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**LAW & HUMAN DIGNITY**

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# MADE BY THEM, FOLLOWED BY US: CHALLENGING THE PERCEPTION OF LAW THROUGH THE DECONSTRUCTION OF JURISPRUDENTIAL ASSUMPTIONS

JOY TWEMLOW\*

*The standard position within western thought is that the bulk of domestic law derives from, and is legitimised by, the local populous. Through the institution of democratic representation, it is rationalised that the resulting law produced reflects the social consciousness of the population at the time. While there are a number of limitations to this argument, this paper focuses on the juxtaposition of this stance with the public perception that law is inaccessible, complicated, and prestigious. By looking at the ways in which jurisprudential assumptions contribute to this dissonance between law and the public and exploring what accessibility to the law means, this paper argues that law must acknowledge and incorporate different perceptions — that, at its core, access to law is about being able to engage in a conversation.*

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## I HOW WOULD YOU PERSONIFY THE LAW?

What gender is it? What is it wearing? What adjectives do you attach to it?

At the heart of this paper is a desire to examine how people define law, talk about law, view law, and experience law — and to create a space for these different understandings to engage. The above question, or more specifically the answer given, can conjure a rough illustration of the approach, values, and assumptions one might attach to law. Your personification elucidates the relationship that you have with law, and it is important that, as an institution, law facilitates positive relationships with its participants. Take your personifications with you as you read the following pages — talk to them, question them, listen to them.

When answering the personification question, many might describe law as a powerful institution that brings us security and predictability. Law sits above us: enforcing order, punishing wrongdoers, and protecting the weak. Much of the literature in both legal and political theory focuses on legitimising this omnipotent position — whether it is endorsement from the people or some other justification — the language we use to describe the functions of law reinforce a hierarchical structure. *Law is made for us to follow.* Others may replace fear and duty with a fidelity to law grounded in loyalty, ownership, and commitment. Through the institution of democratic representation, they believe that the bulk of domestic law derives from, and is legitimised by, the local populous. *We make laws we want to follow.*

The paper situates itself between these two perceived functions of law; specifically, it looks at how law is defined and the implications of this representation on access to law. Straying away from more orthodox discussions, this paper is not concerned with how to legitimise law, nor does it purport to provide a positive description of law. Instead, the paper grounds itself in understandings about society, individuals, communication, and cognitive processes to argue that law must acknowledge and incorporate different perceptions — that, at its core, access to law is about engaging in a conversation with all those who are impacted by the institution. The paper advances a request to the institution of law: listen more.

Prior to outlining my structure, it is useful to make a clarification. The issue explored here is not to make existing legal principles simple or comprehensible — it is not an argument situated in the Plain Language movement.<sup>1</sup> It is a question of shared understanding. Law, as a profession that primarily deals in words, cannot define itself without communication. Like any human institution, law is shaped by historical, social, and cultural contexts.<sup>2</sup> Legal theory and our understanding of law in general is situated in deciphering the coherency of these forces. Any identification of the coherency that law might possess relies on a description: a communication of a subjective interpretation of what law is.<sup>3</sup> In this way, our understanding of law is shaped by how we think, write, and talk about it. Definitions reached may be based on objective realities, familiarity with content, experiences, etc. This paper does not deny that some people have a *better* understanding of law. Rather, it understands that these definitions — the *meaning of law* — does not exist until the subjective interpretation has been communicated.

Each section of this paper has a ‘persona’ attached: a characterisation of a package of values, assumptions, and tools — *perceptions* — which may be brought to this particular issue. The characters of the Democrat, the Analyst, and the Humanist are undoubtedly oversimplifications and not the only personas that can be brought to the issue of accessibility. This adoption of persona is used for a number of reasons; namely, it acts as a representation of some of the perspectives that might be brought to the issue of access. The utilisation of these personas allows a middle ground to be reached between leaving

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<sup>1</sup> See, eg, Michele M Asprey, *Plain Language for Lawyers* (Federation Press, 4th ed, 2010).

<sup>2</sup> JM Balkin, ‘Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence’ (1993) 103(1) *The Yale Law Journal* 105, 141.

<sup>3</sup> *Ibid* 139.

assumptions unacknowledged and digressing into an explicit — and likely disorientating — outline of influences. However, these personas are not only expository, but they contribute to the overall argument that this paper makes. Creating a space to speak and understanding the value of different perspectives is what access to law entails. This paper treats the relationship between these personas not as adversarial, but collaborative — that it is in the interplay between the different personas' strengths and weaknesses that we grow.

With this in mind, the paper is organised into three sections. In the first section, the Democrat concerns himself with the conflict between the perception that law is inaccessible and the ideal that law derives from, and is legitimised by, the local population. The Democrat draws an observation out of this tension — that, in many cases, access to law is understood as access to legal institutions. Not satisfied with the superior status that legal practitioners might hold within this conception, he claims that law itself must be made accessible to all: that it should no longer be seen as something that 'sits above' ordinary citizens, but as an articulation of the public's view of how society should be organised. In the second section, the Analyst seeks to explain, understand, and deconstruct the idea that law is the exclusive realm of practitioners. The Analyst starts by giving a tour of this construction by pointing out some of its defining characteristics and examples within legal theory. Pleased with the description, the Analyst proceeds to undertake her favourite activity: deconstructing it with whatever tools are at her disposal. In the last section, the Humanist brings the analysis back to the individual. While acknowledging the flaws in our understanding of law, the humanist concerns herself with the fact that law has very real impacts on real people. Access to law, the Humanist posits, is about conversation: how we talk and how we listen.

## II THE DEMOCRAT

The Democrat works with Law often. He would describe Law as a common man, well-built with a full-bodied voice that echoes for miles. The Democrat likes that Law is very straight to the point, honest, and seems very knowledgeable.

*Law — the Democrat says to himself — now that's a man I can be friends with.*

But then the Democrat remembered the incident from the other day while waiting for coffee. The barista got Law's order wrong and what a scene Law made. The poor barista could not even get a word in. And the Democrat could swear he heard Law curse a homeless man on his way out.

*Disgraceful* — the Democrat thought — *on second thought I could never be friends with someone so entitled.*

The Democrat seems like the obvious persona to start any discussion about the inaccessibility of law. Using notions of consent, legitimacy, representation, participation, and, often, a normative claim about content, the Democrat paints an ideal picture of law: one that is relatively standardised in Western political discourse.<sup>4</sup>

This orthodox illustration usually starts with the assertion that there is an implicit social contract that instils the government with the legitimacy to govern. The social contract, typically Lockean in nature, requires the state to continuously check that the citizens consent to the exercise of state control, to frequently review the terms of the contract. Practically, this is undertaken through periodic demonstrations of consent giving, more commonly called elections. Through this process we choose select few people who are given the power to make laws. Theoretically, the role of these elected individuals is to represent the wishes of their constituents in their law-making activities. The result, ideally, is a body of law that reflects the collective consciousness of the populous. Law is essentially viewed as the terms of a social contract we have negotiated and agreed to.

Setting aside the flaws in the conceptualisation, the implication of this legitimising narrative is that people have a place in legal development. If law is to reflect the collective beliefs of the people, we must be able to talk to law — and law must listen. This sentiment was expressed by Fuller when he stated that law must

[o]pen up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire. In this matter the morality of aspiration offers more than good counsel and the challenge of excellence. It here speaks with the imperious voice we are accustomed to hear from the morality of duty. And if men will listen, that voice, unlike that of the morality of duty, can be heard across the

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<sup>4</sup> Here I mean popular political discourse, as opposed to Western political theory.



boundaries and through the barriers that now separate men from one another.<sup>5</sup>

However, most people do not view law as reflecting their ‘collective consciousness’. For many, laws are confusing, out of reach, and, at times, in complete opposition to their values and interests:

The ominous statement which begins Kafka’s famous parable of the futility of modern law — “Before the law stands a doorkeeper” — sums up much of our knowledge of access to legal justice. His villainous doorkeeper with ‘big sharp nose and long, thin, black Tartar beard’ fits well with the gloomy picture of the legal profession painted by much contemporary socio-legal scholarship ... Because lawyers do their most careful and creative work for the rich, the discourse of law becomes increasingly irrelevant, and oppressive, to those who have little access to it. It reflects the concerns of those who use it most, vivid in the technicalities of tax avoidance or takeovers; and excludes those who use it least, biased against women and ethnic minorities in language and content.<sup>6</sup>

Problems of legal access are not merely anecdotal or theoretical; it is supported by a number of empirical studies. The 2012 Australia-wide Access to Justice and Legal Needs (A2JLN) survey is one such example.<sup>7</sup> Focusing on legal problems experienced by those over 15 in the last 12 months, the survey looked at the prevalence, response, and impact of legal issues. It found that in all jurisdictions approximately half of the respondents had faced at least one legal problem in the preceding year (47–55%).<sup>8</sup> While a wide range of actions were taken in response to these problems, only about one-fifth of the respondents sought legal advice.<sup>9</sup> About 20% took no formal or informal action: Their reasons included the length, cost, or stress of the process; lack of knowledge of options; and the belief that action would make no difference to the problem.<sup>10</sup> Alongside this general ambivalence towards legal forms of resolution, the survey highlighted a considerable lack in knowledge of not-for-profit legal services. In fact, individuals often lacked even very basic knowledge about legal rights, remedies, and systems.<sup>11</sup> While legal problems were

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<sup>5</sup> Lon Luvois Fuller, *The Morality of Law* (Yale University Press, 1964) 186.

<sup>6</sup> Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 1 (citations omitted).

<sup>7</sup> Christine Coumarelos, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in New South Wales* (Report, August 2012) vol 7.

<sup>8</sup> *Ibid* 157.

<sup>9</sup> *Ibid* 186.

<sup>10</sup> *Ibid* 97.

<sup>11</sup> *Ibid* 177.

experienced by all demographics, the survey found that disadvantaged groups were particularly vulnerable. They were more likely to experience multiple legal problems of a serious nature and often obtained unsatisfactory or no resolution.<sup>12</sup> These statistics reflect that access is a multi-faceted problem, both caused and perpetuated by subjective and objective factors.

This problem of accessibility is not new, and the attempts to address the issue have produced volumes of articles, books, speeches, and — of course — more law. The standard response is to focus on legal institutions or practitioners. As an example, in her book titled *Access to Justice*, Deborah L Rhode concludes that improvements can be made to access through increasing legal aid, dispute resolution processes, and the accountability of lawyers.<sup>13</sup> While these types of reforms are important, stating that obtaining a lawyer constitutes accessing law seems disingenuous. Arguably, the legal institutions and practitioners are the very ‘doorkeeper’ Kafka speaks of — the aim is to get past them.

It is worth noting that most approaches are couched in the terms of access to justice as opposed to access to law. Rhode herself states that ‘access to law is not an end in itself; the goal is justice’.<sup>14</sup> Similarly, the A2JLN discussion of a holistic approach to legal access focuses not only on obtaining traditional legal recourse but having the knowledge to identify potential legal problems and prevent their occurrence.<sup>15</sup> Again, while such initiatives are important, this account does not satisfy the idea that law is made by the people for the people. It betrays the democratic sentiment of our legitimising narrative — while it allows citizens to recognise when law may apply, it does not give citizens the ability to question the fit of existing laws to their values and experiences. It is not a conversation: it is a lesson in dictation.

The next inquiry that must be undertaken is to examine whether there is a reasonable justification for denying individuals access to law — not justice, nor intuitions, nor legal information — but *law*. Is there a reason why citizens do not have the ability to shape our collective understanding of what law is and of what is meant by justice; to question the

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<sup>12</sup> Ibid 201.

<sup>13</sup> Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 185–94.

<sup>14</sup> Ibid 189.

<sup>15</sup> Coumarelos (n 7) 202.

structures and processes of legal institutions; to challenge the content of legal information; to present a valid interpretation of the thing we call 'law'? This is not a question for the Democrat. The very conviction that acted as a strength in highlighting how we approach access to law can act as a barrier to gaining an understanding of the status quo. One might say that the Democrat is biased towards a particular outcome. However, it would be misguided to interpret this bias as a weakness rather than inescapable and desirable. Law has been influenced by a particular conception of human nature that divorces reason from emotions: that progress is made in suppressing passions. However, research shows that the cognitive process of reasoning cannot occur without emotion, convictions, and values.<sup>16</sup> These idiosyncratic emotional measuring sticks are how we make sense of our world. Thus, in defining law, our values not only inescapably influence how we approach an issue, but also allow us to spot problems in other definitions, raise the questions that interest others, and provide unique solutions. Thus, a disposition that is central to access to law is 'a view of the world in which one's own self stands not at the centre, but appears as one object among many'.<sup>17</sup> An acknowledgement that some questions are better answered by someone else.

### III THE ANALYST

The Analyst cannot quite remember when she first met Law, but she vividly recalls the start of her infatuation. It was just a regular day. The Analyst and Law crossed paths like they had many times before, but this time the Analyst suddenly noticed Law anew — her poise, her perfectly pressed suit, not one hair out of place, the lyrical way in which she spoke.

*How does Law do it — the Analyst asked — What is her secret?*

With each additional encounter, the Analyst carefully observed Law's actions — noting the order, predictability, and rationality in which Law conducted her affairs.

Whether motivated by a desire to understand Law's perfection, or a compulsion to discover a fault, the Analyst committed herself to understanding the inner workings of Law's mind. Tirelessly, the Analyst

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<sup>16</sup> Antoine Bechara, Hanna Damasio and Antonio R Damasio, 'Emotion, Decision Making and the Orbitofrontal Cortex' (2000) 10(3) *Cerebral Cortex* 295.

<sup>17</sup> Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986) 4–6.

theorised, observed, engaged. Granted, there were rare moments when the Analyst thought she understood Law's secret. But as the days wore on, she was not so sure. In her dedication, the Analyst uncovered Law's faults, inconsistencies, unpredictability, injustices. Law's perfect image was shattered in the eyes of the Analyst.

She asked herself:

*But why, despite her flaws, am I still so infatuated with Law?*

The Analyst is given the task of understanding and challenging why law is not made accessible to citizens. Concerned with the inner workings of law, the Analyst explains the structure of the idea presented, identifies occurrences of the idea within our legal language, and assesses whether the idea is conceptually sound.

Faced with the argument that legal practitioners are better positioned to interpret law, the analyst questions the root of this assumption. The late Supreme Court Judge, Benjamin Cardozo stated:

It is [the] generalisations and abstractions that give direction to legal thinking, that sway the mind of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. It accepts one set of arguments, modifies another, rejects a third, standing over in reserve as a court of ultimate appeal.<sup>18</sup>

Cardozo implies here that law has a form of internal consistency, or at least multiple threads of internal consistency. Those who are trained at law are better equipped to decipher and apply them — to read the omnipotent mythical signs and communicate what it means in practice. The reason that citizens are unable to access law is that law is a technical language, one of which they are not part of.<sup>19</sup> The argument of specialised legal knowledge is not limited to grand judgements seeking overarching consistency. For instance, words such as “reasonable” or “consideration” have special meaning in law

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<sup>18</sup> Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1963) 25–7.

<sup>19</sup> For discussion on whether law is a technical language: Frederick Schauer, ‘Is Law a Technical Language?’ (2015) 52(3) *San Diego Law Review* 501.

which do not accord with general understandings.<sup>20</sup> Speaking law, it would seem, requires learning a whole new language.

Two ideas are contained within this position: (1) that there is a coherence to law and (2) that legal practitioners either know it or are best equipped to decipher it. This, in essence, describes the nature and practice of legal reasoning — or more accurately, a particular conception of legal reasoning. Unger refers to this type of legal reasoning as “rationalizing legal analysis”:

Rationalizing legal analysis is a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles. It is a self-consciously purposive mode of discourse, recognising that imputed purpose shapes the interpretive development of law. Its primary distinction, however, is to see policies of collective welfare and principles of moral and political rights as the proper content of these guiding purposes. The generalising and idolising discourse of policy and principle interprets law by making sense of it as a purposive social enterprise that reaches toward comprehensive schemes of welfare and right. Through rational reconstruction, entering cumulatively and deeply into the content of law, we come to understand pieces of law as fragments of an intelligible plan of social life.<sup>21</sup>

When practitioners adopt this reasoning, there is a realisation that the existing physical body of law — that is legislation, common law, treaties, etc — may not all be consistent with each other. However, they are informed by a belief that these laws reflect an “imperfect approximation” of some higher order, somewhat analogous to the idea of Plato’s forms. Such an understanding imparts legal practitioners with two tasks: the first is to recognise the ideal element in law that they are duty bound to follow. Describing law, Owen Fiss states:

I continue to believe that law is a distinct form of human activity, one which ... differs from politics, even highly idealized politics, in important ways. Political actors can and often do make claims of justice, but they need not ... Judges on the other hand, have no authority other than to decide what is just ...<sup>22</sup>

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<sup>20</sup> Soha Turfler, ‘Language Ideology and the Plain-Language Movement: How Straight-Talkers Sell Linguistic Myths’ (2015) 12 *Legal Communication & Rhetoric: JALWD* 195, 202.

<sup>21</sup> Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso, 1996) 36.

<sup>22</sup> Owen M Fiss, ‘The Law Regained’ (1989) 74(2) *Cornell Law Review* 245, 249.

The second task is to ensure that law is reflective of these ideals, to interpret and improve law in light of them. As Dworkin states: '[I]dentifying true propositions of law is a matter of interpreting legal data constructively, and that constructive interpretation aims both to fit and justify the data.'<sup>23</sup>

Certain discourses and approaches within jurisprudence can be seen as a search for the source of coherence. The most obvious example is the natural law doctrine: the belief that morality is intrinsically linked to law. While students of jurisprudence understand the difficulties that lie in such a claim, the natural law position is a powerful sentiment that continues to consciously, or unconsciously, inform peoples' understanding of law.<sup>24</sup>

The positivists, however, do not escape this search for coherence, nor the prioritisation of legal thinkers. Acknowledging the difficulties that arise out of claiming morals provide predictability, they instead look to social practice. Raz claims that coherence in law is revealed by the 'internal point of view' — that is, the understanding possessed by those who participate in the legal system. To Raz, it doesn't matter that law may be incoherent under certain views and argues that 'even the [outside] observer, in order to acquire a sound understanding of the law, must understand it as it would be seen by a participant. If it must be coherent to a participant then coherent it is.'<sup>25</sup>

Even critics claim that law possesses a certain consistency, albeit an undesirable one. Take for example this passage from LM Finley:

Legal language is a male language because it is principally informed by men's experiences and because it derives from the powerful social situation of men, relative to women ... The fact that there are many women trained in and adept at male thinking and legal language does not turn it into androgynous language — it simply means that women have learned male language, as many French speakers learn English.<sup>26</sup>

As opposed to saying that those within the legal system have a privileged understanding of the technical language of law, they argue that the legal language is foreign and

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<sup>23</sup> Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006) 171.

<sup>24</sup> Natural law assumptions, for example, inform much of human rights law.

<sup>25</sup> Joseph Raz, 'The Relevance of Coherence' (1992) 72(2) *Boston University Law Review* 273, 293.

<sup>26</sup> Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64(5) *Notre Dame Law Review* 886, 893–4.

oppressive. The claim does not deny the privileged position in interpreting legal language — they merely reverse the value judgement attached to that finding.

While a number of observations can be made about this method of reasoning, the Analyst chooses two which are directly relevant to the issue of accessibility. The first is a common critique levelled against the way in which law is understood. The representation of law as a coherent entity neutralises legal principles and processes, hiding questions of power, bias, and human limits. The position is described by historian Peter Novik:

The assumptions on which [the ideal of neutrality] rests include a commitment to the reality of the past, and to truth as correspondence to that reality; a sharp separation between knower and known, between fact and value, and, above all, between history and fiction. Historical facts are seen as prior to and independent of interpretation: the value of an interpretation is judged by how well it accounts for the facts; if contradicted by the facts, it must be abandoned. Truth is one, not perspectival. Whatever patterns exist in history are "found," not "made."

The objective historian's role is that of a neutral, or disinterested judge; it must never degenerate into that of advocate or, even worse, propagandist. The historian's conclusions are expected to display the standard judicial qualities of balance and evenhandedness. As with the judiciary, these qualities are guarded by the insulation of the historical profession from social pressure or political influence, and by the individual historian avoiding partisanship or bias — not having any investment in arriving at one conclusion rather than another.<sup>27</sup>

The quote is interesting — not only does it explain the idea of neutrality, it also demonstrates how those outside of the legal profession define law by its impartiality. The extent to which judges are neutral as debated within legal theory is considered a myth in legal practice,<sup>28</sup> but neutrality is taken as a given for those who are outside of the profession.

The important focus here is not if law is neutral, nor if the general public are mistaken in thinking it is neutral, but how the belief that law is neutral impacts access to justice. Legal theory focuses on the big questions in law, and when it does look to practice, inevitably it

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<sup>27</sup> Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (Cambridge University Press, 1988) 1-2.

<sup>28</sup> Cf Pierre Schlag, 'Normativity and the Politics of Form' (1991) 139(4) *University of Pennsylvania Law Review* 801.

looks at the really meaty difficulties — uncomfortable questions about personal autonomy, problems with agency in criminal law, particularly unjust laws or applications of law. However, law is everything from homicide to the most mundane regulations, and for some, these mundane regulations constitute their daily exposure to law. Legislation that determines how much water you can put on crops, requirements for rigging circus equipment, the type of fishing equipment you can use on certain boats — there are a series of regulations that impact very specific people. Legal theories and legal reasoning are not particularly concerned with these regulations. If the legislation no longer reflects industry standards or fails to include new understandings, the problem isn't one of legal theory but one of updating statute books. However, those individuals who deal with mundane regulation every day, and thus best positioned to challenge these specialist laws, may not feel they are able to.

Language, and the manner in which law is communicated, impacts whether an individual feels they are able to engage with law.<sup>29</sup> The compounding of different legal propositions, all deemed to be true, alongside the privileged position given to legal professionals can result in stagnation. In order to understand this, it is important to understand a process of communication Peter Gabel calls *reification*:

For reification we do not simply make a kind of private error about the true nature of what we are talking about; we participate in an unconscious conspiracy with others to whereby everyone knows of the fallacy, and yet denies the fallacy exists. More specifically, in a reified communication the speaker: (1) misunderstands by asserting that an abstraction is concrete; (2) understands that he misunderstands or knows the communication is “false”; and (3) denies both to himself and the listener that he knows either of these things by the implied assertion that the communication is “true”, or concrete. Thus, reification is not simply a form of distortion, but also a form of unconscious coercion, which, on the one hand, separates the *communicated* or *socially apparent* reality from the reality of experience and, on the other hand denies that this separation is taking place. The knowledge of the truth is both repressed and “contained in” the distorted communication simultaneously.<sup>30</sup>

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<sup>29</sup> Practical considerations aside.

<sup>30</sup> Peter Gabel, ‘Reification in Legal Reasoning’ (1980) 3 *Law and Society Review* 25, 26.



The issue is not simply one of individuals internalising questionable and oppressive legal assumptions as *truth*. It is the belief that law has a coherence they are unable to see that acts to silence, to play with a jurisprudential phrase — *a rule of unrecognition*. As an illustration:

- A citizen might face a regulation that does not reflect their practice;
- But then they tell themselves that law is omnipotent and beyond their reach;
- They quash this discomfort through reassurance that they form part of a democratic system.

Realising that the series of positions are inconsistent, or at least disjointed, they assume a coherence they are unable to recognise because they do not have legal training. The same could be applied to wider concerns:

- An individual faces discrimination from law enforcement;
- They are upset but do not warrant it serious enough for the cost of legal proceedings;
- They quash the discomfort through the reassurance that they possess rights.

Instead of highlighting any inconsistencies, the rule of unrecognition acts to preserve the coherence and virtue of law, denying any questions about their experience with law or justice and instead making them believe they are exercising autonomy. The silencing is compounded to the extent that individuals, while aware of substantive issues, are denied access to law.

The second observation is about the impact of the idea of coherency on the manner in which legal practitioners view their role. It is true that law has been dominated by an elite and that they have shaped the discourse of law to reflect their understanding of the world — a world view that excludes other demographics. Critics are quick to attribute malice on the part of legal practitioners claiming, like Bentham did,<sup>31</sup> that lawyers purposefully retain a monopoly on law. Such a position fails to appreciate the self-referential nature of a profession like law:

Since the origin of authority, the foundation or ground, the position of the law can't by

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<sup>31</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice* (Hunt and Clarke, 1827).

definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of 'illegal.' They are neither legal nor illegal in their founding moment.<sup>32</sup>

That is to say, without individuals in the legal profession, there would be no "legal" or "illegal" actions. Law knows that it rests on shaky grounds; most contemporary definitions of law don't try to hide this. When summarised, their justification of law comes down to: 'we all have a community of legal actors and legal interpreters whose task it is to make it so'.<sup>33</sup> This uncertainty, the inability to locate the source of law's objectivity, makes law's authority vulnerable. And law, when representing itself, attempts to numb this realisation — law makes the uncertain certain; law pretends that it does not affect people;<sup>34</sup> law pontificates.<sup>35</sup> And those within law, unconsciously aware of their precarious position, define themselves by their ability to know law *when they hear it*.<sup>36</sup> The form of reasoning taught and observed becomes a habit — an intuition.<sup>37</sup> What is difficult for the practitioner to see is that legal intuition becomes more about linguistic aesthetic than substance. There is a certain idea of what constitutes a 'valid' legal argument and, when it fails to meet the prescribed structure, it not only fails to convince but it becomes incomprehensible.

When applying these observations in the context of accessibility, we see that not only does the focus on legal coherence silence citizens, but it makes those in law poor listeners. Listening requires comprehension and understanding; the current dominant mode of legal understanding does not encourage this. For example, if one insists on coherence, there is a greater incentive to justify or reject anomalies instead of learning and understanding them. Further, coherence does not encourage revisiting and questioning already existing assumptions. Finally, insistence on coherence as a necessary element of valid legal understandings leads to a binary approach: does the information I am faced

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<sup>32</sup> Jacques Derrida, quoted in Gunther Teubner, 'Economics of Gift — Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (2001) 18(1) *Theory, Culture & Society* 29, 31.

<sup>33</sup> Pierre Schlag, "'Le Hors de Texte, C'est Moi': The Politics of Form and the Domestication of Deconstruction' (1990) 11(5-6) *Cardozo Law Review* 1,631, 1,658.

<sup>34</sup> Here I do not mean that legal practitioners deny that individual cases or policy decisions affect people, but law denies that decisions regarding its self-definition can affect people.

<sup>35</sup> Brené Brown, *Daring Greatly: How the Courage to Be Vulnerable Transforms the Way We Live, Love, Parent, and Lead* (Penguin Publishing Group, 2012).

<sup>36</sup> Schlag (n 33) 1,666.

<sup>37</sup> For information on intuition-based knowledge: See Matthew D Lieberman, Johanna M Jarcho and Ajay B Satpute, 'Evidence-Based and Intuition-Based Self-Knowledge: An fMRI Study' (2004) 87(4) *Journal of Personality and Social Psychology* 421.

with fit or not fit? To be in the legal profession means to look at the world a certain way — a view that inhibits the ability to look beyond themselves.<sup>38</sup> Those in law set out to capture a picture of the world, but instead they gain a distorted image of their own reflection. It seems, when it comes to law:<sup>39</sup>

We had talk enough,  
but no conversation.

The Analyst, through her deconstruction, comes to the conclusion that the understanding of law as a coherent entity creates the reality of inaccessibility, that the rhetoric of coherency demands legal practitioners present law in an inaccessible fashion. She realises that the enemy is in all of us: in defining law the citizens are excluded and the practitioners constrained. She is left with more questions, and no answers, about how to address access to law. Experiencing a sudden bout of post-modern despair, she quotes Mark Kelman in exasperation:

One real conclusion, one possible bottom line, is that I've constructed a very elaborate, schematized, and conceptual piece of winking dismissal: Here's what they say, this is how far they have gotten. You know what? There is not much to it.<sup>40</sup>

#### IV THE HUMANIST

*Law? — The Humanist says — Oh, I've never met Law; I only know of Law through my friends.*

*I am really not sure what to make of Law — the Humanist confesses.*

*You see — the Humanist explains — My neighbour said to me that Law helped him set up his family business. This neighbour, he said he couldn't have secured a premises, obtained a loan, organised products, employed workers, and generally conducted his business if it wasn't for Law. When my neighbour told me this, I thought Law seemed like a really helpful and resourceful man.*

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<sup>38</sup> Balkin (n 2) 168.

<sup>39</sup> Jack Lynch (ed), *Samuel Johnson in Context* (Cambridge University Press, 2012) 154.

<sup>40</sup> Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33(4) *Stanford Law Review* 591, 672-3.

*But then my family friend — the Humanist continues — she was treated horribly by her husband; the poor girl was hospitalised repeatedly. Knowing that Law was a helpful man, my friend reached out. Law did not seem to care though — well, Law said he could only help her if she brought all the tools to do the job. I don't think my friend even knew what those tools were. My friend — she is no longer with us. I guess it is not really Law's fault ... But it seems strange how resourceful he is in one case, and not in the other.*

*I would really like to have a chat with Law before I really form an opinion — the Humanist concludes — But I am not entirely sure where he lives if I am perfectly honest.*

The humanist isn't so much concerned with law, but how law relates with people. Law is intertwined with the daily lives of individuals — and individuals are intertwined within the institution of law. When it comes to access to law, the problem, at least in part, is that our current legal understanding acts as a bulwark to maintaining open channels of conversation: the very channels required to form new definitions of law. Effective conversations require both thoughtful representation and active listening, neither of which are present. The law shouts with conviction, lacking the requisite disposition for a meaningful discussion. Luckily conversation is a skill, not a trait, and can thus be learnt. Here, it is worth making two clarifications. The first is the reiteration that law is made up of — and made up by — people. While we may think about law as a wide-reaching force, there is always an individual behind anything we label law. Second, this paper does not purport to provide a grand solution to the problem of access. Citizens are not going to flood their public office motivated by a newfound enthusiasm for the legislative process. The dispositions and approaches that will be outlined are humble, offered as food for thought for anyone who thinks about, writes about, and talks about law.

The case for accessibility lies in our social structures, in ourselves, and in what it means to live together. Psychologists attribute the growth of human society to our ability to communicate. While the first hunting tool was important, our ability to convey its use, incorporate improvements, and cooperate in its utilisation — *conversation* — is what was fundamental to human development. Language is what has given us the indeterminate ability to question, marry, deconstruct, and construct ideas. In turn, the positive-feedback system created through communication allowed humans to direct evolution and shape

their own physical and theoretical environments.<sup>41</sup> Being part of a society involves taking part in the positive-feedback system, in the context of law; this means allowing people to direct the course of law's evolution and create a more inclusive legal environment. Conversely, it requires the legal profession to effectively communicate the ideas, concepts, and understandings with others.

There are a number of points that can be raised about communication and access to law, but here three are offered. First, where society restricts the scope of participants, its evolution can not only stagnate but can regress.<sup>42</sup> It is not in the transfer, but through the marrying, incorporation, and abandonment of ideas that society develops. If law limits who is able to partake in this exchange, it is impacting its own ability to grow. To understand why collective input is important, we must develop the skill of equipoise: to acknowledge and accept biases and limitations in our own mind. This may be difficult, as Pierre Schlag notes, 'traditional legal discourse rhetorically establishes the self of the legal thinker as a privileged individual subject — as the author of his own thoughts, the captain of his own ship, the Hercules of his own empire'.<sup>43</sup> As desirable as that conception may be, the legal profession can benefit from the input of the rest of society.

Sandra Harding argued that other people can provide a vantage inaccessible to ourselves — that in sharing different perspectives we can obtain a more objective view of the social phenomena we are observing.<sup>44</sup> With the understanding that it is always an individual, and usually one in the profession, who confers meaning onto law — all definitions of law must account for human error. This is not a simple argument of judges making a mistake in legal reasoning — it is the realisation that we have cognitive limitations by virtue of us being human. In brief, in constructing a consistent understanding of the world (or a consistent understanding of a concept such as law), we utilise a number of different cognitive functions, and these can blind us to alternative interpretations. For one, people

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<sup>41</sup> Michael C Corballis, *The Lopsided Ape: Evolution of the Generative Mind* (Oxford University Press, 1993).

<sup>42</sup> See I Davidson and D Roberts, '14,000 BP — on Being Alone: The Isolation of Tasmania' in Martin Crotty and David Andrew Roberts (eds), *Turning Points in Australian History* (UNSW Press, 2009).

<sup>43</sup> Schlag (n 33) 1637.

<sup>44</sup> Sandra Harding, 'After the Neutrality Ideal: Science, Politics, and "Strong Objectivity"' (1992) 59(3) *Social Research* 567.

have varying abilities to spot potential inconsistencies and thus activate the process of evaluation.<sup>45</sup> Some people simply do not see a problem where there is one.

Second, the part of the brain that holds our ability to combine, compare, and sequence multiple sources of information is limited by processing constraints.<sup>46</sup> On average, people can only hold up to seven considerations in their mind at one time — in an expansive concept such as law, this poses the danger of overlooking relevant considerations. Finally, resolving conflicts takes a great deal of energy, and therefore, once resolved, humans form a habit of approaching similar issues in the same manner, *even if the original calculus was mistaken*. Challenging the view requires multiple instances of new conflicts, different from the original evaluation undertaken.<sup>47</sup>

The understandings that those within law develop through law school and through their practice makes certain ways of thinking habitual, and thus difficult to challenge by one's self. This internalisation acts to reinforce the shared understanding. In order to uncover possible inconsistencies, alternative voices must be given the opportunity to challenge key legal assumptions — *without others, we simply cannot see new possibilities*.

Third, to state that law is a technical language out of the reach of citizens denies the legal practitioner's position within society. This quote, from a middle school teacher, seems apt:

The way they exclude one another is the way eight-year-olds would play. They don't seem able to put themselves in the place of other children. They say to other students: "You can't play with us."<sup>48</sup>

To state that law is a different language denies the fact that legal practitioners are members of society who are capable of conveying meaning in non-legal contexts. Communicating law is not a case of a native French speaker talking with an English speaker, but the process of one person conveying new knowledge to another within their society. Humans have an amazing ability to share our social world through

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<sup>45</sup> Matthew Lieberman and Naomi Eisenberger, 'Conflict and Habit: A Social Cognitive Neuroscience Approach to the Self' in Abraham Tesser, Joanne V Wood and Diederik A Stapel (eds), *Building, Defending, and Regulating the Self: A Psychological Perspective* (Taylor & Francis, 2004) 86.

<sup>46</sup> Ibid 84.

<sup>47</sup> Ibid 85.

<sup>48</sup> Sherry Turkle, *Reclaiming Conversation: The Power of Talk in a Digital Age* (Penguin Publishing Group, 2015) 16–17.

communication — to induce a mirroring of brain activity in our listener.<sup>49</sup> However, we also comprehend the world differently — humans have diverging understandings of even basic concepts such as time.<sup>50</sup> There are two key components to effective communication: the first is an awareness of one's own values, assumptions, approaches — the aforementioned skill of equipoise. The second is the locating of a common ground with the listener, contextualising one's idea within the listener's lived experience, and continuously catering communication to their understanding. On a practical level, it calls for the abandonment of the assumption that there is an objectively clear manner in which law can be presented.<sup>51</sup> Rather, it is a conscious reflection on whether the words written or uttered allow your audience to access your thoughts, beliefs, and passions. It is not a science, nor an art, but a practice.

Communication of this form is essential for access to law. It allows individuals to understand law without being coerced into accepting it as an unquestionable truth. It is the basis upon which individuals can determine whether law reflects their needs, wants, and understandings. People who are unable to take part in the positive-feedback system are extra-society; to take part, they have to be given the ability to question dominant understandings. In this manner, access to law involves allowing people to 'enter into [law], to criticise it without utterly rejecting it, and to manipulate it without self-abandonment to *their* system of thinking and doing'.<sup>52</sup> Arguably those within the legal profession benefit as well — the focus on objectivity denies their ability to share their definition of the legal world. Joy is rarely found in the accepted or the normalised, it is usually found in the unexplained, the new, the unique; being forced to pretend that their perspective is objective almost transforms it into something mundane.

Finally, a conversation cannot occur unless there is an exchange of ideas. Law must not only explain, but also listen. At the most basic level, listening has been linked with greater empathy and the ability to overcome differences. Fostering a sense of value through listening can have positive impacts generally, helping to address key social issues without

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<sup>49</sup> Uri Hasson et al, 'Brain-to-Brain Coupling: A Mechanism for Creating and Sharing a Social World' (2012) 16(2) *Trends in Cognitive Sciences* 114.

<sup>50</sup> Lera Boroditsky and Alice Gaby, 'Remembrances of Times East: Absolute Spatial Representations of Time in an Australian Aboriginal Community' (2010) 21(11) *Psychological Science* 1,635.

<sup>51</sup> Turfler (n 20).

<sup>52</sup> D Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982) 62.

the need for law to demonstrate its force.<sup>53</sup> However, in the context of access to law, listening requires the active participation of individuals. It is the essential mechanism through which new ideas can be incorporated into our current legal understanding. Alongside the recognition of fallibility, and the contextual framing of information, this requires that one

suspend or bracket one's own perceptions long enough to enter sympathetically into the alien and possibly repugnant perspectives of rival thinkers. All of these mental acts — especially coming to grips with a rival's perspective — require detachment, an undeniably ascetic capacity to achieve some distance from one's own spontaneous perceptions and convictions, to imagine how the world appears in another's eyes, to experimentally adopt perspectives that do not come naturally.<sup>54</sup>

The different perspectives gained in this process of “stepping out” are where the seeds for growth are found, where ideas are merged, and law developed.

The Humanist accepts that her contributions are minor as they call for those within law to actively reflect on their role as a legal thinker, speaker, and listener. Her focus is on the individual level and does not deny that more holistic methods have to be adopted to make law more accessible. However, no matter how one conceptualises law — whether an objective entity we can positively describe, a set of coherent structures guided by principles, a directional endeavour, or a mere construction — communication is the only means through which we can identify and solve problems. The dispositions and practices highlighted are not sufficient to ensure access to law, but it would be impossible without them. How might this be practically implemented: That is a question for another person.

## V THE LAW

In examining the issue of inaccessibility, this paper set out to highlight the role that different perspectives play in the act of defining law. In relation to the issue of accessibility, the paper advanced the proposition that the way we understand, express, and comprehend law can create limitations on individuals to speak, practitioners to listen,

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<sup>53</sup> Arie W Kruglanski et al, 'The Psychology of Radicalization and Deradicalization: How Significance Quest Impacts Violent Extremism' (2014) 35 *Political Psychology* 69.

<sup>54</sup> Thomas L Haskell, 'Objectivity Is Not Neutrality: Rhetoric vs Practice in Peter Novick's *That Noble Dream*' (1990) 29(2) *History and Theory* 129, 132.



and law to develop. Currently, Law silences citizens and constrains practitioners. The offered solution is a change in disposition and practices when talking about law — to offer a lesson for law in conversation.

Weaved into this position on accessibility was a demonstration of the importance of engagement. Through the adoption of different personas, it was shown that individuals bring their own skills and values, providing unique perspectives on law and legal issues. The Democrat, Analyst, and Humanist each brought with them a position that added to the conversation but also prohibited them from drawing a conclusion. The personas' preoccupation with their relationship with law — the Democrat's bend towards populism, the Analyst's focus on 'truth', and the Humanist's desire to contextualise individual experience — prohibits law's ultimate goal: to make a determination. The Democrat cannot incorporate every perspective, the Analyst is unlikely to discover a grand truth, and the Humanist wishes to keep listening to the detriment of reaching a conclusion. Law must make a judgement in order to be operational, but this paper is a call for the Law, and more accurately those individuals who form part of law as an institution, to listen more openly.

Law must remember that it is people who constituted her; that in a collective enterprise they came up with the most effective tool of social organisation; that without their input, she will cease to be authoritative — worse still, she will no longer be loved.

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