Chapter 16

Some elusive -isms

16. 1 Introduction

> The use of the suffix –ist in English is so wide and various that any full discussion of it is not here possible. But there are (a) some words whose exact form is still uncertain and should be fixed, and there are (b) others that are both established and badly formed, so that there is danger, unless their faultiness is pointed out, of their being used as precedents for new formations. (Fowler, *Modern English Usage* (2nd edn, 1968) at p.309)

The suffix '-ist' is typically used to locate a thinker in some school, movement, trend or tradition.[1] The suffix '-ism' is similarly used to designate a trend or tendency or movement in respect of ideas. 'Ism' may also apply to a situation: for example, belief pluralism refers to the historically contingent fact that we live in a world characterised by diversity of beliefs that are probably irreconcilable. In jurisprudence we need broad classifications of thinkers and ideas, but the practice of 'ismatisation' is fraught with pitfalls. The thoughts of thinkers develop over time and ideas are not easy to pin down. Sometimes articulating very specific propositions or tenets may be helpful (as in the formulation of the separation and social source theses for 'positivism')[2], but sometimes this may be over-precise, for a group of thinkers or theories may have some broad affinities without necessarily being committed to specific tenets or propositions. Categorising an individual may suggest that he or she has only one interesting idea or subscribes to some dogma or proposition without any reservations or refinements.[3] Isms are often used polemically – to set up a target to attack and

[1] *The Oxford English Dictionary* distinguishes four main uses of the suffix '-ist'. The third is: '3. Designating an adherent or professor of some creed, doctrine, system or art, which is usually denominated by a cognate -ism'.

[2] See Chapter 1.7.

[3] Self-categorisation may sometimes be helpful. For example, Brian Tamanaha's self-designation as a legal positivist (following Hart), a pragmatist (Dewey and Putnam rather than Rorty), an interactionist (Mead, Goffman, and Geertz), an interpretivist (Weber, Mead, and Schutz), and a conventionalist (again following Hart). (Tamanaha (1997) at pp. 7–10). This, of course, leaves scope for different interpretations. I work within a recognisable Anglo-American tradition in which my main teachers have been, in chronological order three mainstream jurists: Herbert Hart, Karl Llewellyn, and Jeremy Bentham. I am not an uncritical disciple of any of them and my

this too often involves choosing extreme or simplistic or otherwise vulnerable versions or descending into caricature.[4]

Ismatising is useful, sometimes necessary, but dangerous. We have to be aware of ambiguity, false precision, indeterminate attribution, caricature, and false polemics. In this book I have tried to focus on individual thinkers and texts rather than 'schools' or 'movements' or creeds to avoid some of these pitfalls.[5] However, in earlier chapters we have encountered a number of '-isms': loose and precise meanings of 'positivism'; the ambiguity and vagueness of 'universalism', 'relativism', 'post-modernism', 'liberal legalism' and 'post-structuralism'; varieties of scepticism, utilitarianism and so on. This chapter considers possible interpretations of some further isms: legal and normative pluralism, because from a global perspective this is a crucial feature of the broad landscape of law; 'realism' and 'Realism' because these are often confused and misrepresented and are important ideas in the history of the development of empirical legal studies; 'instrumentalism', which is a prime target of attack by some significant figures in general jurisprudence, especially Tamanaha and Griffiths; and concerns underlying suspicion of 'scientism' that may prove to be obstacles to the development of an empirical science of law.

16.2 Normative and legal pluralism

She is as in a field a silken tent
At midday, when a sunny summer breeze
Has dried the dew and all its ropes relent,
So that in guys it gently sways at ease.
And its supporting central cedar pole
That is its pinnacle to heavenward,
And signifies the sureness of the soul,
Seems to owe naught to any single cord,

views have also been influenced by legal anthropology, my African background, and some contemporary intellectual trends. Scratch me and you will find a common lawyer, a weak positivist (closer to Neil MacCormick than Herbert Hart), a modified consequentialist (again more modified than Hart), an innocent realist in the vein of Susan Haack and Charles Sanders Peirce and a fairly orthodox, liberal intellectual in the tradition of John Stuart Mill, mildly sceptical, but I hope reasonably progressive. I am sympathetic to imaginative post-modernism in the style of Italo Calvino, but reject anti-rationalist post-modernism and strong versions of cultural, epistemological and ethical relativism. (See especially *GLT* 170–3). I am a legal realist in that I believe that understanding law involves studying it in context – social, political, historical, and so on – and being concerned both with legal doctrine and the law in action, with what happens as well as what is meant to happen. This catalogue of my biases and background is broadly relevant to interpreting what I say, but should not facilitate pigeon-holing me under a particular '-ism'.

[4] Herbert Hart famously complained that he found that 'positivism' was often used as a term of abuse (see Chapter 1, n. 102), but he himself engaged in false polemics by attributing 'the claim that talk of rules is a myth' to Llewellyn and other Realists (Hart (1961) Ch. VII.2). Hart demolished the claim, but failed to identify anyone who satisfied his definition of a 'rule-sceptic'.

[5] My approach to reading and interpreting juristic texts is strongly influenced by R.G. Collingwood (see *GJB* Chapter 2).

But strictly held by none, is loosely bound
By countless silken ties of love and thought
To everything on earth the compass round.
And only by one's going slightly taut
In the capriciousness of summer air
Is of the slightest bondage made aware.

(Robert Frost, 'The Silken Tent')

'… it seems to me that the great mass of confusion and distress must arise from these less evident divergencies – the moral law, the civil, military, common laws, the code of honour, custom, the rules of practical life, of amorous conversation, gallantry, to say nothing of Christianity, for those that practise it. All sometimes, indeed generally, at variance; none ever in an entirely harmonious relation to the rest; and a man is perpetually required to choose one rather than another, perhaps (in his particular case) its contrary. It is as though our strings were each tuned according to a completely separate system – it is as though the poor ass were surrounded by four and twenty mangers.'

'You are an anti-nomian,' said Jack.

'I am a pragmatist', said Stephen. Patrick O'Brian, *Master and Commander* (1971) 319

These quotations illuminate the nature of normative and legal pluralism. Robert Frost's poem presents one image of the pervasiveness of rules in social life. In this view rules both support and constrain unobtrusively, are usually taken for granted, are not easily individuated and leave some leeway for individual freedom and aspiration. Frost's 'countless silken ties of love and thought' is more benign than Weber's 'iron cage' of bureaucratic rationalism. Patrick O'Brian illustrates the bewildering variety of co-existing normative orders that individuals encounter in daily life and the dilemmas and opportunities they create. Like most writings on legal pluralism, O'Brian emphasises divergence and conflict rather than convergence and synergy.

Normative pluralism is a part of our lived experience. Every day each of us encounters hundreds of rules of many different kinds that support and constrain our thought and behaviour.[6] Most of the time we take them for granted, are guided by and conform to them unthinkingly and 'only by one's going slightly taut' do we direct our attention to it. Then we may be puzzled, bewildered, frustrated, resentful, angry, enlightened, or delighted. Mostly we navigate them without undue trouble, but if we pause to think how we cope, we may suffer the predicament of the centipede who became paralysed when asked how she co-ordinated her legs.

A good deal of confusion has surrounded discussions of legal pluralism in jurisprudence. I have argued elsewhere that legal pluralism is usefully conceived

[6] I sometimes ask my students to record and list all of the rules they encounter in a 48-hour period and then to classify them by source, subject-matter, function, obligatoriness, clarity and so on. See further *GLT* at 83, *HTDTWR* at 141–3.

as a species of normative pluralism, that it exists as a social fact, that from a global perspective legal pluralism is an important phenomenon and that some of the puzzlements and controversies are either unnecessary or relate to wider issues, about epistemology or the concept of law, or the nature of rules and rule-systems.[7] However, some aspects of normative and legal pluralism are in need of further theoretical development.

First, a fairly straightforward semantic point. 'Plural' can mean diverse or varied. But when '-ism' is added there is often confusion as to whether 'pluralism' refers to a social phenomenon or to a perspective or way of thinking about the phenomenon. For example, 'belief pluralism' can refer to the point that at this stage in history there exists, in fact, a diversity of belief systems or values that people hold. But 'pluralism' is sometimes used to refer to a philosophical view or position that recognises many different sets or systems of beliefs or values as equally correct or valid. This can be interpreted as a form of relativism. Similarly, if one interprets 'multi-culturalism' to be a form of 'pluralism', this may refer to the social fact that a multiplicity of cultures co-exist in a particular country or society; or it can refer to a view or strategy, contrasted with assimilation, that favours retaining the identity and distinctiveness of different cultures as a matter of policy. Again, 'pluralism' in an epistemological sense, contrasted with monism or reductionism, sometimes refers to the view that there are many ways of interpreting the world – multiple perspectives on multiple realities – and these cannot be reduced to a single set of laws or uniformities.[8]

A second terminological point is that it is important to distinguish between (a) 'state legal pluralism' (recognition *within* a state legal system of different bodies of law, such as religious or customary law, applying to members of particular groups for given purposes);[9] (b) 'legal polycentricity' (the eclectic use of sources in different sectors of a state legal system);[10] and (c) legal pluralism as the co-existence of discrete or semi-autonomous legal orders in the same time-space context. Here we are concerned with the last category.

Third, it is hard to deny normative pluralism as a fact of life, but those who maintain that the co-existence of multiple legal orders in the same time-space context is a social fact are sometimes labelled 'legal pluralists'. They are

[7] *GLT* 82–88, 224–33

[8] On the distinction between multiple perspectives and multiple realities from the viewpoint of innocent realism and my position on post-modernism in relation to Calvino and Haack, see *GLT* 200–20 (reprinted *GJB* Chapter 9)

[9] Hooker (1975). Benda-Beckmann (2002 at p. 64) raises the question whether different interpretations of the same rule or system within a legal system (or, one might add, different schools of jurists within a legal tradition, as in Islam) are examples of legal pluralism. This would be an extension of ordinary juristic usage about state legal pluralism, but one can imagine some borderline cases that illustrate the elusiveness of this category.

[10] Important studies, pioneered by Petersen and Zahle (eds.) (1995) in Scandinavia, explore the variable use of sources of law in different branches of administration opening up possibilities of conflict or incompatibility between the branches of a single state (criticised by Woodman (1998)). Cf. the 'myth of the unitary state'.

sometimes treated as if they represent a minority view, though one that is becoming increasingly fashionable.[11] Two lots of concerns seem to muddy the waters: one is broadly epistemological, the other relates to hostility to 'state centrism'.

Some commentators interpret the term 'legal pluralism' to refer to a kind of perspective, akin to post-modernism or relativism.[12] These epistemological issues are complex and important, but they unnecessarily complicate the idea of legal pluralism. Gunther Teubner has elegantly suggested that legal pluralism fits the post-modern mood:

> Postmodern jurists love legal pluralism…The crucial question of how to reconstruct the postmodern architecture, the connections between the social and legal fields finds a highly vague answer: interpenetrating, intertwined, integral, superposed, mutually constitutive, dialectical…. we are left with ambiguity and confusion. After all, this is the very charm of postmodernism.[13]

However, one can accept the idea of legal pluralism as a social fact without being committed to any strong form of epistemological relativism.[14]

If one treats legal pluralism as a species of normative pluralism that naturally raises question about how to distinguish legal from other normative orders – what are the *differentiae* or criteria of the identification of law? – the topic explored at length in Chapter 4. This problem of 'the definitional stop' has re-surfaced in the context of debates about legal pluralism.[15] But this is not a specific puzzle about legal pluralism as such, but is part of the perennial topic of how best to conceptualise law.

If one adopts a broad conception of law, but leaves resolution of borderline cases to particular contexts, this has implications for one's conception of legal pluralism. The broader one's conception of law, the wider the range of situations characterised as examples of legal pluralism. But on its own this is not very interesting. What is more interesting is the nature of the relationships and interactions between co-existing normative orders, some of which can be characterised as legal orders. For example, in diffusion studies it is widely accepted that law is almost never imported to fill a vacuum;[16] it will almost certainly interact with pre-existing normative orders – whether these particular orders are characterised as legal, unofficial, traditional, or non-legal will normally be of secondary importance.[17]

Another problem, which we have already encountered, is what counts as a normative or legal order? (the problem of individuation).[18] Normative pluralism

[11] A recent example is Galligan (2007) Chapters 9 and 10.
[12] An interesting example is Melissaris (2004); see also Santos (2005) p. 461.
[13] Teubner (1992) at pp. 1443–4, discussed at *GLT* 87–8. [14] See n. 3 above.
[15] This is a particular concern of Tamanaha (1993) (2001), discussed in Twining (2007) pp. 42–6.
[16] On 'the empty vessels' (or 'blank slate') fallacy' see Chapter 9.4(d) above.
[17] Pistor and Wellons (1999) also give an excellent account of the interactions between 'official' and 'unofficial' law without being unduly concerned about the distinction.
[18] See Chapter 4, n. 137 above; Chapter 15.4

typically treats 'orders' or 'systems' as the basic unit, although sometimes we are concerned with the interaction of smaller units such as individual concepts, devices, or laws. As we have seen, ideas such as order, system, or code are conceptual constructs that assist thinking. It is often useful to proceed *as if* a legal order or system or code is a discrete unit, even though it has vague or contested boundaries. Concepts such as society, social field, country are useful even if, or even because, they are vague. Bright line distinctions are often useful, even though they are artificial or arbitrary. But sharp distinctions between formal/informal sectors, state/non-state law, hard/soft law can be misleading. For example, they may not reflect the perspectives of some or any significant actors. Lauren Benton and others have shown that it is a mistake to assume that participants in the informal sector of an economy do not observe or use state law.[19]

If one pares away broader issues that belong to the general theory of norms, or problems of conceptualising law, or epistemological issues about post-modernism and relativism, or ideological issues about 'the state', it is relatively straightforward to conceive of legal pluralism as a social fact. Its scope depends in large part on one's conception of law. There are, however, several further problems about understanding legal pluralism. Three deserve special mention here. First, internal questions about how a particular legal order deals with the co-existence of other legal and normative orders. (The monist's question) Second, the relative importance of different legal orders within a given context. Third, how the relationships and interactions between co-existing legal orders can best be characterised (interlegality).

The first set of questions is familiar to lawyers in respect of the kind of issues that are raised in the subject of conflict of laws (including private international law). When and on what basis, should a judge or other official recognise and apply a rule or doctrine belonging to another legal system? Conflicts of laws doctrine governing such issues is part of domestic law, but its adequacy in today's world is regularly questioned. In the present context, the range of issues is broader. For example, a judge in England may have to deal not only with issues of recognition of foreign state law (e.g. the validity of a foreign divorce), but also with the kinds of issues raised by a cultural defence or about the relevance of cultural norms (whether legal or not) in sentencing or other areas involving discretion. Recent accounts of the place of Muslims in British society show a gradual, but distinct, process of sensitisation of the judiciary to the values and norms of minority communities.[20] Conversely, there are highly developed doctrines within Islam about the nature and extent of duties owed to a secular state, including the state of a country in which Muslims are in a minority.[21]

[19] Benton (1994) (arguing that structural theories of legal pluralism can produce misleading dichotomies). Criticising De Soto (1989), she concludes: 'The boundary between the two legal spheres is very difficult, if not impossible, to locate, and it is clear that the participants themselves operate at times as if the boundary did not exist' (at p. 229).

[20] See, for example, publications of The Judicial Studies Board (1999–), (2007).

[21] An-Na'im (2008).

A further set of questions has been discussed in relation to 'state centralism'. Under this rubric some complex ideological issues have been raised concerning the role of the state, its claims to a monopoly of legitimate force and claims to independence or autonomy by or on behalf of non-state legal orders.[22] Again some of these are general issues of political theory which have been debated in the context of legal pluralism, rather than questions about legal pluralism as such.

Historically, one of the stimuli to interest in legal pluralism was a reaction against 'state centrism' – the tendency for legal scholars to focus more or less exclusively on state law or to treat state law as the paradigmatic case of the legal.[23] In a thoughtful analysis of the issues, Denis Galligan identifies three underlying concerns: exclusive focus on state law, sometimes accompanied by a denial of legal status to any non-state normative orders; an assumption 'that state law is the best way of obtaining social goods, the converse being that informal orders are inferior'; the idea that all informal systems are subordinate to state law and only operate within boundaries set by it.[24] Galligan deals in a quite balanced way with these concerns: he recognises that there are forms of non-state law that co-exist and intersect with state legal orders. Whilst he concludes that the modern democratic state provides the best hope for achieving some social goods, including human rights, the Rule of Law and democracy, he acknowledges that many claims made for the state's social role are extravagant, that it can be ineffective or worse and that non-state normative orders, whether recognised as legal or not, often have social utility. But he suggests that we are a long way from a general theory about the advantages and disadvantages of different kinds of law for attaining social goods. In respect of the subordination of non-state law, he recognises that there can be semi-independence or semi-autonomy, but asserts strongly: 'It is impossible to accept that families, professional associations, and sporting clubs, among others, are in a strong sense autonomous of state law either legally or socially…independence and autonomy occur *within* the jurisdiction of state law and in relationship to it.'[25] It follows from this that legal pluralists have to accept two fairly simple statements:

> (a) in the modern state, legal orders tend to claim authority over all activities and associations within their jurisdiction (with occasional exceptions); while (b) at the same time affording substantial freedom to associations to regulate their own activities by their own social rules.[26]

[22] See Galligan (2007). Chapter 10 forcefully criticises claims to strong autonomy by non-state orders, but allows much weaker claims for semi-autonomy or semi-independence. One must, of course, distinguish claims by states and officials to superiority and monopoly of legitimate force from the standpoints of those subject to multiple co-existing orders who do not necessarily accord the state highest priority (e.g. a member of a religious minority who places religious precepts above state laws).

[23] Griffiths (1986). [24] Galligan (2007) at p. 175.

[25] *Ibid*., pp. 176–7. [26] *Ibid*., at p. 178

This conclusion can be criticised as state-centric in that it focuses on the *claims* made by modern states, without regard to the points of view of those who accept other non-state normative orders. Challenges to such claims range from total rejection of a state's claim to legitimacy to modified, sometimes complex, recognition of state authority, to general acceptance, with a few exceptions (e.g. the pacifist stance of Quakers). Galligan is focusing on the modern state and his account raises a host of empirical questions about the extent to which a given state's claims to ultimate authority are accepted by all groups in a society and the extent to which claims are in fact made for superiority or primacy over state law (e.g. by adherents to a particular religion).

Galligan goes further by claiming that in modern societies state law is *dominant, ascendant, superior, and more important*[27] than all other forms and modern legal systems are indispensable in modern societies because they effectively add 'security to relations between persons, facilitate the provision of services and welfare, enable the regulation of one set of activities to achieve another set of social goods, and control the imposition of punishment'.[28]

This raises a range of normative and empirical issues, some of which are relevant to legal pluralism (the relations and interactions between co-existing legal orders) and some that concern much broader questions that are best kept separate. Some are complex ideological issues concerning the role of the state, its claims to a monopoly of legitimate force and claims to independence or autonomy by, or on behalf of, non-state legal orders.[29] These are general issues of political theory, which have sometimes been debated in the context of legal pluralism rather than questions about legal pluralism as such.

The idea that in modern societies state law is the most important form of law has a strong intuitive appeal. But what are the criteria of importance? And, are such judgements weakened if one adopts a global perspective? Let us set aside normative claims to authoritative superiority or supremacy, to ideological superiority, or to technical superiority of 'modern law' – all of which can be considered independently of legal pluralism. That leaves a number of empirical and interpretive claims, including the following:

(a) *The actual power, influence and effectiveness of state legal regimes relative to other forms of social ordering.*[30] That is an elusive kind of enquiry which is likely to produce variable results in different parts of the world. Studies of legal pluralism may assist in identifying potential competitors and may warn against treating non-state legal orders and other normative orders as discrete units, but such empirical and interpretive enquiries belong to

[27] *Ibid*., at pp. 158–61 *et passim*. [28] *Ibid*., at p. 161 [29] See above n. 22

[30] In criticising the concept of legal pluralism Starr and Collier (1989) at p. 9 emphasise differences of power. They suggest that words like 'pluralism' and 'dual' 'carry connotations of equality that misrepresent the asymmetrical power relations that inhere in the coexistence of multiple legal orders'. This does not seem to fit much of the literature on legal pluralism that is generally sensitive to disparities of power.

political science and sociology and stretch way beyond the sphere of legal pluralism.

(b) *The importance of a given legal or normative order for those subject to it*, judged in terms of behaviour and attitudes, could be a matter for empirical enquiries directly relevant to legal pluralism. For example, when faced with marrying according to a civil or customary religious form, or of using one rather than another kind of dispute process, or using Islamic forms of financing a small business or the purchase of a house, studies of what people in fact choose or get pressured into are recognisable empirical enquiries done under the label of legal pluralism.[31]

(c) *The significance for lawyers of non-state law* is another potential line of enquiry. In many Western countries and beyond it may be fair to say that 'lawyers don't practice non-state law', if that means that private practitioners licensed to practice by the state by and large focus on municipal (state) law. That may be changing at the margins, but insofar as that statement is true, it has considerable significance for legal education and training. For example, to what extent do local professional law examinations include any reference to non-state law? However, from a global perspective, the picture is more complex than that. Apart from large questions about the percentage of any given population that has access to legal services, and questions about who besides licensed private practitioners provide such services, there are important empirical questions about knowledge, opinion and expertise about non-state law. In situations where legal orders co-exist there are important questions about who transcends, navigates, or manipulates such situations in whose interest with what kinds of knowledge and skills.

(d) Finally there is the *intellectual significance of non-state law*. Opponents of the concept, such as Simon Roberts, emphasise the distinctiveness as well as the power of centralised law-government. As was argued in Chapter 11, most of these concerns can be met by using 'state law' or 'municipal law', or Llewellyn's 'law-government' instead of 'law', without being committed to a necessary conceptual link between law and state. A central thesis of this book has been that from a global perspective, a picture of law in the world as a whole confined to municipal (state) law leaves out too much, including the important phenomenon of legal pluralism.

A further range of issues concerns the kinds of relationship that occur between co-existing legal (and normative) orders. In this context Santos' concept of interlegality as referring to relations between legal (and normative)

[31] The story of Ataturk's reforms in Turkey is a parable, repeated in different ways in many places, about the variability of impact of centralised reforms on the general population, especially in rural areas. On the significance of religious law and custom for Islamic minorities in Europe See Chapter 10, n. 82 above and works cited there.

orders is suggestive.[32] It links diffusion and pluralism. In particular it brings out three points: the relations between co-existing legal orders may be relatively static or dynamic. Neither stability nor change is necessarily presupposed. Second, it should not be assumed that inter-legality necessarily involves conflict or competition. There are plenty of examples in the literature of peaceful co-existence, co-optation, or co-operation, as well as subordination, repression or destruction. Third, it draws attention to the problem of individuation of legal and normative orders. Inter-legality suggests interaction between discrete entities, but the interaction is often more like that between waves or clouds or rivulets than between hard, stable entities like rocks or billiard balls. Moreover, as Benton has argued, thinking of pluralism in terms of levels or discrete orders often does not reflect the perceptions of participants.

Here again there is no substitute for detailed particular studies and it is unlikely that any schematic typology will capture the complexities. As Von Benda-Beckmann concludes:

> 'Co-existence' thus can mean many different types of interrelations and social practices. Elements from different systems may be fused in one context, and reproduced as distinct 'pure' systems in the other – theoretically by the same people, in the same village, on the same day…Through any single process contributing to reproduction of one subsystem in view of alternatives, the relationship between the subsystems is reproduced as well. What can be generalised from any such single process, however, is limited. For simultaneously and through time, a multitude of such single processes occurs, in many different contexts, with different outcomes and different further consequences. These complexities defy easy generalisations on the existence and actual configuration of plural legal orders at macro-level, macro understood as a large scale socio-political space.[33]

Sidelining broad definitional, epistemological and political questions clears the way for a rich agenda of issues about legal pluralism that deserve attention within jurisprudence as well socio-legal studies. How should one conceptualise 'pluralism', 'co-existence', and different forms of 'interlegality '? [34] Can one construct a useful typology of forms of pluralism or of relations between legal orders? What kinds of task are best done by informal legal orders rather than by state law or a combination of these?[35] To what extent, if at all, are the values embodied in one or other conception of human rights and the rule of law furthered or undermined by a given example of legal pluralism? As Von Benda-Beckmann argues, once the general conceptual and other issues are clarified, most of the interesting questions about legal pluralism are empirical and need

[32] Santos (2005) at p. 437, explicitly linking it to a post-modern conception of law.

[33] Von Benda-Beckman (2002) at pp. 70–1. [34] Ibid. at pp. 59–60.

[35] Galligan (2007) at p. 179. Galligan also suggests that the kind of questions 'legal pluralists' need to answer are: 'under what conditions are informal rule-governed orders likely to arise and why; how effective are they in achieving social goods, including social order but going beyond it; what variables affect their capacity to do so; and what are the advantages of informal orders over state law.' (*Ibid.* at 180).

to be set in some broader intellectual framework, including that of orthodox jurisprudence.[36]

16.3 Realism, realism and contextualism*

The two most visible movements to broaden the study of law 'from within' have been American Realism and 'law in context' in the United Kingdom. In academic law a 'movement' is vaguer than a school, but more specific than a trend.[37] Both movements have been the subject of extensive commentary and it is hardly surprising that different interpretations of each have been advanced. Here we are concerned with the concepts of 'realism' and 'law in context' more than their history.

'American Legal Realism' is generally interpreted to refer to the ideas and activities associated with some twenty or thirty individual law teachers who became prominent mainly before World War II.[38] It is important to distinguish 'Realism' in this local historical sense and 'realism' as a widely endorsed perspective on understanding law that emphasises 'the realities' of how law in fact operates in particular contexts.[39] In my view, most historical generalisations about American Legal Realism are false or trivial or both. The individuals involved were only very loosely connected, they had diverse political views, they did not share a theory of law, and the most interesting ideas to emerge from the ferment are associated with individuals rather than the movement generally – Frank on fact-finding, Llewellyn's law-jobs theory and the concept of Grand Style judging, the ambition to establish law as an empirical social science, and Willard Hurst's historiography are examples. There are still some widespread fallacies about Realism in this sense: that concern to be 'realistic'

[36] von Benda-Beckmann (2002) at p. 74.

* Parts of this section are adapted from Twining (2008) 'The Law in Context Movement' and are reproduced here by kind permission of Oxford University Press.

[37] I shall not attempt to deal in detail with the complex story of a third movement, 'critical legal studies' (cls) which fragmented early on into critical race theory, critical feminism, and other tendencies that were largely concerned with issues internal to the United States. On critical approaches to comparative law and international law that have their roots in cls see Chapter 1, n.38 above.. On cls oriented to Latin America ('lat-crits') see Iglesias and Valdez (2001), Symposium (2006).

[38] Aspects of the history of American Legal Realism are contested. My views are developed at length in KLRM and 'Talk About Realism' (1985, now *GJB* Chapter 5). Other excellent, more detailed, histories by Schlegel (1995), Kalman (1986) and Hull (1997) offer different interpretations on some points of detail (e.g. the origins of the movement, who counted as ' Realists', the significance of the split between 'scientists' and 'prudents'). My strictures in the text are directed at looser, largely ahistorical, interpretations and assumptions, which downplay the significance of 'realism' in respect of subject-matters and geographical scope (mainly focussing on American appellate adjudication).

[39] This formulation includes structures, attitudes, demand for law, as well as actual behaviour of participants, consequences etc. The inverted commas round 'realities' signals that the concept is problematic. On the deficiencies of the term 'law in action' see p. 228 above; on ontological and epistemological issues concerning 'reality' and 'innocent realism' see *GLT* 204–20 (reprinted *GJB* 293–309).

about law is an American exclusive;[40] that Realism advanced a distinctive theory of law (e.g. the prediction theory);[41] that American Realism was essentially or mainly a theory of [appellate] adjudication;[42] that Realism was essentially a nihilistic, or irrationalist, or purely negative force without any constructive aspects.[43] We need not pursue these hares further, because our concern here is with 'realism' as a concept.

'Realism' is associated with a number of phrases, such as the law in action, how law works, law in the real world, the contrast between aspiration and reality and between appearance and reality. Clearly the term is both vague and philosophically problematic. But the idea of realism in law catches a central truth: in order to understand law, the study of rules alone is not enough.[44] In other words, one has to be concerned with social fact, context, consequences and what actually happens in the 'real world'. This is a precept about appropriate perspectives for studying and talking about law, but on its own it is not a distinctive theory of law. It prescribes a necessary, but not a sufficient condition for understanding law.[45]

[40] See, e.g. jurists as different as Ehrlich, Ihering, R. M Jackson, Aubert, and Eckhoff. On this interpretation Scandinavians such as Hagerstrom, Olivecrona, Lundstedt, and Ross used 'realism' in a quite different sense (see *KLRM* 522, n.7, *GJB* 125).

[41] The theory is generally discredited and so is the thesis that any significant jurist subscribed to it. See *GJB* 48–51.

[42] On the strange conception of 'a theory of adjudication' that confines it to decisions on questions of law see Chapter 1 at p. 28.

[43] See *GJB* 115–19. There are also disagreements about the extent to which the Realists were politically motivated; whether they had shared political views; whether they were all positivists (I agree with Leiter (2007, Chapter 2) that most American Realists most probably were positivists, but that is hardly distinctive) and to what extent they were all in revolt against 'Langdellian formalism' (my view is yes, but vaguely so).

[44] See above Chapter 10.2.

[45] There have been several recent attempts to 'revive' American Realism by selective and charitable reading of a few texts. For example, Brian Leiter (2007, Chapters 1 and 2, see Chapter 2.4(a) above) advances an interpretation that purports to give 'Realism' a defensible philosophical basis, linked to 'naturalism'; Hanoch Dagan (2007) interprets 'realism' as providing a rich account of law 'as a going institution accommodating three sets of constitutive tensions – between power and reason, science and craft, and tradition and progress'. (Letter to author, 19 August 2007). Both accounts contain ideas that are well worth exploring. But the status of their claims is unclear: as historical accounts of what those individuals commonly identified as Realists said they are over-generalised and contain significant omissions (e.g. Frank on fact-finding, Llewellyn's law-jobs, ideas about an empirical science of law) (*GJB* Chapter 5). As attempts at theory construction they are unnecessarily tied to the historical texts, producing a juristic hybrid, neither clearly historical nor conceptual. These juristic hybrids continue to treat 'R/realism' as an American exclusive and focus mainly on 'adjudication', interpreted as being solely concerned with questions of law. Freed from the historical texts a contemporary attempt to construct a contemporary 'realist jurisprudence' need not be limited in this way. For example, a rounded realist theory of adjudication would surely deal with fact-finding, sanctioning, procedure, pre-trial processes, administration, and the institutional context. In this chapter, the concept of 'realism' is deliberately presented as abstract, vague and open-ended – because concerns to be 'realistic' are widespread and diverse. But efforts, such as those of Leiter and Dagan, at least suggest how richer interpretations about what is involved in being realistic about legal phenomena might be constructed (beyond the United States and not just about adjudication). The

Much the same considerations apply to the idea of 'law in context', which overlaps with, but is broader and even vaguer than 'socio-legal studies', 'sociology of law', 'law and society', and 'critical legal studies'. Historically, 'the Law in Context Movement' is a convenient label for quite varied approaches to broadening the study of law that developed in the United Kingdom from the mid-1960s. In 1966 Professor Abraham Goldstein of the Yale Law School reported that English academic law had yet to experience 'its legal realist revolution'[46] By this he meant that English law teaching and legal scholarship were dominated by a quite narrow orthodoxy that focused almost exclusively on expounding and analysing legal rules, whereas in the United States this kind of approach had been undermined by the American Realist Movement before World War II. This was broadly accurate, but by the mid-1960s the UK was already experiencing its own 'revolt against formalism'. The Law in Context Movement was similar to the American Realist Movement, in being based on university law schools, in mainly involving younger law teachers and in claiming to be reacting against a dominant orthodoxy[47]. However, in the United Kingdom in the 1960s the context and the intellectual climate were quite different from the United States in the 1920s and 1930s. The end of Empire, the post World War II welfare state, the rapid expansion of universities, a tradition of professional training outside the universities, an academic milieu hospitable to socialist and Marxist ideas, and many other factors made up a contrasting background. Some of the advocates of broader approaches had studied in American law schools, but others had returned from teaching in newly independent countries, where they had needed to confront problems of adapting or replacing English law in radically different political, economic and social conditions. It was natural for such returnees to emphasise 'context'.

Intellectually, there were also some significant differences between American Legal Realism and British contextual approaches. Both largely defined themselves in terms of a revolt against a caricatured 'formalism': in America the prevailing orthodoxy ('Langdellism') had been charged with two main weaknesses: a deluded emphasis on deductive logic and a lack of empirical concern with the realities of the law in action. This resulted in a split between those who wished to develop more sceptical, policy-oriented approaches to case method teaching and those who wished to develop the study of law as an empirical social science – two very different enterprises. In addition to these complaints, the English version of 'formalism' was also criticised for being out of touch with the 'law in action' (both professional legal practice and the operation of law in society); it was also castigated for being narrowly focused, educationally illiberal

term 'new realism' is also applied to the work of Dezalay and Garth and some scholars at Wisconsin: www.newlegalrealism.org/

[46] Goldstein (1966).

[47] A few individuals had earlier advocated broader approaches to academic law, including Wolfgang Friedmann, J.L. Montrose, L. C B. Gower, Julius Stone, Otto Kahn-Freund, and R.M. Jackson.

and politically conservative. On one interpretation, in the United Kingdom different diagnoses prompted varied prescriptions: a more humanistic pedagogy, inter-disciplinary co-operation, empirical research, progressive law reform, and radical social-theoretical critique.[48]

Like 'realism' the idea of 'law in context' is not rooted in a particular or distinctive general theory of, or about, law. It accommodates positivists and non-positivists, proponents of legal pluralism and advocates of liberal legal education or enlightened vocational training. It can accommodate a wide range of political views, although it has a 'progressive' tendency. It is not an 'ism'. 'Context' is vague, but not entirely meaningless. 'Contexere' (to weave') suggests inter-disciplinary perspectives. Such an approach favours thinking in terms of total pictures and total processes. For example, the first book in the *Law in Context* series, Patrick Atiyah's *Accidents, Compensation and the Law*[49] critically analysed the common law action for negligence in the context of a total picture of accidents in society and an overview of different kinds of compensation system. Students of civil and criminal procedure set the detailed study of contested trials and appeals in the context of a total process model, emphasising the inter-relationship between different stages in the process of litigation, the relative rarity of contested trials and successful appeals, and the importance of settlement out of court and plea bargaining.[50]

During the past forty years 'law in context' has been largely absorbed into the mainstream of academic law in the United Kingdom and most other common law countries. It has become respectable. Today the most visible signs are in academic legal literature: in 2007 the *Law in Context* series, now published by Cambridge University Press, had over 50 volumes in print; the *Journal of Law and Society* is well-established and has been joined by *Law in Context* (Australia) and *The International Journal of Law in Context* (London). 'Context' regularly appears in the titles of books and articles. Just because of its widespread acceptance, the central ideas are open to different interpretations.

It is a commonplace of both realist and contextual approaches that 'the study of rules alone is not enough'. In order to interpret rules and to understand their operation in practice they need to be studied 'in context'. Recently Galligan has formulated this view as follows:

> [A] rule is part of and a sign to a social setting comprised of understandings and conventions, interests and values, whose origins and force derive from experience and practice. Each rule has its own little social world of which it is only part, and only by entering that world can we assess a rule's significance and obtain a full understanding of what is required or permitted, condoned or condemned. To settle on the rule, to take it as definitive as to what should or should not be done, without taking account of the other factors within the social setting, would lead to an incomplete and inaccurate understanding of the reality of rules.[51]

[48] Twining (1974a). [49] Atiyah (1970) [50] *RE* 249–52.

[51] Galligan (2007) at p. 54. Galligan elegantly illustrates the interaction of rule and context by the example of a university rule that a lecture should only last fifty minutes.

A great deal of recent sociology of law has focused on the immediate social setting of formal rules and how informal rules and 'soft law' influence their invocation, interpretation, application, modification and enforcement.[52] However, both 'realism' and 'law in context' are not solely focused on rules. Rules are an essential part of understanding law, but one can also be 'realistic' or 'contextual' about other legal phenomena, such as disputes, processes, actors, attitudes, and outcomes. One reason for the objection to confining R/realism to adjudication, is that this is only one step away from doctrinal conceptions of law. That focus is still on questions of law and how they are argued about and decided – important, but only one aspect of legal phenomena.[53]

Recently, the American sociologist of law, Philip Selznick summed up some of the central ideas of both 'realism' and 'law in context' as follows:

> In law-and-society theory, the phrase 'law in context' points to the many ways legal norms and institutions are conditioned by culture and social organization. We see how legal rules and concepts, such as those affecting property, contract, and conceptions of justice, are animated and transformed by intellectual history; how much authority and self-confidence of legal institutions depends on underlying realities of class and power; how legal rules fit into broader contexts of custom and morality. In short, we see law in and of society, adapting its contours, giving direction to change. We learn that legal order is far less autonomous, far less self-regulating and self-sufficient, than is often portrayed by its leaders and apologists. This perspective encourages us to accept blurred boundaries between law and morality, law and tradition, law and economics, law and politics, law and culture. Accepting the reality of blurred boundaries leads to much puzzlement and controversy. Law loses some of its special dignity and some jurisprudential questions cannot be avoided.[54]

Not all who are sympathetic with the general approach will agree with Selznick's specific formulation, but it captures some of the variety and the significance of 'realist' and 'contextual' perspectives once these concepts are freed from their particular historical associations. However, some critics suggest that these terms articulate only lawyers' perspectives within the parameters of law as a discipline. For example, Roger Cotterrell seeks to draw a sharp distinction between 'law in context' and sociology of law:

[52] Galligan (2007) at pp. 62–3, 67–8.

[53] It is sometimes suggested that focus on adjudication is a quintessentially American obsession and that European legal cultures (including the British) are not so inclined to put courts and judges at the centre of the legal world. They place at least as much emphasis on legislation, administration, and enforcement. That is partly true, but there is also a grain of truth in the idea that the standpoint of an upper court judge (the *iudex*) is the best vantage point from which to survey the whole legal terrain. (Ross (2001), discussed MacCormick (2007) at p. 55). However, from a global perspective, the relative political and social importance of courts varies between state legal systems, the concepts of 'court' and 'judge' are problematic, and third-party adjudication does not exist in some legal orders.

[54] Selznick (2003) at pp. 177–8. For earlier interpretations associated with the Warwick Law School see Twining (1974b) and Folsom and Roberts (1979).

> [T]he sociology of law presupposes much more than 'contextualism': that is, the study of law in its social context. Contextualism, which established itself as an alternative to traditional approaches to legal education in Britain in the late 1960s, has been accommodated within existing organizations of legal education. It requires only that particular legal subjects – as defined by lawyers – be studied with a broad awareness of social consequences and social origins of law. A sociological perspective on law presupposes, however, that lawyers' definitions and interpretations of the field are insufficient: that law itself needs to be understood not merely in terms of lawyers' categories, but in the light of theoretical understanding of the nature of societies within which legal systems exist. In other words, law is to be understood in terms of social theory. Legal theory is to be seen as a branch of social theory.[55]

This interesting comment seems to me to be wrong in some important respects. First, there is a taxonomic point. For purposes of exposition much of legal doctrine is divided up into fields of law: contract, torts, crime, property, constitutional law and so on. These are lawyers' conventional organising categories. Some are specifically legal: contract and torts for example. These do not fit with categories from other spheres of discourse. Some overlap or are broadly commonsensical or are borrowed from outside the law (e.g. family, environment, land). Some legal categories *constitute* social knowledge: property, constitution, and crime and, more specifically, murder and rape. When criminologists realised that their field was organised around a category posited by law, they sought an alternative in deviance – with mixed success.

Cotterrell is wrong in suggesting that what he calls 'contextualism' required only that fields classified by conventional legal categories be studied 'in context'. For it was obvious from the start that neither contract nor tort had one social or economic 'context'. 'The Sociology of Tort' or 'the Psychology of Contract' make no sense. The social context of personal injuries is a long way from that of cattle trespass or defamation. So Atiyah substituted 'compensation for accidents' for 'negligence' and separated this off from other areas of tortious liability; Elliott and Street wrote a book on road accidents; and Jolowicz stimulated a debate on 'fact-based classification'.[56] 'Contract' proved intransigent because, although contracting takes place in a wide variety of social and economic contexts, there are general concepts and contested general principles that transcend these diverse situations.[57] 'Law in context' is much broader and more flexible than Cotterrell suggests.

[55] Cotterrell (1995) at p.767.

[56] Atiyah (1970/2006 (ed. Cane)), Elliott and Street (1968); Jolowicz (ed.) (1970). In the event, legal convention generally won out, so torts and contracts survive as standard categories, even though Atiyah's *Accidents, Compensation and the Law*, first published in 1970, is still in print in its seventh edition. See further *LIC,* 53–62.

[57] Note, however, Karl Llewellyn's insistence on 'narrower categories' as one of the starting-points of Realism and his argument that commercial law had to be sensitive to 'type-fact situations' that reflected the ways of thought of merchants and particular trades. *KLRM* 135–7, 331–3.

However, Cotterrell's observation raises an important general point about organising categories. The abstract category 'law' is not generally part of the standard taxonomies of most social sciences. Few sociology degrees use the 'sociology of law' as a taxonomic category. If law is considered at all it is under such rubrics as family, work, occupations, social control, or deviance. Similarly 'Law and Psychology' is not a category that makes much sense to psychologists[58] nor, more controversially, 'law and economics' for economists.[59] This may be one of the main reasons for social scientists' alleged neglect of law.[60] Finding compatible organising categories at appropriate levels of generality is one of the recurrent challenges to inter-disciplinary co-operation.

Cotterrell is right in pointing to the power of conventional classifications of 'fields of law', but he goes too far in suggesting that lawyers only think in 'lawyers' categories'. Lawyers do have a distinct terminology, as do many other disciplines, but this affects only a small part of legal discourse, both law talk and talk about law. This suggestion smacks of the exaggerations of autopoiesis – that lawyers, like Argentinian frogs, can only see the world through one set of lenses.[61] If this were true, lay participation in the administration of justice, by jurors, magistrates, and ordinary witnesses, would not be possible and it would be difficult to make sense of the role of 'general experience'/'common sense' generalisations in inferential reasoning in legal contexts.[62] Perhaps underlying Cotterrell's argument is an assumption about the autonomy of disciplines with distinct forms of knowledge: Sociologists think in sociological categories and produce 'sociological knowledge'; the discipline of law produces a distinct form of 'legal knowledge' and so on. Apart from my general scepticism about autonomous disciplines and distinct forms of knowledge, this goes against the whole thrust of this book which maintains that understanding law involves multiple perspectives and, if a concept of 'legal knowledge' is meaningful, we are concerned with many legal knowledges, not just one.

16.4 Instrumentalism(s)

At the Law and Society Conference in Berlin in 2007 one colleague commented that the prevailing ideology was 'sophisticated instrumentalism'. In some quarters in socio-legal circles 'instrumentalism' is a term of abuse. This may at first sight seem strange, because law is often talked of as an instrument of social policy, purposive interpretation is generally preferred to literal interpretation, and the idea of a pointless or purposeless rule seems to offend common sense. The term is used pejoratively in two different contexts: first, from

[58] On the variety and fragmentation of 'law and psychology' see Carson *et al.* (2007) Chapter 1.

[59] 'Economic analysis of law' is an established category, but it usually refers to one kind of economics applied to one aspect of law, common law doctrine. On its separation from socio-legal studies see Friedman (2005) at pp. 8–11.

[60] See above pp. 229–30 and 264.

[61] On autopoiesis see Teubner (1992).

[62] On 'general experience' see *RE* Chapter 12, *Analysis* 262–80.

a sociological perspective some assumptions about the relations between the purposes and actual consequences of legal rules are considered to be at best simplistic and more often wrong. Let us call that 'naïve instrumentalism'.[63] A second usage refers to an attitude to legal rules as tools that are to be used and manipulated in pursuit of selfish ends. Such thinking, as Brian Tamanaha has argued, is the enemy of the rule of law.[64]

(a) Naïve instrumentalism

A question like: 'Has this rule achieved its purposes?' makes certain assumptions: that the rule has definite, coherent purposes; that these purposes are ascertainable; that a rule, on its own, can actually have consequences that fit its alleged purposes. A simple counter to such assumptions is to point out that rules on their own are not self-drafting, self-enacting, self-promulgating, self-interpreting, self-applying, self-implementing, and self-enforcing. Such naivety is not uncommon: a standard reaction to a crisis is to blame the law and to suggest that the law should be reformed to avoid a repetition. Confronted by a problem, make a rule and the problem is solved. I have encountered expensive law reform projects that assumed that drafting legislation or getting agreement on a rights declaration completes the task.[65] For political leaders creating new laws is often a simpler and cheaper way 'to solve' a problem than increased expenditure or more complex long-term solutions, as Tony Blair's propensity for reactive over-legislation clearly illustrates.[66] The sociology of law is replete with examples of laws that had unintended, inadvertent or unexpected consequences, or even resulted in the opposite of what was intended.[67]

So, this is an important target, but a soft one. Criticism of naïve instrumentalist ideas and assumptions is a message of complexity. To attack the very idea of laws being purposive instruments of policy or means to ends is to throw out the baby with the bathwater. Purpose, policy, consequences, and rules are central concepts of legal theory. But most legal scholars are mature instrumentalists who know that rules are not self-interpreting or self-implementing and

[63] A third dyslogistic /opprobrious use of the term is directed at 'ideologically loaded technocratic discourse' masquerading as neutral technology (e.g. Riles (2004)).

[64] Tamanaha (2006).

[65] Patrick McAuslan recounts the story of land law reform in Uganda, where first a UN team tried to propose measures in ignorance of the complexities of pre-existing land tenure and administrative structures and then Ugandan officials severely underestimated the amount of detailed regulation required to make the new land legislation operative so that its implementation was delayed for several years. McAuslan (2003).

[66] See *HTDTWR* at pp.118–19, 227.

[67] Griffiths usefully distinguishes between A. Direct effects (primary and secondary); B. Indirect effects; C. Independent effects; and D. Unintended effects. He concludes that: 'Legal rules are important – according to the argument sketched here – not because they cause social phenomena in the instrumentalist sense, but because they are one form in which the total social investment in the maintenance of (some) collective goods manifests itself.' (Griffiths (1979) at p. 341).

so on. They understand distinctions between principle and policy, enactment, promulgation, implementation and enforcement and the significance of institutions, processes, craft-traditions, and *mentalité* in the actual operation of laws. They know that enacted laws are often the result of compromise or sectional interest or muddle; that law-making and law-enforcement involve complex political and technical processes; that there are limits to effective legal action; that laws can be ineffective and have unintended side-effects; and that assessing the impact of a particular law is elusive, difficult, and only occasionally undertaken in practice.

The most powerful critic of naïve instrumentalism is John Griffiths. The abstract of his well-known inaugural lecture on 'Why is law important?' reads as follows:

> Instrumentalism is the belief that legal rules are important because they cause social phenomena. It has come to dominate modern thought about law, especially in the United States. In this lecture Professor Griffiths examines the evidence bearing on the modern orthodoxy and concludes that the instrumental effects of law are probably of only marginal importance and interest. He proposes a new conception of the relationship of legal rules to social phenomena: a conception in which legal rules no longer stand in an essentially causal relation to these phenomena, but are seen as an inseparable aspect of them.[68]

Here it is relevant to note that his argument is not quite as radical as it sounds in that he acknowledges that 'legal rules are the *form* in which the political decisions taken by a nation-state generally appear. …The question 'is law important?' must be taken to ask what legal rules add to the political decisions they embody: the question is about law and it would be wrong to try to answer it by observing that politics is important.'[69] In short, the effects of political decisions should not be conflated with the effects of laws.

(b) Unconstrained instrumentalism

In 2006 Brian Tamanaha launched a passionate attack on legal instrumentalism.[70] He argued that American legal culture has steadily become imbricated

[68] Griffiths (1979) at p. 339. He concludes that: 'Legal rules are important – according to the argument sketched here – not because they cause social phenomena in the instrumentalist sense, but because they are one form in which the total social investment in the maintenance of (some) collective goods manifests itself.' (341). See Griffiths (2003), which modifies his earlier position, see above Chapter 8, n. 165.

[69] Griffiths (1979) at p. 337. For Griffiths legal rules are rarely an independent variable: 'Why do people comply with this law?, can rarely be answered by reference to the law and its sanctions alone: for example, explaining why motorists only go above the speed limit at point X , but completely disregard the same rule at point Y might be explained by a number of factors – the width of the road, point X is known as an accident black spot, chances of detection, or they slow down at point X because there is a beautiful view.'

[70] Tamanaha (2006).

with an attitude that sees law solely as a means to an end. When this view is combined with scepticism or cynicism about any consensus about the public good the result is that any claims to formal rationality or objectivity and the very idea of the rule of law are undermined. Tamanaha argues that such attitudes underlie both crude versions of Marxism (law is an instrument of the dominant class) and the law and economics movement (committed to wealth maximisation without concern for equality or fairness); law students graduate believing that law is an empty vessel that can be used for any purpose; many legal practitioners feel that the law is there to be manipulated to serve their clients' or their own interests without constraint; that legislators are lobbied by representatives of special interests and that 'cause lawyering' has descended into using the machinery of justice to serve particular sectarian goals; that debates over judicial selection and appointments turn not on candidates' competence or uprightness or commitment to the Rule of Law, but on their personal beliefs about contentious issues, such as abortion and capital punishment; that judges resolve hard cases by resort to their subjective beliefs.[71] The nadir of such attitudes is exemplified by the Justice Department memorandum justifying the use of torture in Guantanamo Bay of 2002 being perceived as 'standard lawyerly, routine stuff.'[72]

All of these are recognisable grounds for concern. But what exactly is this 'instrumentalism' to which Tamanaha attributes all these evils? Surely regarding social legislation as an instrument of policy, purposive interpretation by judges and others, the view that the health of a legal system is to be measured, at least in part, by its actual effects are all 'instrumentalist' in that they regard law as a means to social ends. Is Tamanaha requiring us to return to literal interpretation, wooden formalism, denial that judges ever make law, and conceiving of legal rules as things in themselves rather than as responses to perceived problems? Are we to believe in pointless rules?[73]

Tamanaha acknowledges that there is no going back to such pre-Realist naivety and he is not advocating a return to traditional natural law.[74] His first target is the substitution of sectarian or selfish interests for the idea of public good. Even a pure utilitarian, such as Bentham, would agree that this is wrong, because utility dictates that in both morals and legislation the test of right and

[71] E.g Posner (1999) (2003). Posner's views on moral theory and adjudication are sharply criticised in Dworkin (2006) Chapter 3.

[72] Lichtblau (2008) quoting Eric Posner at p. 149. See Vischer (2006).

[73] In *HTDTWR* we explicitly try to steer a path between 'naïve instrumentalism' and dogmatic formalism, but acknowledge that we have a bias in favour of a view of rules as instruments for solving problems (155). We defend purposive interpretation, Llewellyn's Grand style judging, explicit policy arguments, and the view that judges sometimes 'make law'. When I first read Tamanaha's book I felt that I was a target of his attack. I have come round to the view that his concern is with unconstrained instrumentalism, not instrumentalism as such, but there is still some need for clarification about the exact scope of his target. On different instrumentalisms see Vermeule (2007).

[74] E.g. p. 246

wrong is aggregate happiness, not individual self-interest.[75] But the fault here is not in thinking of law as a means to an end, but on the wrong choice of ends – individual interest rather than the general welfare.

Tamanaha's other target is a decline in belief in a set of ideals that conceive of law as embodying principles that constrain legislators, judges, lawyers, and citizens alike – that is the classical Rule of Law: 'The central idea, again, is that the non-instrumental views of law established legal limits on the law itself – that legal officials are legally bound to higher law.'[76] But Tamanaha distances himself from the contemporary heirs of the Natural Law tradition, including Dworkin, Finnis, Weinrib, and Moore.[77] He dismisses purely formal versions of the rule of law, such as those of Fuller and Raz, as 'unadulterated legal instrumentalism. Law is an empty vessel, a tool that can serve any ends'.[78] He also rejects Rortyian neo-pragmatism, 'the higher instrumentalism' of Nonet and Selznick,[79] and the atheoretical attitudes of most academic lawyers as being further forms of the 'instrumentalism' that he is attacking.[80] So what is the foundation for Tamanaha's belief in the Rule of Law? Tamanaha seems to find his answer in Edward Thompson's conversion to the idea that the Rule of Law is 'an unqualified human good', in that to disguise the machinery of power in the ruling class the rulers had to extend 'principles of equity and universality to all sorts and degrees of men'.[81]

Tamanaha's account of intellectual history, his analysis of instrumentalist attitudes, and the practical perversions they lead to are almost entirely confined to the United States. The story he tells is essentially about the perversion of American legal culture. Perhaps its most poignant manifestation is the culture shock felt by many lawyers, especially in Continental Europe, when confronted by cynical attitudes to international law of members of the Bush

[75] On the controversy over Bentham's conception of utility see Chapter 5.4.(a) above. Tamanaha explicitly rejects self-interested or egoistic utilitarianism (at pp. 22–3). Bentham did not think that the sovereign could be limited by law, but he gave a utilitarian justification for constraining those in power by securities against misrule, because no one, including democratically elected rulers, can be trusted to exercise unconstrained power in the general interest. In short, there is a utilitarian need for controlling abuse of power. (*GJB* 270–1).

[76] Tamanaha (2006) at p. 216 attributes the decline in the belief of the Rule of Law and the rise of unconstrained instrumentalism in the United States to a variety of factors: 'Their demise, it must be repeated cannot be attributed to advocacy of instrumental views of law alone. The implications of the Enlightenment, the secularisation of society, doubts about the existence of objective moral principles, a culturally heterogeneous and class-differentiated populace, pitched battles among groups with conflicting economic interests in the late nineteenth century, an increasingly specialized economy with complex regulatory regimes far beyond the ken of common law concepts, the disenchantment of the world in the twentieth century – all these contributed to undermining old notions of natural principles and inviolate common law.' (*Ibid.* p. 217)

[77] At p. 131. [78] At p. 130 [79] See p. 233.

[80] 'Getting by without a theory of law' at p.132

[81] Thompson (1975) at pp. 258–69. Tamanaha denies that this argument is specifically Marxian. Rather 'Thompson set out more clearly influentially than anyone else [the insight that] living up to the ideal of the rule of law had a restraining effect on elite uses of law.' (Communication to author 20 August 2007).

administration.[82] So is this really an American book? Some of the issues – the appointment of judges, the overt politicisation of the Supreme Court, economic analysis of law, and Judge Posner's brand of judicial pragmatism – are matters of specifically American concern. Tamanaha's account could be read as the story of the loss of belief in the specific ideals of the US Constitution.

However, some of the threats to the Rule of Law that Tamanaha details are by no means confined to the United States. The title of his book echoes Ihering, he rejects the pure consequentialism of Benthamite utilitarianism, and he relies quite heavily on the insight of an English Marxist historian. The nub of Tamanaha's concern lies in the tension between purposive thinking and the idea of being governed by rules.[83] He acknowledges the tension and in a striking passage attempts a reconciliation:

> The most portentous development chronicled in these pages is the progressive deterioration of ideals fundamental to the system of law and government: that the law is a principled preserver of justice, that law serves the public good, that legal rules are binding on government officials (not only the public), and that judges must render decisions in an objective fashion based upon the law. The notion that law is a means to an end would be a positive component if integrated within a broader system with strong commitments to these four ideals. If law is seen as an instrument without the nourishing, enriching, containing soil of these ideals, however, there is nothing to keep law from devolving to a matter of pure expediency.[84]

I share a faith in these ideals and accept them as a constraint on purposive thinking. So I agree with Tamanaha that purposive thinking in law needs to be constrained in the way he suggests. But purposive thinking in making, interpreting, observing, reforming, arguing about and studying law needs more stress than he gives it. So it is unfortunate that his target is expressed as 'instrumentalism' rather than 'constrained instrumentalism'.[85] Nor am I convinced by the odd late Marxian twist to the basis for believing in the ideals of the Rule of Law – up to a point law can serve a useful purpose as a form of hypocrisy, a concession by the powerful to the less well off or a socially useful myth. This seems a rather fragile basis for justifying the Rule of Law. Of course, the idea of the Rule of Law is variously interpreted and, accordingly, variously justified. Tamanaha's interpretation is somewhat 'thicker' than the purely formal conception and is rooted in ideals underlying the American Constitution. Broader substantive versions, such as those promoted by the World Bank, are rooted in particular ideologies. Other versions are based on human rights. Ironically, even the narrow belief that government should be under law (the version espoused by Edward Thompson) is based on an instrumentalist justification: that the Rule of Law doctrine (or myth) is one means of constraining abuse of power.

[82] Lichtblau (2008).

[83] This is closely related to the differences between act- and rule- utilitarianism see Chapter 5.4 above.

[84] At p. 249.

[85] See n.73 above.

16.5 Scientism

Ever since the rise of Realism, 'law in context' and socio-legal studies as recognisable movements or approaches, many of those involved have been worried about the 'identity' or 'core' of their enterprise. This is a natural concern, but in my view reductionist definitions or a search for a grand over-arching theory are misconceived. Friedman suggests that 'Law and Society' is comparable to area studies in that it involves specialists from different disciplines focusing on a particular country or region; however, he continues, whereas Russia or Latin America have relatively clear boundaries, there is no consensus about the nature and scope of law as a subject of study.[86] This is helpful, but I would add that the strong orientation of our discipline to legal practice still exerts a strong gravitational pull towards focusing on local, particular, practical problems. Legal academic culture militates against large ambitions to be scientific and, perhaps for that reason, against 'grand theories'.[87] Like colleagues in other disciplines, empirical legal scholars encounter tensions between familiar dichotomies: hard/soft, universal/unique, general/ particular, macro/micro, similarity/ difference. Subject to some important exceptions, not least in respect of normative legal theory and some enclaves of comparative law, most academic law has traditionally had a quite strong tendency towards 'soft', particularistic, local perspectives that emphasise difference.[88]

However, the discourse of 'globalisation' pulls quite strongly in the opposite direction. Talk of 'global law', 'global society', or 'global lawyering' provides temptations to make speculative, uninformed, sometimes self-interested generalisations. Our heritage of concepts for comparing and generalising across legal traditions and cultures is very thin, reliable empirical data about law in the world are strikingly underdeveloped and we have proceeded largely in ignorance of other traditions. Legrand has noted the tendency of comparative lawyers to emphasise similarity rather than difference.[89] The most enthusiastic claims about convergence of laws may be self-interested: for example, many proponents of convergence, unification and even codification in Europe are committed Euro-philes.[90] Peddlers of their own constitutions or commercial laws or other 'solutions' are prone to downplay differences in conditions or

[86] Friedman (2005) at p. 2: 'Law and society, in short, is not a discipline but the application of other disciplines to a specific social system.' (*Ibid.*)

[87] *LIC* 128–30.

[88] See Munger (1995) at p. 22: 'I do offer evidence that the law and society field has been extremely sensitive to the issue of difference, and its history reveals an explicit discourse about boundaries.' Munger interestingly develops the theme that law and society in the United States has been concerned with the metaphor of 'crossing boundaries' in respect of discipline, time, geography, and social status. (*Ibid* at p. 21).

[89] Legrand (2003).

[90] See further Chapter 10.2(b) above. Jan Smits (2007) usefully distinguishes between unification, harmonisation, integration and codification of laws in surveying the arguments about convergence in the context of the European Community.

culture.[91] Life is easier for those involved in structural adjustment or judicial reform programmes or law reform in countries in transition to proceed on the assumption that most law is a form of technology that can be transposed with minimal adjustments to local conditions; it is simpler and more convenient for foreign consultants to assume that by and large 'one size fits all' and to start with assumptions about the superiority of the system they know. We are all susceptible to ethnocentrism for which basic ignorance of other ways of doing things is a great buttress. One of the roles of empirical legal studies is to provide a counter to such tendencies. For valid, well-founded generalisations need to be built up patiently from detailed particular studies with quite modest geographical pretensions.

Despite these temptations to make ungrounded generalisations, the predominating culture of academic law, in my experience, is cautious about or hostile to analogies with the natural sciences or the 'harder' behavioural sciences. Indeed, in this context, 'scientistic' is sometimes used as a term of abuse. I have written at length elsewhere about the uses and dangers of scientific analogies in law,[92] but a recent experience makes the point here. Since 2003, I have been involved at University College London in a multi-disciplinary programme on evidence, which involved participants from over twenty disciplines and specialisms.[93] The suggestion that the programme should be called 'Towards an Integrated Science of Evidence' provoked quite widespread hostility. Although it was emphasised that 'science' was being used in this context to mean nothing more than 'systematic study', suspicion remained. I personally believe that there are general principles of inferential reasoning, that some concepts, such as relevance, credibility, probative value and ancillary evidence (evidence about evidence) travel well and that David Schum's 'substance blind' approach to evidence as set out in his masterly *Evidential Foundations of Probabilistic Reasoning*[94] is well worth developing and refining.[95] However, I realised that 'science' in some quarters has acquired strong negative associations.[96] For example, it is sometimes assumed that enquiries in the humanities and social sciences should be modelled on the natural sciences; that only measurable quantitative data is meaningful; that policies and problems involving value choices can be resolved empirically; that 'evidence-based medicine' had become a dogma which sometimes went far beyond the sensible claim that doctors should try to rely on the best evidence available;[97] that the label 'scientific' is

[91] On the differences of emphasis about place and time by the younger and older Jeremy Bentham, see Chapter 5.4(d) above.

[92] Especially *KLRM passim* (index under 'legal science').

[93] http://www.evidencescience.org. [94] Schum (1994/2001).

[95] *RE* Chapter 15; Twining and Hampsher-Monk (2003).

[96] *RE* Chapter 15 (arguing that evidence should be conceived as a multi-disciplinary field or subject).

[97] On criticism of excesses of evidence-based medicine, see e.g Tonnelli (2006) and Tanenbaum (2006).

often used to give spurious authority or a political advantage to bogus claims that satisfy none of the standards of well-grounded empirical sciences. Susan Haack sums up the dangers of overuse of the term:

> 'Scientific' has become an all-purpose term of epistemic praise meaning 'strong, reliable, good'. …In view of the impressive successes of the natural sciences, this honorific usage is understandable enough. But it is thoroughly unfortunate. It obscures the otherwise obvious fact that not all and not only practitioners of disciplines classified as sciences are honest, thorough, successful inquirers; when plenty of scientists are lazy, incompetent, unimaginative, unlucky or dishonest, while plenty of historians, journalists, detectives etc. are good inquirers. It tempts us into a fruitless preoccupation with the problem of demarcating *real* science from pretenders. It encourages too thoughtlessly uncritical an attitude to the disciplines classified as sciences, which in turn provokes envy of those disciplines and encourages a kind of scientism – inappropriate mimicry, by practitioners of other disciplines, of the manner, the terminology, the mathematics, etc., of the natural sciences. And it provokes resentment of the disciplines so classified, which encourages anti-scientific attitudes.[98]

This is not the place to consider in detail the history of epistemological scepticism and the various perspectives that Haack lumps together under 'The New Cynicism' – those who maintain, in different ways, that the epistemological pretensions of any science are indefensible.[99] Suffice to say here that for present purposes I accept Haack's 'Critical Common-Sensism', which accepts that there are objective standards of better and worse evidence and of better and worse methods of enquiry, but acknowledges that observation and theory are interdependent, that scientific language changes meaning and that science as an activity is a social enterprise.[100] On this view, 'the core standards of good evidence and well-conducted inquiry are … common to empirical inquiry of every kind.'[101] This implies that empirical enquiries about legal phenomena can satisfy such standards and in that sense there can be empirical 'scientific' enquiries about law.

What are these standards? These are, of course, contested within the philosophy of science and the standards are not uniform across disciplines. For present purposes let it suffice to say that for any empirical enquiry into legal phenomena to aspire to meet these standards the findings should be warranted by evidence, generalisable, explanatory (not merely descriptive),

[98] Haack (2003) at p. 18. At UCL some of the resistance to the label 'evidence science' related to such abuses of the word 'scientific', especially in relation to policy-making and evidence-based medicine; some wished to emphasise contextual factors that made their particular disciplines unique and so were sceptical about cross-disciplinary generalisation and some were attracted to diverse forms of 'post-modern' epistemology.

[99] *Ibid*. Elsewhere, I have discussed varieties of scepticism in relation to evidence and the form of post-modernism seemingly espoused by Santos, (*RE* Chapter 4; (2000) Chapter 8; *GJB* Chapter 9), but for a clear philosophical analysis the interested reader would do better to refer directly to Haack's *Defending Science within Reason* (2003).

[100] Haack (2003) at p. 23 *et passim*.

[101] Haack (2003) at p. 23.

testable, predictive, and preferably cumulative.[102] Scientific findings tend to be mutually supportive, 'more like a crossword puzzle than a mathematical proof.'[103]

Judged by such standards, we are a very long way from achieving an empirical science of law. There are many reasons for this, but the most obvious ones are that most legal scholarship to date has not been empirically oriented, much that passes as 'sociological' or 'socio-legal' is theoretical or text-based and relatively little actual empirical legal research has *aspired* to be scientific in this way. To put it simply: a great deal of legal research with an empirical dimension has been oriented towards policy, or law reform, or other kinds of immediate practical decision making. Many such enquiries are particular rather than general, not illuminated by theory, do not claim to be explanatory or predictive, and their findings do not accumulate.[104]

REFERENCES

Abraham, David (2007) 'The Boundaries and Bonds of Citizenship: Recognition and Redistribution in the United States, Germany and Israel' 7 *Migration in History* 210

Atiyah, Patrick (1970/2006) *Accidents, Compensation and the Law* London: Weidenfeld and Nicolson; (7th edn., (ed.) P. Cane) Cambridge: Cambridge University Press.

Banakar, Reza and Max Travers (eds.) (2002) *An Introduction to Law and Social Theory* Oxford: Hart

Barker, Paul (ed.) (1975) *The Social Sciences Today* London: Arnold

Benton, Lauren (1994) 'Beyond Legal Pluralism: Toward a New Approach to the Informal Legal Sector' 3 *Social and Legal Studies* 223.

Cane, Peter and Joanne Conaghan (eds.) (2008) *The New Oxford Companion to Law* Oxford: Oxford University Press

Carson, David, , Becky Milne, , Francis Pakes, , Karen Shalev, and Andrea Shawyer (eds.) (2007) *Applying Psychology to Criminal Science* Chichester: John Wylie

Chiba, Masaji (1993) *Sociology of Law in Non-Western Countries* London: Kegan Paul International

Cotterrell, Roger (1995) *Law's Community* Oxford: Oxford University Press.

De Soto, Hernando (1989) *The Other Path* London: I.B. Tauris

Dagan, Hanokh (2007) 'The Realist Conception of Law' 57 *U. Toronto Law Jo*. 607.

[102] This just one model of 'science'. On cumulation and progress in science, see Haack's cautionary observations at pp. 143–5.

[103] Haack (2003) at p. 58.

[104] The hostility of some sociologists of law to policy-oriented studies and government generated data is sometimes overdone. Policy and practical decisions and project evaluations need to be based on *reliable* data; not all official statistics and data banks are compiled with short-term goals in mind; and knowledge does not need to be 'scientific' to be useful and important (see above). In my view, the sharpness of distinctions between 'pure' and 'applied', policy-oriented and scientific enquiries is often exaggerated. For example: 'There is … an increasing tendency for empiricist, policy-oriented research to present itself as sociology of law. There is, however, nothing sociological about this literature, since it does not address wider questions about the role of law in society.' (Banakar and Travers (2002) at p. 346). Those who share the scientific aspiration have to face hostility from several directions: that it is not law; that it is not practical, that it is 'positivistic' or 'empiricist' in some derogatory sense.

Dworkin, Ronald (1986) *Law's Empire*. London: Fontana
(2006b) *Justice in Robes* Cambridge, MA: Harvard Belknap Press
Elliott, William and Harry Street (1968) *Road Accidents* Harmondsworth: Penguin
Folsom, Ralph and Neil Roberts (1979) 'The Warwick Story: Being Led Down the Contextual Path of the Law' 30 *Jo. Legal Education* 166.
Fowler, H.W. (1968) *A Dictionary of Modern English Usage* (2nd edn Sir Ernest Gowers) Oxford: Oxford University Press.
Friedman, Lawrence (2005) 'Law and Society Comes of Age' 1 *Annual Review of Law and Social Science* 1
Frost, Robert (1946) *The Poems of Robert Frost* New York: Modern Library
Galligan, Denis (2007) *Law in Modern Society* Oxford: Oxford University Press
Goldstein, Abraham (1966) 'Research into the Administration of Criminal Law: A Report from the United States' 6. *Brit. Jo. Criminology* 27
Griffiths, John (1978) 'Is Law Important?' 54 *New York University Law.Rev.* 339
(1986) 'What is Legal Pluralism?' 24 *Jo. Legal Pluralism* 1.
(2003) 'The Social Working of Legal Rules' 48 *Jo. Legal Pluralism and Unofficial Law* 1.
Haack, Susan (2003) *Defending Science Within Reason: Between Scientism and Cynicism* Amherst, NY: Prometheus Books.
Hooker, M. Barry (1975) *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* Oxford: Oxford University Press
Hull, Natalie (1997) *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* Chicago: University of Chicago Press.
Iglesias, Elizabeth M. and Fransisco Valdes (2001) 'LatCrit at Five: Institutionalising a Post-subordination Future' 78 *Denver U. Law Rev.* 1249
Jolowicz, Tony (ed.) (1970) *The Division and Classification of the Law* London: Sweet and Maxwell
Judicial Studies Board (1999–) *Handbook on Ethnic Minority Issues* http:www.jsboard.co.uk.
Judicial Studies Board (2007) *Equal Treatment Bench Handbook* http:www.jsboard.co.uk.
Kalman, Laura (1986) *Legal Realism at Yale 1927–1960* Chapel Hill: University of North Carolina Press
Kamp, Allen (1995) 'Between the Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code' 59 *Albany L. Rev.* 325
Legrand, Pierre (2003) 'The Same and the Different' in , Legrand and Munday (eds.) 240
Legrand, Pierre and Roderick Munday (eds.) (2003) *Comparative Legal Studies: Traditions and Transitions* Cambridge: Cambridge University Press
Leiter, Brian (2007) *Naturalising Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* Oxford: Oxford University Press
Lichtblau, Eric (2008) *Bush's Law: The Remaking of American Justice* New York: Pantheon
MacCormick, Neil (2007) *Institutions of Law: An Essay in Legal Theory* Oxford: Oxford University Press
McAuslan, Patrick (2003) *Bringing the Law Back In: Essays in Land, Law and Development* Aldershot: Ashgate
Melissaris, Emmanuel (2004) 'The more the merrier? A new take on legal pluralism'. 13 *Social and Legal Studies* 57.
Merry, Sally (1988) 'Legal Pluralism' 22 *Law and Society Review* 869.

Munger, Frank (1995/6) 'Crossing Boundaries: Traditions and Transformations in Law and Society Research.' Paper prepared for Law and Society Summer Institute, Niagara

O'Brian, Patrick (1971) *Master and Commander* London: Fontana

Őrűcű, Esin and David Nelken (eds.) (2007) *Comparative Law: A Handbook* Oxford: Hart

Petersen, Hanne and Henrik Zahle (eds.) *Legal Polycentricity: Consequences of Pluralism in Law* Aldershot: Dartmouth

Pistor, Katarina and Philip A Wellons (1999) *The Role of Law and Legal Institutions in Asian Economic Development 1960–1995* Oxford: Oxford University Press

Posner, Richard (1999) *The Problematics of Moral and Legal Theory* Cambridge, MA: Harvard University Press

(2003) *Law, Pragmatism and Democracy* Cambridge, MA: Harvard University Press.

Riles, Annelise (2004) 'Anthropology, Human Rights and Legal Knowledge: Culture in the Iron Cage' 15 *Finnish Yearbook of International Law* 9.

Roberts, Simon (1998) 'Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain', 42 *Jo. Legal Pluralism* 95.

(2005) 'After Government? On Representing Law without the State', 68 *Modern Law Review* 1.

Ross, Hamish (2001) *Law as a Social Institution* Oxford: Hart

Santos, Boaventura de Sousa (1995) *Toward a New Common Sense* London: Routledge.

Schlegel, John Henry (1995) *American Legal Realism and Empirical Social Science* Chapel Hill: University of North Carolina Press

Schum, David (1994/2001) *Evidential Foundations of Probabilistic Reasoning* New York: Wylie; reprinted (2001) Evanston: Northwestern University Press

Selznick, Philip (2003) 'Law in Context Revisited' 30 *Jo. Law and Society* 177

Smits, Jan M. (2007) 'Convergence of Private law in Europe: Towards a New *ius commune*? in Őrűcű and Nelken (eds.) Chapter10.

Symposium (2006) 'LatCrit at Ten: Critical Approaches to Economic In/justice' 17 *Berkeley La Raza Law Rev.*

Tamanaha, Brian (1993) 'The Folly of the 'Social-Scientific' Concept of Legal Pluralism' 20 *Jo. Law and Society* 192.

(2001) *A General Jurisprudence of Law and Society* Oxford: Oxford University Press

(2006) *Law as a Means to an End – Threat to the Rule of Law* New York: Cambridge University Press

Tanenbaum, Sandra J. (2006) 'Evidence by Any Other Name: Commentary on Tonnelli (2006)' 12 *Jo. of Evaluation of Clinical Practice* 273.

Teubner, Gunther (1992) 'The Two Faces of Janus: Rethinking Legal Pluralism' 13 *Cardozo Law Rev.* 1443

Thompson, Edward P (1975) *Whigs and Hunters: The Origins of the Black Act* London: Allen Lane

Tonnelli, Mark R. (2006) 'Integrating Evidence into Clinical Practice: An Alternative to Evidence-Based Approaches' 12 *Jo. of Evaluation of Clinical Practice* 248

Twining, William (1974a) 'Law and Social Science: The Method of Detail', New Society, 27th June, reprinted in P. Barker (ed.)

(1974b) 'Some Jobs for Jurisprudence' 1 *British Jo. Of Law and Society* 149

(1985) 'Talk About Realism' 60 *New York University L. Rev* 329 (reprinted *GJB* Chapter 5)

(2002) *The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* Aldershot: Ashgate. (*GJB*)

(2006) *Rethinking Evidence: Exploratory Essays* (2nd. edn) Cambridge: Cambridge University Press (*RE)*

(2008c) 'The Law in Context Movement'. In Cane and Conaghan (eds)at pp. 680–2.

Twining, William and David Miers (1999) *How to Do Things With Rules* London: Butterworth, (4th edn.) (*HTDTWR*)

Twining, William and Iain Hampsher-Monk (eds.) (2003) *Evidence and Inference in History and Law: Interdisciplinary Dialogues* Evanston: Northwestern University Press

Vermeule, Adrian (2007) 'Instrumentalisms' (Review of Tamanaha (2006)) 120 *Harvard L. Rev*. 2113

Vischer, Robert K (2006) 'Legal Advice as Moral Perspective' 19 *Georgetown J. Legal Ethics* 223

Von Benda-Beckmann Franz (2002) 'Who's afraid of legal pluralism?' 47 *Jo. Legal Pluralism* 37

Woodman, Gordon (1998) 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' 42 *Jo. Legal Pluralism* 21