**

*It has become a rather trite insight to concede that where one sets off in life can have a significant effect on where one ends up. Of course, there are many exceptions to this as people have achieved great success from the humblest of beginnings (and some have managed little success from the most privileged of backgrounds). However, there is still much wisdom and worth in tracing back one's life's journey in order to understand how one got from there to here, as it were. But, in doing so, it is also interesting to think about a certain reversal of that traditional sagacity - where we want to go might well have affected where we started. This insight might seem a little counter-intuitive, but it can be illuminating in thinking about the past in terms of the present and about why the journey from one to the other took the course that it did. For academics and especially self-proclaimed theorists, it seems a tantalizing prospect to take a stab at charting the intellectual route that has been travelled or, at least, appears to have been travelled. Accordingly, after several decades in the jurisprudence business, I want to make what some will consider a vain and self-serving attempt at writing my own intellectual biography.*

### **Résumé**

*C'est une idée devenue plutôt banale que de reconnaître que l'endroit d'où l'on s'engage dans la vie peut avoir un effet significatif sur l'endroit où l'on se retrouve. Bien sûr, il y a de nombreuses exceptions à cette règle car les gens ont obtenu de grands succès des débuts des plus humbles (et certains ont achevé de moindres succès malgré un milieu plus favorisé). Cependant, il y a encore beaucoup de sagesse et de valeur à retracer le cheminement de sa vie pour comprendre comment, pour ainsi dire, on en est arrivé là. Mais ce faisant, il est également intéressant de penser à un certain renversement de cette sagacité traditionnelle - là où nous voulons aller, cela pourrait bien avoir affecté notre point de départ. Ce point de vue peut sembler un peu contre-intuitif, mais il peut être éclairant lorsqu'on pense au passé en termes de présent et à la raison pour laquelle le voyage de l'un à l'autre a pris le chemin qu'il a pris. Pour les universitaires et surtout les théoriciens autoproclamés, il est tentant de tracer le chemin intellectuel qui a été parcouru ou, à tout le moins, qui semble l'avoir été. Par conséquent, après plusieurs décennies dans le domaine de la théorie du droit, je veux faire ce que certains considéreront comme une tentative vaine et intéressée d'écrire ma propre biographie intellectuelle.*

### ABOUT ALLAN C. HUTCHINSON

Are Critical Legal Studies (CLS) dead? Today it is referred to them as a vanished current that had its hour of glory for a brief decade. But we sometimes forget a little quickly the mass of work, of immense quality, that these supposedly brief years made it possible to produce. Allan Hutchinson is one of those fellow CLS travellers who continue to cast a distant, ironic glance on the world, absolutely devoid of any form of arrogance and certainly not indifferent to the world around him, quite the contrary! He observes, he scrutinises, he watches, he notes, he analyses, he deconstructs. He's rebuilding too. He takes stock of the efforts that one makes to rationalise the irrational and to present the polytheism of law as an evidence or a necessity of our modern times. And speaking of mass, do we have any idea of how many books and articles Allan Hutchinson has published? Given what French law libraries contain, it is difficult to get a precise idea. The whole is as dense as it is varied. Because the law as Allan sees it is far from being reduced to a few complex rules that would be the subject of scholarly commentary, not even to a few exemplary cases, nor to a few judges sometimes erected as icons. If Allan Hutchinson has devoted several volumes to the Common Law<sup>1</sup>, as well as to remarkable cases<sup>2</sup> or to “great” judges<sup>3</sup>, it is not because of a taste for celebration but rather because of a perfectly assumed theoretical point of view on the law. As he himself wrote in *Evolution and the Common Law*, “law is a rhetorical activity which can only be properly appreciated in its historical and political context; tradition and transformation are locked into a relationship which mutually reinforces them, but which remains completely contingent”. The law - and in particular the Common Law - is therefore not the result of an established grand plan; it is a “perpetual work-in-progress” as evolutionary, hesitant and inductive as possible when some would like it to be fixed, teleological and perfectly deductive. It would therefore be as wrong as it would be vain to think it outside and beyond society since it is entirely situated within it and evolves with it. In these circumstances, it is understandable that, some seven years later, Allan Hutchinson went in search of the qualities that make a common law judge a “great judge”. Certainly, mastery of the legal technique is necessary. But it is far from enough. As he put it in a Holmes-style formula: “the act of judging is less an opportunity for logical operations

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<sup>1</sup> A. Hutchinson, *Evolution and the Common Law*, Cambridge University Press, 2005.

<sup>2</sup> A. Hutchinson, *Is Eating People Wrong? Great Legal Cases and How They Shaped the World*, Cambridge University Press, 2011 et A. Hutchinson, *Is Killing People Right?: More Great Cases that Shaped the Legal World*, Cambridge University Press, 2016.

<sup>3</sup> A. Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law*, Cambridge University Press, 2012.

than an exercise in operational logic”<sup>4</sup>. We know that he also likes to refer to Thurgood Marshall's other famous formula saying of himself that he “had done what he could with what he had”. This is a large part of Hutchinson's doctrine: the “good“ jurist or the “great” judge (of Common Law, certainly...) is not the one to whom everything succeeds or the one who knows everything but the one who feels how to adapt the past to the present - hence the inextinguishable need to articulate a sense of social justice and the desire to share a political vision. “Politics”: the word is finally pronounced. Allan Hutchinson, as said previously, remains committed to the CLS slogan: “law is politics”. This leitmotif is far from being used at home as a banner covering an obscure junk shop or as a misleading advertising slogan. It deserves a short explanation.

Each of Allan Hutchinson's books or texts is driven by the same need to take seriously the institutional and political consequences to which a critical analysis of law and judgment can lead. This analysis is critical in that it rejects a conception of judgment as an objective activity of a purely neutral application of the rules. Hutchinson is also not concerned with the question of the basis of law or judgment: judging is a specific professional practice, intimately linked to the social context in which it is embedded and always proves to be a deeply ideological undertaking and not a theoretical reflection. As a practice, judgment is really about using the old to make new. Under these conditions, the best criterion for evaluating such a practice is itself political and cannot consist in a search for the conceptual coherence of the theoretical reflections in which judges engage. And the law is as much a matter of political morality as judgment itself is a matter of personal choice. In other words, the law is deeply and completely “political” in both a personal and a partisan sense. And this is, for Hutchinson, a good reason to strengthen social justice and not an obstacle to its implementation: by making ideological choices, judges can assume their democratic responsibilities.

Under these conditions, legal reasoning cannot be seen as a *more geometrical* demonstration, but rather as an attempt to justify a solution that will express the personal preferences of judges. Should we think that judges are totally free to do what they want? As a matter of fact, such a question is not so relevant as it assumes a simplistic alternative between the absence of freedom and total freedom. The freedom that judges enjoy is commensurate with the justification they must provide. As for a game presupposes certain rules that constitute the

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<sup>4</sup> A. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication*, Duke University Press, 2000, p. 175. (“it is not a logical operation but an exercise in operational logic”).

game, legal reasoning implies playing with the rules themselves: the whole art of judgment consists in passing off one's subjective will as that of objective law.

If the law is a practice and not a set of rules laid down in advance that could simply be described, the theory of the law, for its part, seeks not to say how the rules should be used but rather to reveal the presuppositions of judges, clarify their possible contradictions and formulate some suggestions not in the name of a great hidden truth that the science of the law would reveal but with a view to making some improvements to this practical activity that is the law. So where do Hutchinson's rules fit in? Would they constitute the constraint that judges cannot overcome and from which they cannot escape, as some formalist lawyers think? Or are they, on the contrary, toys that could even be dispensed with as other “anti-formalist” lawyers sometimes think? It is not surprising to read in Hutchinson that the alternative itself is misleading: at the same time, they give the practice of law its structure, the rules are also the very object of this practice.

The article we are going to read emphasises several of the main thesis to which Allan Hutchinson devoted so much effort to try to convince his audience and justify his position. The merit of this article is also to restore the path of a spirit as free as inventive and to show that nothing, at the beginning, predestined him to his brilliant career. Although he certainly showed a critical spirit very early on, it was not said that he came to join the path of Critical Legal Studies. Who could imagine him leaving Stammler for Duncan Kennedy?

Eventually, I would like to underline, without any flattery, an ultimate quality of Allan Hutchinson (beyond his extreme kindness and great simplicity): his writing is both as clear and mind-blowing as sharp and direct as it can be imaginative and metaphorical. It is always captivating and pleasant to read. I presume French readers may quickly succumb to his charm. No doubt here is Allan Hutchinson's secret and strength it is hard to resist. In one word, his style.

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## A PROPOS D'ALLAN C. HUTCHINSON

Les *Critical Legal Studies* (CLS) sont-elles mortes ? On en parle aujourd'hui comme d'un courant disparu qui eut son heure de gloire le temps d'une brève décennie. Mais on oublie parfois un peu vite la masse de travaux, d'immense qualité, que ces prétendument brèves années ont permis de produire. Allan Hutchinson est de ces compagnons de route des CLS qui continuent de jeter sur le monde un regard distancié, ironique, absolument dépourvu de toute forme d'arrogance et certainement pas indifférent au monde qui l'entoure, bien au contraire ! Il observe, il scrute, il surveille, il note, il analyse, il déconstruit. Il reconstruit aussi. Il prend la mesure des efforts que les uns et les autres déploient afin de rationaliser l'irrationnel et de présenter comme une évidence ou une nécessité ce polythéisme de nos temps modernes qu'est le droit. Et à propos de masse, a-t-on une idée du nombre d'ouvrages et d'articles qu'Allan Hutchinson a publié ? Eu égard à ce que contiennent les bibliothèques juridiques françaises, il est difficile de s'en faire une idée précise. L'ensemble est aussi dense que varié. Car le droit tel que le voit Allan est loin de se réduire à quelques règles complexes qui seraient l'objet de commentaires savants, ni même à quelques cas exemplaires, ni non plus à quelques juges parfois érigés en icônes. Si Allan Hutchinson a consacré plusieurs volumes au droit de Common Law<sup>5</sup>, ainsi qu'à des *cases* remarquables<sup>6</sup> ou encore à des « grands » juges<sup>7</sup> c'est moins par goût de la célébration qu'en vertu d'un point de vue théorique sur le droit parfaitement assumé. Comme il l'écrivait lui-même dans *Evolution and the Common Law*, « le droit est une activité rhétorique qui ne peut être appréciée à sa juste mesure que dans son contexte historique et politique ; tradition et transformation sont enfermées dans une relation qui les renforce mutuellement mais qui reste complètement contingente ». Le droit – et notamment le droit de *Common Law* – n'est donc pas le résultat d'un grand plan établi ; c'est un « perpétuel *work-in-progress* » aussi évolutif, hésitant et inductif que possible quand certains voudraient le voir figé, téléologique et parfaitement déductif. Il serait donc aussi erroné que vain de le penser en dehors et au-delà de la société puisqu'il est tout entier situé en elle et évolue avec elle. Dans ces conditions, on comprend que, quelque sept années plus tard, Allan Hutchinson soit parti à la recherche des qualités qui font d'un juge de *Common Law* un « grand juge ». Certainement la maîtrise de la technique juridique est-elle nécessaire. Mais elle est loin d'être suffisante. Comme il le dira d'une formule à la Holmes : « l'acte de juger est moins l'occasion d'opérations

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<sup>5</sup> A. Hutchinson, *Evolution and the Common Law*, Cambridge University Press, 2005.

<sup>6</sup> A. Hutchinson, 2011, *op. cit.* ; A. Hutchinson, 2016, *op. cit.*

<sup>7</sup> A. Hutchinson, 2012, *op. cit.*

logiques qu'un exercice de logique opératoire »<sup>8</sup>. On sait qu'il aime aussi se référer à cette autre célèbre formule de Thurgood Marshall disant de lui-même qu'il « avait fait ce qu'il pouvait avec ce qu'il avait ». On trouve là une grande part de la doctrine de Hutchinson : le « bon » juriste ou le « grand » juge (de *Common Law*, certes...) n'est pas celui à qui tout réussit ni celui qui sait tout mais celui (ou celle) qui sent comment adapter le passé au présent – d'où le besoin inextinguible d'articuler un sens de la justice sociale et le goût de faire partager une vision politique. « Politique » : l'adjectif est enfin prononcé. Allan Hutchinson, on l'a dit, reste attaché au mot d'ordre des CLS : « law is politics ». Ce *leitmotiv* est, chez lui, loin d'être utilisé comme un étendard recouvrant un bric-à-brac obscur ou comme un slogan publicitaire trompeur. Il mérite d'ailleurs une courte explication.

Chacun des livres ou des textes de Allan Hutchinson est mû par le même besoin de prendre au sérieux les conséquences institutionnelles et politiques auxquelles une analyse critique du droit et du jugement peut conduire. Critique, cette analyse l'est en ce qu'elle rejette une conception du jugement comme un activité objective de pure application neutre des règles. Hutchinson ne se préoccupe pas non plus de la question du fondement du droit ou du jugement : juger est une pratique professionnelle spécifique, intimement liée au contexte social dans lequel elle est inscrite et s'avère toujours être une entreprise profondément idéologique et non une réflexion théorique. En tant que pratique, le jugement consiste en réalité à utiliser l'ancien pour faire du neuf. Dans ces conditions, le meilleur critère d'évaluation d'une telle pratique est lui-même politique et ne saurait consister en une recherche de la cohérence conceptuelle des réflexions théoriques auxquelles les juges se livrent. Et le droit est tout autant affaire de moralité politique que le jugement lui-même une affaire de choix personnels. En d'autres termes, le droit est profondément et complètement « politique » au sens tant personnel que partisan du terme. Et ce constat est, pour Hutchinson, une bonne raison de renforcer la justice sociale et non un obstacle à sa mise en œuvre : en faisant des choix idéologiques, les juges peuvent assumer leurs responsabilités démocratiques.

Dans ces conditions, le raisonnement juridique ne peut être vu comme une démonstration *more geometrical* mais bien plutôt comme une entreprise de justification d'une solution laquelle exprimera les préférences personnelles des juges. Doit-on pour autant penser les juges comme totalement libre de faire ce qu'ils veulent ? Là encore, c'est mal poser les termes du problème, car on suppose ce faisant, une alternative simpliste entre absence de liberté

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<sup>8</sup> A. Hutchinson, 2000, *op. cit.*

et liberté totale. Or, la liberté dont bénéficient les juges est à la mesure de la justification qu'ils doivent fournir. Comme pour un jeu qui suppose certaines règles constitutives du jeu, le raisonnement juridique implique de jouer avec les règles elles-mêmes : tout l'art du jugement consiste à faire passer sa volonté subjective pour celle du droit objectif.

Si donc le droit est une pratique, et non un ensemble de règles posées à l'avance que l'on pourrait se contenter de décrire, la théorie du droit, de son côté, cherche non pas à dire comment les règles doivent être utilisées mais bien plutôt mettre au jour les présupposés des juges, éclairer leurs éventuelles contradictions et formuler quelques suggestions non au nom d'une grande vérité cachée que révélerait la science du droit mais en vue d'apporter quelques améliorations à cette activité pratique qu'est le droit. Quelle place occupent alors les règles selon Hutchinson ? Sont-elles cette contrainte que les juges ne peuvent surmonter et à laquelle ils ne peuvent se soustraire, comme le pensent certains juristes formalistes ou sont-elles, au contraire, des jouets dont on pourrait même se passer comme le pensent parfois d'autres juristes antiformalistes ? On ne s'étonnera pas de lire chez Hutchinson que l'alternative est elle-même trompeuse : en même temps qu'elles donnent à la pratique du droit sa structure, les règles sont également l'objet même de cette pratique.

L'article que l'on va lire reprend plusieurs des thèses auxquelles Allan Hutchinson a consacré tant d'effort pour tenter de convaincre son auditoire et justifier sa position. Mais le mérite de cet article est aussi de restituer le cheminement d'un esprit aussi libre qu'inventif et de montrer que rien, au départ, ne le prédestinait à la très brillante carrière qui fut la sienne. S'il a certes très tôt fait preuve d'esprit critique, il n'était pas dit qu'il en vienne à rejoindre la voie des *Critical Legal Studies*. Qui aurait pu l'imaginer passer de Stammler à Duncan Kennedy ?

On voudrait enfin souligner, sans flagornerie aucune, une ultime qualité d'Allan Hutchinson (au-delà de son extrême gentillesse et de la grande simplicité qu'il sait introduire dans les rapports sociaux quotidiens) : son écriture est à la fois limpide et ébouriffante, aussi tranchante et directe qu'elle peut être imaginative et métaphorique. Elle est toujours captivante et agréable à suivre. Les lecteurs francophones pourraient fort bien succomber à son charme - et sans doute est-ce là tout le secret et toute la force d'Allan Hutchinson auxquels il est fort difficile de résister – en un mot, son style.

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## INTRODUCTION

“We shall not cease from exploration  
And the end of all exploring  
Will be to arrive where we started  
And know the place for the first time.”

T.S. Eliot<sup>9</sup>

It has become a rather trite insight to concede that where one sets off in life can have a significant effect on where one ends up. Of course, there are many exceptions to this as people have achieved great success from the humblest of beginnings (and some have managed little success from the most privileged of backgrounds). However, there is still much wisdom and worth in tracing back one’s life’s journey in order to understand how one got from there to here, as it were. But, in doing so, it is also interesting to think about a certain reversal of that traditional sagacity - where we want to go might well have affected where we started. This insight might seem a little counter-intuitive, but it can be illuminating in thinking about the past in terms of the present and about why the journey from one to the other took the course that it did. For academics and especially self-proclaimed theorists, it seems a tantalizing prospect to take a stab at charting the intellectual route that has been travelled or, at least, appears to have been travelled.

Accordingly, after several decades in the jurisprudence business, I want to make what some will consider a vain and self-serving attempt at writing my own intellectual biography. For one who has insisted on the connection between the context of writing and the context of the writer, this seems to be the least that I can do<sup>10</sup>. So, mindful of the obvious pitfalls of imposing a dubious and inexorable rhyme and reason on a much more haphazard and serendipitous process, this essay offers itself as an honest-as-I-can-be and warts-and-all account of where I started, where I have been (with detours and trips down blind-alleys), and where I am now. After revisiting my graduate studies, I will draw out the themes that were beginning to emerge and that I developed and revised over the years. However, this is not simply an historical or indulgent piece. The overriding aim is to understand my present jurisprudential commitments in light of my past orientations and, as Eliot put it, to “know the place for the first time”. And, of course, in undertaking that journey, I will likely be charting new paths forward and exploring fresh territory ahead.

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<sup>9</sup> “Little Gidding”, *Four Quartets*, 1943.

<sup>10</sup> See A. Hutchinson, *Taking a Stand: Politics, Prisons, and Football*, in A. Hutchinson, *Law, Life And Lore: It's Too Late To Stop Now*, Cambridge University Press, 2017.

## I. GETTING STARTED

My undergraduate studies in Jurisprudence fell within the shadow of the Hart-Fuller debate. In many ways, this set the context and tone of much that we covered. It seemed very much that we had a simple choice – go with Hart’s positivistic insistence on the separation of law and morality or go with Fuller’s efforts to defend a morality of law. If expressed in those stark terms, I went with Hart. And would still do so today. After all, Hart was an English jurist and was building on the Austinian tradition that had dominated English jurisprudence for a century or more. Indeed, although taught by someone who fired up my interest in legal theory, the Jurisprudence course followed the pattern of much of my legal studies<sup>11</sup>. The plan and objective was to present law as a self-contained body of rules and principles to be learned and applied in a quasi-scientific manner. There was not only no expectation that students would develop their own views or stance on any issue, but also a strong understanding that students should not allow their personal views to intrude on their appreciation of law and its practical application. This was high formalism in pedagogic action.

But I never really accepted that the choice – positivism or naturalism? -- was so stark. To me, the question was the wrong question to ask and, therefore, was bound to lead to the wrong answers. If the issue was whether bad law could be law, the favoured response seemed obvious and apparent. Of course, there could be a valid legal system even if it plumbed immoral depths and contained immoral directives; history and experience (e.g., British Empire, South Africa, Nazi Germany, etc.) offered ample testimony to that. But this seemed such a limiting way of thinking about the relation between law and morality – an all-or-nothing stance was ill-suited to the complexities of jurisprudential scrutiny. A better way to approach the positivism/naturalism quandary was to think less about the analytical or philosophical identity of law, but more about how law and morality could be understood as related in more constructive and productive, if contingent ways. Although not its necessary corollary, positivism’s exclusive focus on the “is” of law tended to downgrade or marginalize the important study of what law “ought” to be. For me, this worked to turn jurisprudence into more of an intellectual indulgence, much like completing crossword puzzles, than a compelling debate about the role of law in modern society and its possible contribution to a more just society.

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<sup>11</sup> After an immature rebellion against schooling during my final year of high school, I blew off my A-levels and managed to enroll in an external degree of London University at Leicester Polytechnic. Grey Denham taught me Jurisprudence. Although more a practicing barrister than legal academic, he lit a spark in me for legal theory.

If the positivists carried the day over law's validity, they seemed to have little useful to contribute when it came to talking about law's substance as a matter of political morality. In this sense, the naturalists had much to commend them. Whether it was by way of the modest Fullerian proposals or the more full-blown Dworkinian ones, they addressed the morality of law and held it to a higher standard. Because they were mistaken in insisting that morality was a necessary condition of law's validity, this does not mean that the naturalists should be dismissed out of hand when it came to making proposals for the content or substance of law. In other words, there is no reason to throw out the moral baby with the naturalist bathwater – concern for the rules' content is vitally important, but simply not as a condition for their validity or identity as law.

So, for example, Fuller's eight "principles of legality" had much to recommend them - (1) generality – the legal system should have general rules; (2) promulgation – laws should be published; (3) prospectivity – laws should be prospective; (4) clarity – laws should be clearly stated and understandable; (5) consistency – laws should be consistent with one another; (6) possibility – laws should not command the impossible; (7) constancy – laws should not be subject to constant change; and (8) congruence – consistency between the law as officially declared and as actually administered<sup>12</sup>. Any legal system would do well to adopt and maintain these institutional commitments as part of the Rule of Law. Of course, the historical record shows that, without more, there is no necessary or historical connection between respect for the Rule of Law and the achievement of a substantive just society<sup>13</sup>. Accordingly, a commitment to these "principles of legality" is a desirable, but not sufficient feature of good and just governance.

So, it seemed to me that, even though its virtues are considerable, the Rule of Law is more aptly thought about as much in terms of its functional institutional efficacy as its substantive political morality. In line with this, legislation that did not align with "the inner morality of law" was law but might be open to serious moral scrutiny and even political condemnation. The legitimacy of any legal system that ignored these principles was in serious moral jeopardy. For me, therefore, the Rule of Law seemed best and most realistically understood simply as a prized precept of good democratic governance. By respecting its dictates, a state might bring about more good than bad. Accordingly, the Rule of Law is neither

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<sup>12</sup> L. Fuller, *The Morality of Law*, Yale University Press, 1969, pp. 46-91.

<sup>13</sup> See, for example, B. Tamanaha, *On The Rule Of Law: History, Politics, Theory*, Cambridge University Press, 2004.

the answer to all law's problems nor irrelevant to their resolution. However, those governments that respect Fuller's imperatives rather than ignore them are already displaying a concern for the citizenry that is neglected or ignored by more dictatorial or totalitarian regimes. Accordingly, reliance on the Rule of Law works best as a judicially-monitored principle of democratic aspiration, not as a condition of either legal validity or even constitutional soundness.

## II. KANT DO THAT

After I completed my law degree, I went off to the Inns of Court to qualify as a barrister. My time at Gray's Inn was a mixed blessing. Although I found that the pomp and pomposity of the place reinforced my working-class sense of alienation from the law and a future career as a barrister, my studies there allowed me to become even more convinced that the traditional English style of lawyering and thinking about law was seriously wanting. The task set for us was simply to learn the law in as much procedural and practical detail as possible. The governing image of the "good lawyer" was that he (and, unfortunately, that was what most of us still were) served justice best by paying little heed to law's substantive content or its effect in any individual case; doing an advocate's job well was its own reward (along with a handsome chunk of remuneration). In so proceeding, my colleagues and myself could rest assured that we were making a sterling contribution to English justice whose general wisdom and overall beneficence was taken for granted despite any aberrational lapses or loopholes. In short, our Tennyson-like duty as young advocates was not to reason why, but simply to do and go home.

Clear that the Bar was not for me, I enrolled in an LL.M. in 1975 at Manchester University. My plan was to research and write a thesis in Jurisprudence that would allow me to explore the possibilities for getting beyond the Hart-Fuller debate in order to put legal theory on more secure and defensible footings. With enormous *chutzpah*, I drew on some passing references from my undergraduate studies about the work of European theorists. I decided that the Continent offered much greater and more fruitful prospects for jurisprudential progress than the relatively sterile and pinched preoccupations of Anglo-American legal thought. This brought me to the dense writings of the German jurist, Rudolph Stammler, and his neo-Kantian efforts to elaborate "natural law with a variable content". Even though I had never studied philosophy and knew not a word of German, I had the idea that this largely unknown and difficult source of jurisprudential wisdom, at least in England, might deliver a more sustaining

and compelling set of theoretical goods<sup>14</sup>. I suppose that, being slightly familiar with ideas of Karl Savigny and Hans Kelsen, I mistook pretension for sophistication and obscurity for rigour.

I began with great hope that Stammler would lead me out of what I considered to be the dead-end of much contemporary Anglo-American jurisprudential thinking in its efforts to establish the proper relation between law and morality. His project appeared attractive to me because, although he drew upon a rarefied set of conceptual and analytic resources by way of a new and revised Kantianism, he eschewed the idea of there being a once-and-for-all answer to all life's problems. Indeed, one of the initial attractions of Stammler was his view that positivism was an insular and sterile notion that ignored the ultimate problems of law, morality and life. He compared a legal positivist to a caterpillar who "gnaws the leaf which alone it knows, without the least concern about the trunks and roots of the supporting tree"<sup>15</sup>. For me, this seemed a promising place to start on my further jurisprudential studies.

Stammler claimed to offer a critical theory of law that elucidated certain formal and objectively valid principles of justice whose application would vary from one socio-historical situation to another. It was his attempt to traverse the theoretical and the practical: he sought to integrate a positivist understanding of law into a broader and more fulfilling account of a just society. He recognised that the worlds of "is" and "ought" were separate. But he maintained that it was possible to construct a scientific methodology that, while distinct from each, could be used to bolster the other. As such, he developed an empirical analysis of the is-world (fact) and a teleological one of the ought-world (values). Armed with such an approach, he first identified the pure forms of law and justice; he then put the former in the service of the latter. While he accepted that legality and justice were not conceptually linked (and would, therefore, have been on Hart's side of the law-morality debate), he believed that law and morality could be united through a universally valid method. In a famous passage, he concluded that:

"Hence old jurists were wrong when they sought for a determinate law of absolute significance. But they would have been on firm ground if they had striven

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<sup>14</sup> In a stroke of outrageous good fortune, I was given as a supervisor a young lecturer, Andrew Ashworth. Only a couple of years older than me, he was primarily a criminal lawyer, but did some teaching on the Jurisprudence course. He must have thought that I was truly mad in both ambition and preparation. Yet he tolerated me and tried to keep me on the straight and narrow. He went on to great academic success and became the Vinerian Professor of Law at Oxford University. Over the years, we kept in touch and he has been a valued source of continuing support over my career.

<sup>15</sup> Rudolph Stammler, "Fundamental Tendencies in Modern Jurisprudence", *Michigan Law Review*, 1923, vol. 21, p. 864.

for natural law with a changing content – that is, precepts of right and law which contain a theoretically just law under relations empirically conditioned.”<sup>16</sup>

As I delved deeper and read more broadly, I quickly became disenchanted. His work was frustrating because, although his goal was laudable, his efforts to achieve it were unconvincing. Indeed, the more I struggled with Stammler’s ideas, the more I realised that they were drawing upon a problematic philosophical tradition and headed in the wrong direction. His resort to the scientific pretensions of neo-Kantianism was very much a case of barking up the wrong tree. For him, the “empirically conditioned” could be handled and brought to heel by reliance on a rationalist method and by the guiding authority of right thinking. In short, for all his historicist protestations, Stammler insisted that the “natural” was eternally valid and ordered and took priority over the ephemeral content of history’s disorder. For me, this was the crux of the problem, not the basis for its solution. Indeed, by the time, I completed the thesis in June 1978, I was sufficiently convinced of this that I included in its preface a bald statement of my own disenchantment:

“Looking back, it is difficult to remember or understand why I became so intrigued by this dialectically difficult author whose juristic writings rely on a long-forgotten and obscure branch of German philosophy. Nevertheless, I was and resolved to attempt to penetrate the dialectic and linguistic confusion that shrouded Stammler’s work and contributed to his relative obscurity. Although, in my preliminary studies, I took an openly and generously sympathetic view towards his ideas, I soon became disillusioned and realised that this confusion permeated the whole of [his] work and that only through such confusion was he able to attain any superficially satisfactory or attractive results. I am now convinced that Stammler’s work is of historical value and significance only. In any work of a jurisprudential nature, I have come to realise that any attempt to take up an objective and neutral standpoint can never be entirely successful.”

My thesis was an immature and middling effort; it was larded with too many references to others’ writings and ideas. I was only half-way, at best, in the important process of getting out ahead of my sources and bringing them into my own thematic arguments. But that seems to be the fare and fate of many graduate theses. Nevertheless, I learned much from completing the thesis about how to do research, hang together ideas, and write decently. But, most importantly, it gave me a set of questions and queries that have conditioned and motivated my whole jurisprudential career<sup>17</sup>. Although my thesis dispensed with Stammler’s work as a possible solution to jurisprudence’s problems, I now realise that the claim that “any attempt to take up

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<sup>16</sup> R. Stammler, *Economics And Law According To The Materialist Conception Of History*, 1896, p. 181.

<sup>17</sup> At the time, the critical work of Alf Ross was important here, even though his own emotivist or behaviourist account of justice is extreme and unconvincing. See A. Ross, *On Law and Justice*, Stevens & Sons, 1958. See also W. Friedmann, *Legal Theory*, Columbia University Press, 5<sup>th</sup> ed., 1967, p. 185.

an objective and neutral standpoint can never be entirely successful” has informed and sustained my critical project over the ensuing decades.

Indeed, I have hardened my stance and now insist that “no attempt to take up an objective and neutral standpoint can ever be successful”. I have tried to be an uncompromising critic of the presumptuous assumption that it is either possible or desirable to achieve “the view from nowhere”. The flight to abstraction is little more than a ruse or distraction. Unless one is prepared to defend the existence of some mystical universe, there is no place to be other than in the socio-historical world. Any “nowhere” is always influenced by and beholden to a “somebody” and, therefore, a “somewhere”. If authors (including myself, of course) are standing anywhere, it is on a platform that they have built for themselves and that is hurtling along through history. Any sense of stability or groundedness is illusory. As it has become rather clichéd to note, if the world is supported by a giant turtle that is resting on another turtle, then “it is turtles all the way down”<sup>18</sup>.

But my graduate studies also made me more alert to the fact that striving for the “view from nowhere” was not the only sleeveless errand that jurists were running. Related to this more basic failing is what I will call the “mind the gap” problem -- the effort to move seamlessly and impersonally between theory and practice. Or, to put it in more political terms, the unmet challenge of relating general principles to specific instances. Although there have been better and worse efforts to resolve the dilemma of moving from abstract emptiness to concrete application, these explanations are doomed to fall short. That being the case, it is important to understand, especially in law, why continuing efforts are being made to do this and why they persist in the face of an overwhelming pile of substantial evidence to the contrary.

### III. LOOKING FOR NOWHERE

In the Age of Reason, there occurred the push to explore and discover new lands and places across the globe. At the same time, philosophers were also on a pioneering expedition. In contrast to their kindred geographical spirits, they were looking for “nowhere”<sup>19</sup>. Rather than risk death and suffering from multiple sources of existential peril, these theoretical explorers rarely left the comfortable sanctuary of their libraries and offices. But theirs was no less an intrepid endeavor, at least in the own minds. Seeking to overthrow the all-embracing dominion

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<sup>18</sup> There are many sources for this tale. But a recent and unlikely source can be found in Justice Scalia’s plurality opinion in *Rapanos v. United States*, 2006.

<sup>19</sup> I borrow the term from Thomas Nagel, but do not treat the idea in the same way that he does. See T. Nagel, *The View From Nowhere*, Oxford University Press, 1986.

of religion and superstition, they were looking to place men (as women did not really count in their reflections) at the centre of the world; man could be the author of his own fate, not merely a cipher in another's script. Ironically, they did this by looking to replace the belief in God as an architect and controller of the universe with the idea that rationality and truth could offer similar benefits and reassurances. Immanuel Kant was in the thick of this shift.

Some continued to seek an ideal place that would reveal the true nature of life and living; this was the lingering ambition of Plato and his followers. However, others, like Kant, were less sanguine about the prospects of such a venture. Instead, they settled for locating a method that would allow them to bestow on the products of rational inquiry a certain objective authority and lasting truth. Either way, the ambition was the same – to establish a set of enduring and abstract principles for living. A divine vision was traded in for “the view from nowhere”. Of course, in many ways, this development was no less pernicious than the one it sought to displace. Maintaining that there are right methods that will produce right results, these philosophers claimed to speak in the authoritative accent of truth and objectivity. For the humble person, the authority of priest was to be replaced by that of philosophers. If the former held forth in the accent of divine authority, the latter declaimed in the voice of universal reason. In place of divine wisdom, human reason and rationality became the new gods. As Friedrich Nietzsche aphorized, “god is dead, but ... there will perhaps be caves, for ages yet, in which his shadow will be shown.”<sup>20</sup>

As such, philosophy's traditional task became to explain the world by understanding what the world is, what is our relationship to it, and how we can be sure that what we understand or know about the world is reliable. And, to do this, it was thought that philosophers must first excuse themselves from the real world in order to get a better and purer sense of what thought was all about. At the heart of this rationalist endeavor was the belief that it was possible to generate a grand theory that was able to distinguish the necessary from the contingent, the universal from the particular, and the conceptual from the concrete.

As I began my professorial career in Canada, this was an attractive idea. However, try as I might, I simply could not buy into it. Although I was embarking on my own personal voyage of discovery, I knew that I was leaving and perhaps escaping one “somewhere” - a very class-conscious England, especially in universities. But I never thought that coming to Toronto

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<sup>20</sup> F. Nietzsche, *The Gay Science*, 1882 (transl. W. Kaufman, Vintage, 1974), Book III, aphorism #108. In his best-selling book *A Brief History of Times*, Stephen Hawking states that the discovery of why the universe exists will be equivalent to knowing “the mind of God”.

was getting me nearer to “nowhere”; it was, for me, simply a better place to be – less interested in where you had been and more in where you were going. Of course, as with so much else, it was not a one-man expedition: I was supported and tutored along the way by the work of others, particularly Duncan Kennedy. As with comedy, in jurisprudence, timing is everything. I came of jurisprudential age when Critical Legal Studies was in its most potent phase. While I did not embrace all that was on offer, I was bolstered in my own critical and non-traditional approach by the writings and doings of this motley American crew as they took the educational and scholarly agenda of others to task. Indeed, I remain very much a CLS-er at heart, even if it is no longer an active movement<sup>21</sup>.

Two significant philosophical interventions, one ancient and one modern, will suffice to illustrate this sense of how we are always “somewhere” even if some pretend that they are “nowhere”. Abstract philosophers come no greater or larger than Plato. His signature move was to look beyond the horizons of contingent circumstances and strive for a more enduring realm of intellectual existence. However, even his life and times influenced his philosophy; his “view from nowhere” was very much anchored in his own “somewhere”. He wrote what he did not in spite of, but in large part because of his local Greek context. His philosophy grew out of the need to find practical solutions to practical problems. Philosophy was intended to be a preparation for politics; it was not intended as an end in itself: he believed that philosophy must earn its keep in the house of politics. He was very much “a man of his times”. Of course, to reduce the sweep of Plato’s philosophy to the details of his life is as absurd as ignoring the context of his life in understanding his philosophical ideas. Although Plato’s writings lend themselves easily to the interpretations that have come to dominate, it is Plato’s followers who have turned those writings into the archetypical “view from nowhere” philosophy that it has become.

The three central hallmarks of the Platonic approach tie in neatly with the way he lived his life and the influence of his times upon him -- a retreat from the daily hustle and bustle of social living, the establishment of an elite corps of thinkers, and the practice of philosophy as a quasi-scientific undertaking. At its core, philosophy was construed as something of a mystical trek or religious pilgrimage. Those with the necessary intellectual aptitude and moral commitment would leave the world of ordinary people behind and ascend to some higher, more removed and abstract plane. Once the peak was achieved, the purer air of rationality would take

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<sup>21</sup> See A. Hutchinson, *Critical Legal Studies*, Rowman & Littlefield, 1989.

hold; the disabling influences of social interests, commitments, fuzziness, history, culture, ideology and the like would be filtered out. Suitably refreshed and inspired, the surviving few would encounter “eternal nature not varying from generation and corruption” and be guided by the clear light of truth that would dispel the lingering shadows of conventional thinking. So enlightened, the philosophers might then carry back such infinite insights for the hoi polloi’s edification and enlightenment - the more recalcitrant the problem, the higher the ascent; the more entrenched the controversy, the more transcendent the escape; and the more convoluted the possibilities, the purer the ambition.

This notion of philosophy would be comical, if it were not so commonplace over 2500 years later. These Platonic-like philosophers presumed to illuminate the transcendent features of humanity with the intellectual lightning of analytical insight. Plato’s insistence on the primacy of the mathematical sciences - remember that the Academy’s imposing welcome was “do not enter unless you know geometry” - has done as much harm as good. Philosophers have been intoxicated by their own rhetorical excesses and begun to believe that not only is there a truth about humanity, but also that it is a simple and universal one that is discoverable by those and only those with the appropriate analytical and abstract gifts. That Plato was an elitist cannot be doubted. He believed that a select group of sages (i.e., philosophers like him) should govern in accordance with a particular ideal form of social life as revealed and applied by reason; there was a perfect way of life that we must pursue and, having found it, we must live in accordance with it. Cast as an authority-figure, the philosopher could pretend to stand outside history and, from that privileged vantage-point, judge competing claims about the worth or truth of human practices, such as art, morals, science, religion, law, etc. Indeed, there is the whiff of the cult about Plato’s philosophical pursuits; his writings leave the impression of a masonic or monastic order of mountaineering mystics.

The claim that the best way to provide solid and secure footings for life is by becoming more and more abstract is doubly mistaken. First, there are no solid and secure philosophical footings for life that are not themselves part of the very social and historical debate that they are intended to ground and underwrite: there is no escape from the messy and contingent facts of social living. And, secondly, insofar as it is possible to think critically about life, it cannot be done by escaping its concrete and contextual circumstances: life is a practical enterprise and theory is simply one and only one way of undertaking that enterprise. Those that argue differently or claim to have hit upon universal truths about life, law or whatever, no matter how successful they are or how emulated their methods are, have passed off a practical triumph as a

theoretical victory. This does not undermine their worldly success, but simply checks their other-worldly vanity. Although I did always accept it, their views warrant scrutiny and perhaps allegiance, but not because they are objective or universal in origin and content.

A more modern example of the “view from nowhere” tendency can be found in the influential work of John Rawls (and, by extension, Ronald Dworkin). He does not simply put out a proposal for making society more just, but offers a full-blown defence of it as being objectively and apolitically validated. Indeed, in my thesis, I took aim at his Kantian-like methodological strategy whereby any proffered principles of justice will be mandated by people’s rational choice. To achieve this, Rawls resorts to the idea of people being placed in the “original position” behind a “veil of ignorance”: people will be stripped down to their basic moral and noumenal selves with appreciation of the basic facts of social life, but no knowledge of their own social position or status. The upshot of this is the celebrated two-part account of justice that Rawls believes would be agreed to by most rational people<sup>22</sup>.

However, the problem is that Rawls’s principles of justice reflect his own political aspirations and demand only a modest overhaul of existing social condition in American society. The “view from nowhere” is very much “somewhere”. After his grand and abstract detour through abstract philosophy, he comes out much at the place he started – a spruced-up version of the 1964 Democratic Party’s political platform of liberal progressivism. Of course, I appreciate Rawls’s use of “reflective equilibrium” as an effort to validate his outcome. This epistemic device calls for a to-and-fro deliberative process: moral practices/instincts and theoretical principles are brought into temporary balance through adjustment and modification. The obvious limitation with this way of proceeding is that extant practices/insights are given ethical weight in the justificatory method simply by virtue of their present existence and acceptance; there is no critical threshold to be crossed before they are taken seriously as valid or credible ethical resources<sup>23</sup>. As such, Rawls’s theory of justice is less a “view from nowhere”, but more a sophisticated defence of the “view from somewhere”.

Before turning to how this mind-set continues to haunt legal philosophy, I want to offer some important cautions and caveats. First, I am not suggesting that any effort to nurture sophisticated skills will not depend on developing generalisations that can be used as operating

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<sup>22</sup> J. Rawls, *A Theory of Justice*, Oxford University Press, 2<sup>nd</sup> ed., 1999, pp. 251-64, 34-40.

<sup>23</sup> See N. Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice*, Cambridge University Press, 1996, pp. 21-46. Of course, the question of how people’s political instincts and, as Rawls put it, “sense of justice” arise and change remain a mystery; individuals with similar experiences and backgrounds can develop very different moral compasses.

guidelines for practical implementation. Understood in this way, there is an important difference between generalising and theorise. Whereas generalising is inevitable and functions as a revisable way of coping with the bewildering barrage of facts and experiences, theorise is an effort to offer a complete, integrated account of what a practice can and should comprise. Instead, a rejection of the “view from nowhere” recommends that the pressing question of how people should live or think about life is not a methodological puzzle of abstract dimensions, but a substantive challenge of historical proportions.

Secondly, none of this means that, having rejected strong objectivity, I think that everything is subjective. This is a silly view. First, the reliance on a dichotomy between “objectivity” and “subjectivity” is cramping and problematic; it perpetuates the very problems that it is meant to resolve. Released from the debilitating effects of the objective/subjective framework, I suggest that there can be degrees of judgment and detachment that put some distance between an observer and their personal feelings or values. This is not the “view from nowhere”: it is part of, but not entirely hostage to a “somewhere”. Such a stance does not render all knowledge illusory, turn all truths into falsehoods, throw all order into chaos, or reveal all objectivity as sham. Rather than engage in a fruitless search for the “view from nowhere”, philosophers can accept that they are part of the local and historical experience of which they try to make sense. As one uncompromising critic noted, “there is no room for moral theory as something which is more philosophical and less committed than moral deliberation, and which is not simply an account of our customs and styles of justification, criticism, protest, revolt, conversion, and resolution”<sup>24</sup>. This is a noble, if more modest undertaking.

Thirdly, a demonstration that some philosophers’ conclusions are not as universal or absolute as they claim does mean that we can simply ignore their ideas. While it robs them of their claimed authority as objective truths, their proposals must still be judged as another contingent proposal for making sense of the world and its transformative possibilities. The loss of transcendental authority is no loss at all because there never were any such constraints in the first place. Rather than waste valuable energy in intellectual grandstanding, they should come down from their mountain tops and deal with more down-to-earth problems, such as unemployment, racism, poverty, and the like; they should stop looking for justificatory height in order to attain moral depth. If there is general agreement on the problems, then more time can be spent on their practical resolution than on pseudo-disputes about philosophical niceties.

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<sup>24</sup> A. Baier, *Postures of The Mind*, University of Minnesota Press, 1985, p. 232.

If there is disagreement, it will not help much to take time out and argue about abstract notions of truth and objectivity. Even if there was an agreement about such matters, it has no necessary consequences for the more crucial efforts to improve the quality of people's lives. Instead, it is more productive to unpack and identify what is shared and to work to persuade each other how best to go forward as part of a common commitment to improve society.

#### IV. JURISTIC EVASIONS

So what has all this got to do with the more mundane world of lawyers and judges? The answer is an emphatic “lots”. As I settled into the academic milieu, I began to gain a fuller appreciation of the lengths that colleagues were willing to go to defend and justify the traditional project of demonstrating that law and jurisprudence had a separate logic and independent domain that was properly fenced off from other disciplinary and ideological sites. This ambition was particularly acute the year that I arrived as full professor in Canada. The *Charter of Rights and Freedoms* was introduced in April 1982. It put the work of courts even more at the centre of the constitutional compact; they now had the authority to strike down legislation that offended the document's political substance, as interpreted by the judges themselves, of course. As well as empowering courts, these interventions also conferred enormous power on those academics who saw their role to be advisors and apologists for the courts as objective and neutral arbiters. The advent of the *Charter* was a boon to my own jurisprudential project. Somewhat perversely, as I now recognise, my academic career has much to be thankful for to the *Charter*: it provided more grist for the critical mill than anyone could ever wish for<sup>25</sup>. The worlds of lawyers and judges remained very much in thrall to the philosophical mind-set that sought to find and substantiate the “view from nowhere”.

Although contemporary lawyers are more pragmatic and sceptical in their sensibilities, they operate in and gain professional prestige from the influential sphere of the judicial function. In both cases, the approach taken to their tasks is heavily affected by legal philosophers. As much as any other sub-section of the philosophers' guild, jurists have drunk the Kool-Aid. Despite their protestations of modesty and practicality, they insist on maintaining that there is some “view from nowhere” or, at least, in more recent times, some “view that is not here, but on the road to nowhere”. What is found there is touted as being able to provide meaningful guidance through an available methodology that can inform their work, insulate

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<sup>25</sup> See A. Hutchinson, “The Politics of Constitutional Law: A Critical Approach”, in P. Oliver, P. Macklem, N. Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution*, Oxford University Press, 2017.

them from charges of improper political or moral partiality, and relieve them of the personal responsibility for decisions made and judgments rendered. The closer to nowhere that can be reached, the more dependable and sturdier the outcomes reached<sup>26</sup>.

Moreover, these theories about what judges are doing or are supposed to be doing influence what judges do or think that they are doing. However, the link between theories of adjudication and adjudication itself is contentious and problematic; there seems a constant toing-and-froing between claims about whether theories of adjudication are descriptive, prescriptive or a baffling mix of both. However, although somewhat extravagant, Keynes's trenchant observations (about economists) are not far from the point when it comes to the relation between jurists and judges: "madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back"<sup>27</sup>. Of course, many judges deny such a cosy or influential dependency, but the connection is by no means imaginary. Less philosophical and more pragmatic, judges are fellow travellers, albeit in the rear, with their jurisprudential colleagues on the road to "nowhere".

Judges and lawyers translate the search for the "view from nowhere" into the position that law, not judicial values or politics, is the source and underwriter of their judicial opinions. In this rendering, "nowhere" becomes not-where-they-are. Law is viewed as a relatively independent body of norms and argumentative techniques that can be accessed and relied upon to guide and validate decisions. In the same way that philosophers seek to place some methodological distance between their own views and those that have universal or impersonal warrants, so do lawyers and judges. When lawyers do law, they think of themselves as engaged in a process that is objective and rational; they do not stand on their own two feet within an extant socio-political situation, but claim to be transported to some terrain that is distinctively separate from themselves and that context. However, on closer inspection, it turns out that, like philosophers, they are caught within the same circular process – where they end up is the same place or very close to where they started. Like Rudolph Stammler and his neo-Kantian brethren, judges and jurists travel long distances, but arrive safely back home where they started.

Of course, as philosophers have moderated some of their more extravagant claims since Plato's time, so lawyers and judges have toned down the idea that law is entirely its own universe and has its own special rationality à la Coke or Blackstone. Instead, they settle for a

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<sup>26</sup> The most celebrated example of this tradition, albeit in a low theoretical key is P. Hogg, *Constitutional Law of Canada*, Carswell, 5<sup>th</sup> ed., 2010.

<sup>27</sup> J.M. Keynes, *The General Theory of Employment, Interest And Money*, Palgrave Macmillan, 1936, p. 383.

more modest stance that concedes that there is some seepage from politics into law. The most common position is that, in so-called hard cases, judges will inevitably have to stray into the ideological fray and allow political values to inform their legal analysis. However, the traditional stance has been that such a resort to ideology is and should not be either personal or partisan. Judges are not left entirely to their own devices and should not simply legislate their own political preferences. There are a variety of interpretive theories on hand – originalism, literalism, purposivism, dialogism, etc. -- that recommend that judges can safely bridge the gap between law and ideology so that the law is applied and developed according to relatively neutral and objective criteria. The standard move is to concede that “law is ... deeply and thoroughly political ..., but not a matter of personal and partisan politics”<sup>28</sup>.

The seductive appeal of this approach is that, by claiming that a favoured interpretive way of proceeding has a secure theoretical foundation, then the outcomes reached will be seen to trump all competing judicial performances that lack such a secure theoretical base – law (or, at least, legal theory) will be seen to determine and vouchsafe decisions, not ideology. “Theory” (or, at least, a successful one) is seen as something that is unsullied by partisan politics; it is thought to gain its political traction from the fact that it offers an accurate, detached and reliable account of a particular phenomenon that can claim some institutional authority because it is not compromised by ideological influences. Despite the popularity of this jurisprudential technique, it is by no means established or clear that theory has such another worldly authority in providing an epistemological warrant for judicial decision-making. Judges rarely, if ever, reach decisions that do not square generally with their sense of justice. The epistemological dimension (i.e., what is the correct methodology to access the true meaning of law?) is intertwined with the ideological dimension (i.e., what political interests and values are promoted by a particular interpretive methodology?). Two prominent and influential examples will suffice to make this point – the juristic work of Ronald Dworkin and the judicial craftsmanship of Brian Dickson, both leaders in their respective fields.

The prolific Dworkin developed and defended a “left liberal” theory of justice that placed an egalitarian account of freedom as its core. He presented this not as some personal preference, but as the result of a rigorous process of deduction from first principles that had objective and enduring merit. When it came to law, he developed a critique of judicial decisions, particularly in the American constitutional tradition, in line with that theory of justice. However

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<sup>28</sup> R. Dworkin, *A Matter of Principle*, Oxford University Press, 1985, p. 146.

– and this is the kicker – he did not propose that some decisions were good and some decisions were bad because of their fit with his account of justice, but because the Constitution itself demanded such outcomes. In effect, constitutional law and adjudication were not simply best read in terms of his account of liberal equality, but were tantamount to what the constitution mandated if understood rationally and objectively: judges’ decisions that took a different approach were not simply bad law, but invalid law<sup>29</sup>. Dworkin’s constitution was not only his preferred constitution, but was *the* constitution. While many might like (or dislike) Dworkin’s proposed reading of the constitution, it defies any reasonable belief that constitutional law would perfectly align with one theorist’s vision of justice as a matter of law. In a manner of speaking, for Dworkin, his “view from nowhere” was squarely located in his own study.

Chief Justice Brian Dickson took a similar, if more modest approach to his judicial task. A middle-of-road liberal who moved further away from the law’s conservative side over the decades, the Chief Justice offered and defended an approach to constitutional law that eschewed a legalistic stance. In particular, he relied upon a purposive and generous reading of the Canadian Charter that grounded a large and liberal understanding of individual rights. Whether he was dealing with the Rule of Law or social improvements generally, he turned (or “twisted”, depending on your political leanings) the law to advance his own liberal sense of justice. While it would be mistaken to pretend that he had a full-blown theory of justice in the style of a Dworkin or Rawls, Dickson was considered a great judge in many people’s eyes not in spite of his liberal values and normative commitments, but because of them. Wherever his decisions went or the law took him, he always seemed to end up back home in the same place with “a large and liberal interpretation” of the law<sup>30</sup>. For him, law was to be put in service to an account of both law and justice that had a decidedly Dicksonian slant to it.

While there is no doubt that politics and ideology are major drivers of judicial decisions, as Chief Justice Dickson’s career reveals, it is mistaken to imagine that a judge’s politics map directly onto that of a simple political ideology, liberal or conservative, let alone that of a contemporary political party. Both abstract political principle and partisan political posturing are in the judicial mix; they inform judges’ thinking in important and indistinct ways. Moreover, these ideological predispositions do not easily or straightforwardly cash-out in some of the complex issues that present themselves for decision in courts -- civil procedure, state rights,

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<sup>29</sup> See, for example, R. Dworkin, *Freedom’s Law*, Harvard University Press, 1996. For a more philosophical defence of his theory of law and justice, See *Justice For Hedgehogs*, Harvard University Press, 2011.

<sup>30</sup> R. Sharpe, K. Roach, *B. Dickson: A Judge’s Journey*, Toronto University Press, 2003.

cabinet authority, administrative tribunals, and even free speech. A person's ideology is not a template for resolving difficult moral or political issues, but a framework or an orientation for thinking about and through them. Further, that ideology can shift and change over time; judges are influenced and affected by the work they do as much as the work they do is influenced and affected by who they are.

## V. MIND THE GAP

In perhaps too dogmatic a fashion, I saw politics in every judgment and at every turn. As befitted my approach to most things, I was headstrong and unyielding in the claim that "law is politics". However, the more that I became immersed in legal doctrine, the more that I began to appreciate that vast stretches of law were not necessarily riven with complete indeterminacy and in the service of bad politics. I turned down the rhetorical heat a little in order to increase the analytical light; I recognised that the critical beam worked best with a dimmer switch, not only an on/off switch. This resulted in what I now saw as a strengthening of my critical stance, not a dilution of it. So I moved off the idea that jurists and/or judges were involved in a grand and devious Machiavellian scheme to pull the wool over people's eyes (although I do still maintain that some get perilously close to doing exactly that). Like Stammler in legal philosophy, most are committed to making a serious effort to do their job, be it juristic or judicial, in good faith<sup>31</sup>. But, as is well-known, the road to hell is paved with good intentions.

Despite their putative good ambitions, jurists and judges cannot pull off the feat of demonstrating that the answers that they give to concrete and specific problems are dictated or derived inexorably from either first philosophical principles or the ruling legal norms. Looked at systemically, it is apparent that there are a range of legal principles and rules that push and pull in different directions: no one principle or rule can be isolated or fixed as being the only governing rule without more. It is not that they are necessarily indeterminate in character, but that all legal norms can become indeterminate in contingent contexts and circumstances. Moreover, there is the unavoidable challenge of "minding the gap". Despite their best efforts, judges and jurists are unable to trace a single or authoritative path from general principle to specific applications – there is always a definite gap between practical achievement and

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<sup>31</sup> See the development from A. Hutchinson, *Dwelling on The Threshold: Critical Essays On Modern Legal Thought*, Carswell, 1988 to *A Walk In The Park: Toward An Informal Account Of Legal Interpretation*, Cambridge University Press, 2016.

theoretical ambition. The space in which politics takes hold can be narrowed down, but never done away with.

Although I am not a particular admirer of Charles Fried's work (because he is too much of a political conservative and doctrinal apologist for my liking), he does offer a nice way of capturing the predicament and reality of judging. In a bastardised form that suits my purposes, he states that:

“The picture I have, then, is of [law] proposing an elaborate structure of arguments and considerations which descend from on high but stop some twenty feet above the ground. It is the peculiar task of [the judge] to complete this structure of ideals and values, to bring it down to earth; to complete it so that it is seated firmly and concretely... The lofty [legal] edifice does not determine what the last twenty feet are, yet if the legal foundation is to support the whole, then ideals and values must constrain, limit, inform, and inspire the foundation.”<sup>32</sup>

This seems about right. Legal principles, rules and standards can only get you so far; they must be supplemented by the judge's “ideals and values” to bridge that gap between general norms and specific circumstances. This does not mean that judges act in an arbitrary or irrational fashion, only that these “ideals and values” cannot be explained or justified by resort to any detached and objective methodology. This, of course, is what accounts for the indeterminate character of law and adjudication: the personal equation can never be entirely eliminated in favour of some self-executing legal logic or determinate rationality. In this way of thinking about law and adjudication, law and ideology are not so much separate and competing fields that pull in competing and occasionally contradictory directions. Rather, each infiltrates and informs the other to the extent that it is no longer sensible or convincing to talk about law and ideology or their determinate and structured interaction. There is only law-and-ideology as the basis for and understanding of judicial decision-making.

When I read many legal judgments, I very often have the familiar and frustrating experience that I am reading a faux-thriller or potboiler. There is often an elaborate account of the different legal norms in play and how they have been utilized by the rival lawyers to advance their own position. While there may be hints and intimations of where the judgment is heading, the plot frequently thickens and develops into something of a cliffhanger as to what the result of applying the law will be. Indeed, on occasion, one might be kept in suspense until the very last paragraph of the judgment. This way of proceeding leaves me with the distinct impression

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<sup>32</sup> C. Fried, “The Artificial Reason of the Law or: What Lawyers Know”, *Texas Law Review*, 1981, vol. 60, p. 57. I substitute ‘law’ for philosophy’. Also Fried ends his analogy with the line that “the law really is an independent, distinct part of the structure of value.” Obviously, that is not my sense of things.

that the outcome could have gone either way and that there is no necessary or persuasive connection between the legal arguments offered and the result arrived at. This is all by way of saying that the gap between doctrine and decision cannot be leapt over or filled by one and only one telling argument; there are always too many options for judges to choose from and convincingly explain why the law as opposed to their version of it has carried the day.

Examples of this abound. One fertile doctrinal area is the Supreme Court's recent efforts to explain and apply when there is and is not a duty of care in operation. The three-part test – is the relationship already recognised? is there foreseeability and proximity? and are there residual and limiting policy considerations? – is easily laid out in general terms. However, efforts to explicate these notions further and to apply them to particular facts are baffling. For instance, in the leading case of *Cooper v. Hobart*, Chief Justice McLachlin's attempts to flesh out the crucial meaning of "proximity" create even more confusion in the name of clarification<sup>33</sup>. This is further muddied by reference to the different kinds of substantive policies that are to be taken into account at different stages in the overall analysis. At the end of all this, the application of these guidelines to the particular facts at hand is surprising and counter-intuitive, to say the least. It is not that I am suggesting that the Court got it wrong as a matter of law; that would be to misunderstand my whole line of critique. Instead, it is that there is no way that the Court can get it right in the sense of resting a decision on one distinct and necessary legal argument that supercedes and trumps all others. That is because there is none.

Another area is administrative law. In a very recent decision, the judges of the Supreme Court managed to capture neatly the inescapable gap between adherence to general principles and their specific application. The question at issue was the vexed one of the appropriate standard of review to be applied to an arbitrator's decision – correctness or reasonableness<sup>34</sup>. All the judges agreed on the general doctrinal structure to be worked with and within, but they disagreed completely over the standard to be applied and, even where they agreed, they disagreed on how one standard or another should be applied to the circumstances at hand. In terms of both principle and application, therefore, the judges were all over the adjudicative map. Of course, if this is the situation among sitting Supreme Court judges, what hope is there in identifying clearly and applying consistently the law for other judges, lawyers, arbitrators educators and law students, let alone ordinary citizens?

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<sup>33</sup> *Cooper v. Hobart*, [2001] 3 SCR 537. Another example exhibiting the same vertiginous and inconclusive sense of analysis is *Childs v. Desormeaux*, [2006] 1 SCR 643.

<sup>34</sup> See *Dunsmuir v. New Brunswick*, [2008] SCC 9.

A majority held that the reasonableness standard “necessarily” applied in the circumstances and that the arbitrator’s decision was reasonable<sup>35</sup>. In a judgment that concurred in the result, Justices Brown and Rowe insisted that it ought to be the correctness standard that was applied to the arbitrator’s jurisdiction and that he had erred, on this threshold matter. In regard to other matters in the case, they maintained that a reasonableness standard was appropriate and that he did act reasonably. Finally, in a strong dissent, Justice Cote insisted that the correctness standard also applied. However, she concluded the arbitrator was not only incorrect, but also unreasonable. In short, in seeking to confront the gap between doctrine and decision, the judges were at sixes and sevens. As such, rather than allay concerns about the difficulty of closing the gap between theory and practice, they combined to highlight its unavoidable and persistent character for those seeking to understand and follow the law.

So, in light of such characteristic performances, I remain confident that, like Stammler and his philosophical ilk, judges are unable to move seamlessly between theory and practice; they are destined to fall short in their efforts to resolve the dilemma of abstract emptiness and concrete application. Of course, the need to keep trying to achieve this impossible task is mandated by the precarious position in which judges have placed themselves. It may be one thing for political theorists or jurisprudential critics to offer a personalized view of justice, but it is perceived to be an entirely different thing for judges to do so. The judiciary’s felt need for legitimacy is made to hinge on the very claim that, in a non-trivial way, it is the law that directs and controls their decisions. In a democracy, it is supposed to be about the Rule of Law, not the Rule of Five. Importantly, they insist that the law does not change in line with the individuals who occupy the bench on any particular day. If there is to be change, it must be generated and validated by something other than the changing judicial personnel and their different “ideals and values”. For good and bad, the law is what the judges say it is. And what they say it is depends on who the judges that are speaking are – the law, it is them.

### CONCLUSION

Of course, I both have and have not ended up in the same place that I began. I have stayed generally true to my opening gambit that “in any work of a jurisprudential nature, ... any attempt to take up an objective and neutral standpoint can never be entirely successful”. However, after much “exploration”, while I have “arrived where I started”, I believe that I have developed and modified that critical stance to such an extent that I might now “know the place

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<sup>35</sup> *Quebec (Attorney General) v. Guerin*, [2017] SCC 42 at §. 31.

for the first time”. And one of the things that I am certain about is that there is no “view from nowhere” or any place that even vaguely approximates to it; any postulated “nowhere” is a very much part of the view from somewhere. To paraphrase one astute scientist, the footprint that we find on the future shores of the unknown will be our own<sup>36</sup>. Although some will consider this a cause for disappointment and even anguish, I embrace this idea as being something to be cherished. In particular, it means that judges and jurists can no longer abdicate personal responsibility for what they recommend or propose as a just path to follow. It is (or, at least, should be) no longer acceptable for them to claim that “theory” or the “law” made them do it. As is fitting in a society that claims to be democratic in spirit and substance, this leads to more, not less accountability and more, not less opportunity to craft our own collective fate.

I do not offer these fragments and insights about “standpoint” as compromising some integrated, let alone harmonious whole that can be passed off as a grand theory of law or justice. This would be a stark contradiction on my own terms. Indeed, unlike many jurists and judges, I make no apology for not trying to conceal or validate my “view from somewhere” behind some grand façade of theorise or methodology. Too many jurists and judges are a little like the Wizard of Oz; they project and maintain a fearsome image of philosophical power and legitimacy. But we need to abandon that act and become more like Dorothy’s undaunted dog, Toto. When he pulled back the heavy curtain that hid the Wizard, there was revealed an ordinary middle-aged humbug of a man who had no special powers or insights; his dubious authority depended on others’ naïve suspension of critical disbelief. I glimpsed that fact back in 1978 when I completed my thesis. Today, I realise that there was much more to that critical position than I appreciated then. I presume to suggest that I have managed to fill out and justify that possibility of “much more”.

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<sup>36</sup> A. Eddington, *Space, Time and Gravitation: An Outline of The General Relativity Theory*, Cambridge University Press, 1920, p. 220.