BOOK REVIEW

PAUL KAHN, ORIGINS OF ORDER: PROJECT AND SYSTEM IN THE AMERICAN LEGAL IMAGINATION (YALE UNIVERSITY PRESS, 2019)

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Simple Legal Positivism in the Analytical Tradition of Legal Philosophy maintains a sharp distinction between law and its underlying morality and political legitimacy. As a result, these theories are unable to furnish an adequate account of why sociologically descriptive (external) statements about law and obligation have a normative dimension, and how external legal statements can be cognized, internalised, and fulfilled by law's subjects. Scholarship critiquing Simple Legal Positivism's deficiencies (ie, 'Sophisticated Legal Positivism') draws attention to the metaethical and metaphysical epistemic presuppositions that Simple Legal Positivism must assume to provide an adequate account. This review essay reviews Professor Paul W Kahn's book Origins of Order: Project and System in the American Legal Imagination. *Written in Kahn's hermeneutic 'Cultural Analysis of Law' epistemology,* Origins of Order *provides imaginaries (epistemic devices) that have the potential to better and more explicitly explain the normativity of positivist law.*

I INTRODUCTION

The hallmark of legal positivism is the separation of law from its morality and political legitimacy ('simple legal positivism').[1] The legal validity of a rule does

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[1] In this essay I adopt Shiner's terminology. Theories that insist upon the sharp distinction between law and its morality and political legitimacy are collectively referred to as 'simple legal positivism';

not depend on the conformity to some overriding moral precept,[2] nor presuppose any moral obligation to obey it.[3] This separation is broadly understood to be the separation between the 'is' and the 'ought' (ie, *sein* and *sollen* in Kelsen's legal science), and between the 'descriptive' and the 'normative' (in Hart's distinction between 'internal' and 'external' legal statements).[4] However, in the practice of law, such a separation is somewhat artificial and difficult to cognitively reconcile.[5] Descriptive statements about what the law *is* epiphenomenally implies its normative validity because they give expressive reasons (moral, authoritative, normative reasons) about the *ought-ness* (normativity) to fulfil them.[6] The converse is also true.[7] Legal positivism's methodological appeal to a sociologically[8] 'descriptive, morally neutral, theory about the nature of law' that is committed to the separation of law and morality fails to cognitively explain how descriptive sociology accounts for law's normativity.[9] On this point, the assumption of the "describability" of normative practices has been the topic of intense debate in legal philosophy.[10]

Shiner (n 38); HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593.

[2] Kelsen, *Introduction to the Problems of Legal Theory* (n 4) xxiv.

[3] Schauer (n 64) 506.

[4] Hans Kelsen, *Introduction to the Problems of Legal Theory*, tr Bonnie L Paulson and Stanley L Paulson (Clarendon Press, 1992) xvii-xlii, 21-36; Toh (n 28).

[5] Mrs Justice Lang DBE does not appear to treat the 'is' and the 'ought' as mutually exclusive: *AAM v Secretary of State for the Home Department* [2012] EWHC 2567 (QB), [104]-[110] (Lang J), adopting the analysis in Christopher Forsyth, ''The Metaphysics of Nullity' – Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford University Press, 1998) 141, 146-50; cf Kelsen (n 4) xxv; See further, Litowitz (n 78) 127 (n 1); Brian Tamanaha, 'The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociological Studies' (1996) 30 *Law and Society Review* 163.

[6] *AAM v Secretary of State for the Home Department* (n 5) [104]; Forsyth (n 5) 148; See also, *Percy v Hall* (1997) 3 WLR 573, 595; Shiner (n 38) 263; See also, Roger Shiner, 'Exclusionary Reasons and the Explanation of Behaviour' (1992) 5(1) *Ratio Juris* 1; Kelsen (n 4) xxvi (n 20): Kelsen and Raz consistently equate natural law concept with normativity.

[7] See also, Axel Hägerström, *Inquiries into the Nature of Law and Morals*, ed Karl Olivecrona, tr C D Broad (Almqvist & Wilksell, 1953) 201-3.

[8] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) v.

[9] Andrei Marmor, 'Legal Positivism: Still Descriptively and Morally Neutral' (2006) 26(4) *Oxford Journal of Legal Studies* 683, 683; cf Frew (n 29) 286.

[10] Toh (n 28) 404; See also, Maximilian Kiener, 'Unpacking Normativity. Conceptual, Normative and Descriptive Issues' (2021) 12(1) *Jurisprudence* 109, 109; George Pavlakos, 'Kelsenian Imputation and the Explanation of Legal Norms' (2019) 37 *Revus: Revija za Ustavo Teorijo in Filozofiojo Prava* 47; Ota Weinberger, 'The Logic of norms Founded on Descriptive Language' (1991) 4(3) *Ratio Juris* 284, 288, 294; Nicholas Aroney and Jennifer Corin, 'Endemic Revolution. HLA Hart, Custom and the Constitution of the Fiji Islands' (2013) 45(3) *Journal of Legal Pluralism and Unofficial Law* 314, 314.

The purpose of this review essay is twofold. First, this review essay will explain how simple legal positivism provides a non-cognitivist account about the nature of law and is therefore inadequate in accounting for why descriptive statements have a normative dimension.[11] Remedying the deficiencies of simple legal positivism requires an ontological commitment to norm-acceptance. Second, this essay reviews Professor Paul W Kahn's book, *Origins of Order: Project and System in the American Legal Imagination*,[12] in the attempt to explain how Professor Kahn's hermeneutic imaginaries of 'project' and 'system', and the tensions between these alternate imaginaries, provide a cognitivist account of descriptive sociology that explain why and how descriptive legal statements have a normative dimension. This review draws on and reviews Professor Kahn's claim that: '[n]atural law theories tended … to be explicitly normative, relying directly on morality, while the social-system idea of [law] tended to locate itself in the emerging sciences. That did not make these theories of [social-]system less normative, but it did make them less explicitly so'.[13] In doing so, this review essay shows how Professor Kahn's use of hermeneutic imaginaries 'mediates the excesses of purely internal and external approaches to law'.[14]

Part II reviews simple legal positivism and its deficiencies in account for law's epiphenomenon. Part III reviews how legal theory has shifted towards sophisticated legal positivism and lays down the requirements for a theory that adequately explains law's epiphenomenon. Part IV reviews *Origins of Order* and offers an account of how it can explain the normativity of descriptive statements about law. Part V describes what audiences will benefit from the book.

II SIMPLE LEGAL POSITIVISM AND ITS DEFICIENCIES

A *Epiphenomenon or Transcendental-Logical Presupposition in Law's Practice*

Uncertainty about what *is* the state of law in the identification (knowing) of the rules at a point in time that make up law (ie, validity) in a momentary legal system

[11] See especially, Toh (n 28) 405.
[12] Paul W Kahn, *Origins of Order: Project and System in the American Legal Imagination* (Yale University Press, 2019).
[13] Ibid 258 (n 9).
[14] See further, Litowitz (n 78) 127 (n 1).

is epistemic uncertainty.[15] Epistemic uncertainty includes the enquiries of not only what *is* law, but also what *should* or *could* be identified as law since these also describe what law *is*, just not at that point in time. Uncertainty in judgments of value about the *ought-ness* (normativity) of law or about what a person *ought* to do (eg, of law's underpinning morality, authority and legitimacy as drivers of human agency), is moral uncertainty.[16]

Neither simple legal positivism nor natural law accounts of law – ie, theories that insist on drawing a sharp distinction *contra* those that 'den[y] the rigid separation'[17] between the law that *is* and the moral content of law – provide a satisfactory answer to either epistemic or moral uncertainty. Simple positivism tends only to provide an answer to the former uncertainty and presumes the truth of the latter (no matter how artificial the separation is).[18] Natural law accounts tend only to provide an answer to the latter uncertainty and assumes the former to be resolved by the latter enquiry.[19] Neither of these theories, however, are capable of adequately canvassing the phenomena of law's practice (eg, in adjudication). These theories, as tools of law interpretation (understanding law), are inadequate in describing precisely how law operates and is practiced in a legal system.[20]

Describing the phenomena of law's practice, Axel Hägerström, writing in the *Inquiries into the Nature of Law and Morals*[21] posits that the practice of law involves enquiries about both epistemic and moral uncertainties. In Hägerström's understanding of the phenomena of law's practice, the resolution of epistemic uncertainty, by that very reason, epiphenomenally implies the resolution of moral uncertainty, and vice-versa.[22] In other words, there is a conflation of validity and efficacy[23] – a tendency to regard legal rules as both

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[15] Philip Soper, '*Epistemic Uncertainty and Legal Theory* by Brian Burge-Hendrix' (2010) 23(1) *Canadian Journal of Law and Jurisprudence* 249, 249.
[16] Ibid.
[17] Lon Fuller, *Law in Quest of Itself* (University of Chicago Press, 1940) 5-6.
[18] Shiner (n 38) 28; See also, HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593; Kelsen (n 4) xxvi.
[19] Kelsen (n 4) xxvi.
[20] Chun (n 70) 22-3: 'Hart himself recognised, his account never defends satisfactorily why the normativity of rules that need not obligate citizens or presuppose any normative relationship to them, would then be the *supreme* or pre-emptive norms within a society, as necessitated by the legal positivist paradigm'.
[21] Hägerström (n 7).
[22] See, eg, Culver and Giudice (n 32) 72-3.
[23] Chun (n 70) 17-9.

descriptive and normative:[24] there tends to be an inescapable inference that once legal rules are identified (or described, factually) to be the state of law, they are for that very reason, authoritative and valid;[25] and vice-versa:

> the practical aims of jurisprudence give rise to a tendency to regard legal norms, … not only as both imperative and factual statements about obligations (ie, containing value-judgments of normativity, or *ought-ness*), but also as valid statements about obligations (ie, epistemic descriptions of what law *is*); and a corollary …, to regard the supposed declarations of will in law as valid statements about duty. *The mediating term is a surreptitious notion of command.*[26]

In the pragmatist and practical understanding of law, the lines separating the enquiries about epistemic and moral uncertainties are blurred,[27] in the sense that it is possible to have knowledge and factual statements about its existence as law that imply the not only its validity but also its normativity,[28] and value judgments about law's normativity that imply that it *is* valid law.[29] Despite defending his positivism as descriptive sociology, Hart concedes in his *Postscript* published posthumously that descriptive statements have a normative dimension: '[d]escription may still be description, even when what is described is an evaluation'.[30]

Central to Hägerström's understanding of this epiphenomenon in law's practice is the institution of *command*. Law must have the ability to effectively 'command' obedience to behave in a certain manner.[31] In this understanding, those who practice law must accept that law, pre-jurisprudentially, makes a claim

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[24] Roger Shiner, 'Jurisprudence: Ideology or Analysis' (1993) 8(2) *Canadian Journal of Law and Society* 205, 205.
[25] Hägerström (n 7) 201-3.
[26] Hägerström (n 7) 201 (my further explanation in parenthesis added, my emphasis in italics added).
[27] See further, Schauer (n 64) 495: 'By recognizing the necessarily opposed demands of system ('norm') [empirical social practices] and value ('nature'), Shiner perceptively identifies the intractable tension that explains why legal theory can never come to rest'.
[28] In an interpretation of HLA Hart's theory, Kevin Toh suggests that internal legal statements presupposes that norms within that statement is generally accepted and complied with by members of the community, therefore also a description (external view) about law: Kevin Toh, 'Raz on Detachment, Acceptance and Describability' (2007) 27(3) *Oxford Journal of Legal Studies* 403, 406; cf W G Maclagan, 'The Nature of a Moral Duty' (1953) 28 *Philosophy* 353, 353-4.
[29] Kendra Frew, 'Hans Kelsen's Theory and the Key to His Normativist Dimension' (2013) 4 *Western Australian Jurist* 285, 291.
[30] Hart (n 8) 244; Jonathan Crowe and Lucy Agnew, 'Legal Obligation and Social Norms' (2020) 41(1) *Adelaide Law Review* 217.
[31] See also, Johnson (n 70) 362-3.

to legitimate authority;[32] accept that for law to be *law*, its subjects must be 'willing to be guided and to require others to be guided, by it'[33] and must accept it as being of at least some legitimate value.[34] While truth-condition of external legal statements are the existence of certain social practices (descriptive sociology), there is the presupposition that external legal statements must be able to be cognized as authoritative or binding by its subjects (cognition of social reality) as truth-condition of its fulfilment.[35] Law is regarded both as exclusionary reasons for action as well as providing expressive reasons (moral, authoritative, normative reasons) to follow law,[36] which implies the law must be worthy of respect.[37]

In Hägerström's view, then, the criterion of law's validity depends on the efficacy of a legal system, which in turn depends on two pre-conditions: First, some *necessary* connection between law and its morality (in the sense of 'legitimacy'[38] and 'authority'[39]).[40] The *ought-ness* (obligatoriness) of law lies in a pre-conventional figure of *bond* buried in legal statements.[41] In this sense, the epiphenomenon in the practice of law presumes an overlap extensionally

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[32] Schauer (n 64) 503, 506; See, Keith Culver and Michael Giudice, 'Claims to Authority, Legal Systems, and Dynamic Social Phenomena' in Roger Cotterrell and Maksymilian Del Mar, *Authority in Transnational Legal Theory* (Edward-Elgar Publishing, 2016) 49.

[33] Toh (n 28) 405-6, quoting Joseph Raz, 'H.L.A Hart (1907-1992)' (1993) 5 *Utilitas* 148.

[34] Shiner (n 38) 28-9, 90-9; Litowitz (n 78) 143; See especially, Shiner (n 38) 90-1 *et seq*: 'Hart has rejected simple positivism: he denies that law may have any content with his doctrine of "the minimum content of Natural Law". … By "natural necessity" (*The Concept of Law*, 195) any system of general social norms (by law defined by social facts: legal norms) – that is, any system of morality and of law – must contain this minimum content'.

[35] In this sense, rules are also conceptualized as norms; Frew (n 29) 286; Kelsen (n 4) xxxiii; Hart adopts this position in his later works: Litowitz (n 78) 147, referring to HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) 14; 'Though Hart thought of his concept of law as 'an essay in descriptive sociology', it wasn't so much that he championed instilling empirical social science in legal theory, but more that legal philosophy be incorporated into the social experience': @alanigolanski (Alani Golanski) (Twitter, 12 December 2020, 5.00 am AWST) <https://twitter.com/alanigolanski/status/1337502495896203266>, archived at <https://perma.cc/D37R-NM39>.

[36] Shiner (n 38) 263; See also, Roger Shiner, 'Exclusionary Reasons and the Explanation of Behaviour' (1992) 5(1) *Ratio Juris* 1.

[37] Shiner (n 38) 268-9.

[38] Roger Shiner, *Norm and Nature: The Movements of Legal Thought* (Clarendon Press, 1992) 20, 23-24.

[39] Joseph Raz, *The Authority of Law: Essays in Law and Morality* (Oxford University Press, 1979).

[40] See also, Shiner (n 38) 28-9; In the Dworkinian sense, both personal morality and political morality: Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 285-91, 317-23.

[41] Curiously, legal positivism does not appear to emphasize this assumption of a pre-conventional bond, as it does seem to undermine simple positivism's distinct separation between law and morality: cf Hart (n 8) 87; Moreso (n 48) [1]-[3].

between law and its morality.[42] Second, resolution of the antinomy between epistemic and moral enquiries – ie, between 'skeptical empiricism' and 'dogmatic rationalism'.[43] Kelsen posits that this requires that legal statements are capable of cognition by its subjects, and this must involve an understanding of how law's subjects cognize and fulfil the law.[44]

B *Inadequacies of Simple Legal Positivism in Accounting for Law's Epiphenomenon*

Simple legal positivism's maintenance of a sharp distinction between the enquiries of what law *is* empirically (epistemic uncertainty) and the value judgments about law's content (moral uncertainty) does not allow the conceptualization of the epiphenomenon in the practice of law.[45] Simple positivism insists that those standards that supply law with its 'internal' authority or legitimacy are not the standards which supply law with its 'external' status as law. Simple positivism treats law from the 'external point of view'[46] by regarding the legal system and its operation as an inanimate simulation,[47] where the external observer views law-abiding social life behavior as no more than simply patterns of regularities and convergent events in the identification of law.[48] The external observer pays no regard for the reasons underlying human agency – why most people abide by the law (thereby making law efficacious). It also fails to account for the relational internal points of view of dissident citizens or judges – ie, why some people abide by but advocate for law's change, and why some defy the law.[49] By this token, it also fails to account for these plural internal points of

[42] Shiner (n 38) 91; See also, Robert Summers, 'Professor H. L. A Hart's "Concept of Law"' [1963] (4) *Duke Law Journal* 629, 650 (n 33), 652 (n 36) and sources cited therein.
[43] In Kelsenian terms, a reconciliation of his normativity thesis (on the metaphysics of law and fact) and his morality thesis (on the meta-ethics of legal statements): Kelsen (n 4) xxix-xxx.
[44] Kelsen (n 4) xxx; See especially, Kantorowicz (n 155) 44: 'Denn alle normativ-wissenschaftliche Tätigkeit wird nur da möglich oder der Mühe wert sein, wo der Gegenstand nicht der Einwirkung bewusst-menschlichen Wollens völlig entrückt ist' (roughly translates to 'Because all normative-scientific activity will only be possible or worth the effort where the object is not completely removed from the influence of conscious human will').
[45] See also, Summers (n 42) 652-8.
[46] Hart (n 8) 87.
[47] Shiner (n 38) 54.
[48] Ibid; cf Jose Juan Moreso, 'Celano: Ontological Commitment and Normative Bite' (2016) 30 *Revus: Revija za Ustavo Teorijo in Filozofiojo Prava* 77, [2]-[3].
[49] Hendrix (n 62) 343.

view that may in future become the majority's internal point of view.[50] The external point of view 'entails a political fallacy by cloaking human agency in the appearance of historical necessity',[51] and 'misses a whole dimension' of social life in which rules serve as guides toward human agency.[52] In this vein, simple positivism takes the approach that 'such projects [concerning law's efficacy, human agency and their relationships with authority or legitimacy; and the temporal development or evolution of law] do not fall within the province of [analytical] jurisprudence, since they do not have to do with the determination of what it is for a law to be law'.[53]

In these ways, simple legal positivism suffers from two deficiencies (that corresponds to the two pre-conditions of an account of law's epiphenomenon). First, simple legal positivism treats epistemic enquiries and moral enquiries as mutually exclusive and rejects the view that both enquiries have ties that are *a priori* in character.[54] Thus, it does not explain how social practices are capable of generating normative rules.[55] Simple legal positivism does not facilitate the possibility of an ontological commitment to both epistemic and moral

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[50] In *The Concept of Law* (n 8), Hart countenances in his Secondary Rule of Change that law at a momentary point in time may change, and when it does, there must be some minimum content of morality or natural law as the underpinning or support for new law. In this sense, the Secondary Rule of Recognition (rules that identifies what is law) must also have some moral content about legitimacy and authority. Simple positivism, in maintaining its distinction between law and its underpinning morality or legitimacy, cannot explain this.

[51] Golanski (n 52).

[52] Litowitz (n 78) 142: 'the … problem with external theory is that it tends to be overly reductionistic and dismissive of the mental states of the actors within the legal system'; See also, @alanigolanski (Alani Golanski) (Twitter, 28 October 2020, 10.18pm AWST) <https://twitter.com/alanigolanski/status/1321456296424542209>, archived as <https://perma.cc/7ED6-ET26>: 'For Hannah Arendt the external point of view entails a political fallacy by cloaking human agency in the appearance of historical necessity. For HLA Hart the external point of view "misses a whole dimension" of social life in which rules serve as guides toward human agency'.

[53] Shiner (n 38) 29; See also, generally, Roger Shiner, *Legal Institutions and the Sources of Law* (Springer, 2005); The Anglo-American tradition of analytical legal philosophy is not as robust as their continental counterparts in accounting for the normativity of law: Jorge Emilio Nunez, 'The Logical Analysis of Law as a Bridge Between Legal Philosophical Traditions' (2016) 7(3) *Jurisprudence* 627, 631; Scott Shapiro, 'What is the rule of Recognition (and Does it Exist)?' (Yale Law School Public Law & Legal Theory Research Paper Series, Research Paper No. 181, 2009) 2; Raz calls this the 'problem of normativity of law': Joseph Raz, *Practical Reasons and Norms* (Oxford University Press, 2nd ed, 1999) 170.

[54] Kelsen (n 4) xxiv.

[55] Scott Shapiro, 'What is the rule of Recognition (and Does it Exist)?' (Yale Law School Public Law & Legal Theory Research Paper Series, Research Paper No. 181, 2009) 2; Raz calls this the 'problem of normativity of law': Joseph Raz, *Practical Reasons and Norms* (Oxford University Press, 2nd ed, 1999) 170.

enquiries.[56] Second, it does not adequately explain how the same social facts, when viewed from the *external* point of view of an observer to describe the law (a statement *about* what the law *is*), can provide an explanation for why and how its subjects ought to follow it. It does not account for how empirically descriptive (external) legal statements *about* the law can be cognized and internalized by law's subjects.[57] Simple legal positivism is a non-cognitivist account of the nature of law.

III SOPHISTICATED LEGAL POSITIVISM: A TURN TOWARDS COGNITION; METAPHYSICS AND AN ONTOLOGICAL COMMITMENT TO NORM-ACCEPTANCE

Scholarship on legal positivism in the last sixty years has not defended simple positivism. It has become more philosophically technical and sensitive.[58] Contrary to the position taken by simple legal positivism, Shiner posits that it falls within the rightful province of jurisprudence to claim that efficacy (and its content) is a necessary condition of the criterion for law's validity.[59] As Hart claims, to regard a complex social institution that is a legal system as simply a system of observable regularities is to 'profoundly misunderstand such an institution'.[60] A simulation of a legal system based on the external point of view, 'cannot reproduce the way in which the rules function as rules in the life of … society'.[61] It conceals and distorts 'what is truly social about human social behavior – its relational and interactional quality'.[62]

The attempt by sophisticated legal positivism[63] to remedy the deficiencies of simple legal positivism in accounting for and for empirically descriptive (positivist) legal statement's normativity (ie, law's epiphenomenon) lies in its emphasis on Hart's claim that law as obligation-imposing set of rules require the

[56] Kelsen (n 4) xxv; cf Moreso (n 48); Keith C Culver, 'Shiner on 'Detached Legal Statements': A Defense of Raz' (1995) 8(2) *Canadian Journal of Law and Jurisprudence* 347.
[57] Cf Schauer (n 64) 505.
[58] Predominantly, see Hart (n 8) and contemporary scholarship; Shiner (n 38) ch 2.
[59] Shiner (n 38) 29; See also Brian Tamanaha, 'Socio-Legal Positivism and a General Jurisprudence' (2001) 21(1) *Oxford Journal of Legal Studies* 1, 10
[60] Shiner (n 38) 55.
[61] Ibid 59; referring to Hart (n 8) 88.
[62] Brian Burge Hendrix, 'Two Perspectives on Legal Theory' (2003) 16(2) *Canadian Journal of Law and Jurisprudence* 337, 344.
[63] Or in Julie Dickson's terminology, 'Critical Legal Positivism': Hendrix (n 62) 343.

'internal point of view' for their efficacy and fulfillment.[64] In essence, sophisticated legal positivism is a methodological turn incorporating an ontological commitment towards norm-acceptance to explain and critique the nature of law.

Hart's claim requires taking seriously the job of accurately describing the nature of the legal system as a social institution.[65] To do so, it must cognitively reconcile empirically descriptive (external) statements *about* law with legal statements *of* law from the point of view of participants in a legal system. Central to this sophisticated legal positivism's reconciliation the descriptive and the normative aspects of legal statements is the idea that passing references to the internal *points* of view will no longer suffice. Instead, they must be reproduced through truth-conditional criterion that represents how rules are followed or not followed, preserved *in statu quo* or changed.[66] As a description of distinctively human phenomena (of law in action), the criterion must account for hermeneutic understanding about the situation described as it is cognized by each of the agents or group of agents whose behavior is to be explained and understood.[67] Such a criterion must be able to precisely simulate the relational and interactional behavior as between agents or groups of agents of an entire legal system.[68] Such a criterion should account for plural internal *points* of view, and be capable of addressing change in states of Being (epistemic enquiry of *is* law, viewed momentarily) and Becoming (moral enquiry of *ought*).[69]
This reconciliation can be achieved if we accept two propositions.

First, empirically descriptive statements about law are pre-conventions that have normative bite.[70] In Kelsen's *Pure Theory of Law*, this is the metaphysical

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[64] Shiner (n 38) 43, referring to HLA Hart, *The Concept of Law* (Clarendon Press, 1961) 80-1; Hart (1961) (n 64) 100-1; Litowitz (n 78) 128; Marcus Singer, 'Hart's Concept of Law' (1963) 60(8) *Journal of Philosophy* 197, 212; Raz assumes that the truth-condition of legal statements are the existence of certain social practices: Toh (n 28) 405; For further discussion, see Shiner (n 38) ch 2; Frederick Schauer, 'Roger Shiner, *Norm and Nature: The Movements of Legal Thought*' (1994) 24(3) *Canadian Journal of Philosophy* 495, 497.
[65] Shiner (n 38) 55.
[66] Shiner (n 38) 59-60.
[67] Ibid 60, referring to Peter Hacker, 'Hart's Philosophy of Law' in Peter Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977) 9.
[68] Hendrix (n 62) 344.
[69] Roger Shiner, *Knowledge in Reality in Plato's Philebus* (Van Gorcum & Co, 1974) 22-3 ('Theory of Transcendent Forms'; 'the 'transcendent intelligible world of Being, and the natural sensible world of becoming'); See also, Peter Gan, 'Being and Becoming and the Immanence-Transcendence Relation in Evelyn Underhill's Mystical Philosophy' (2011) 50 *SOPHIA* 375.
[70] Marc R Johnson, 'Legislative Sovereignty: Moving From Jurisprudence Towards Metaphysics' (2020) 11(3) *Jurisprudence* 360, 362-3; Moreso (n 48); Michelle Chun, 'The Anti-Democratic Origins of Analytical Jurisprudence' (2021) *Jurisprudence* (advance article)

and meta-ethical 'transcendental argument' that descriptive statements are naturally normative.[71] A person's cognition of descriptive legal norms is only possible when a categorical normative imputation is presupposed.[72] Echoing Hägerström, Johnson posits that the conversion of empirically descriptive statements to normative statement requires the inclusion of a command to behave in a certain way.[73] Hart alludes to descriptive legal statements about obligations being pregnant with the figure of a *bond*[74] – a presupposition of an imposed or immanent normative value system accepted by the person subjected to those statements.[75] This is not to say that a person must be totally committed to accepting that the normative value system in its entirety, but must have a minimal ontological commitment to it.[76]

Second, cognition presupposes intelligibility.[77] The methodology of sophisticated legal positivism must be able to aggregate plural internal points of view in an intelligible way. In simulating the relational and interactional behavior as between agents or groups of agents of an entire legal system, the methodology must be capable of facilitating the mediation between plural internal points of view of law between different groups of people in society, some of whom abide by the law, while others do not abide by the law; some of whom advocate preservation of law's *status quo*, while others advocate for law's change.[78] Borrowing from Nietzche, sophisticated legal positivism must be able to mediate between and make sense of different 'power seeking wills'.[79]

<https://www.tandfonline.com/doi/full/10.1080/20403313.2021.1872256> 29-30: 'The very notion of institutions [of command] as instrumentalities is presupposed by a fiction of the omnicompetent and invisible, enforcer of laws, and a view of law and legal normativity'.

[71] Frew (n 29) 290-2 (on Kelsen); 'Ought' has both a moral and non-moral sense: cf Peter Glassen, 'The Senses of "Ought"' (1960) 11 *Philosophical Studies* 10, 11; See also, Kahn (n 12) 33.

[72] Frew (n 29) 290: Kelsen states: '...laws of nature link a certain material fact as cause with another as effect [ie causation], so [do] positive laws link legal condition with legal consequence [ie imputation]'.

[73] Johnson (n 70) 362-3.

[74] Hart (n 8) 87.

[75] Johnson (n 70) 362-3; In Kelsen's terms, this is the presupposition of *basic norm*: Frew (n 29) 289-90 (n 26), 290; Hans Kelsen, 'On the Basis of Legal Validity' (1981) 26 *American Journal of Jurisprudence* 178.

[76] cf Hart (n 8) 87-8; Toh (n 28); Robert Mullins, 'Detachment and Deontic Language in Law' (2018) 37 *Law and Philosophy* 351, 352; Guido Boella, Leonardo Lesmo and Rossana Damiano, 'On the Ontological Status of Norms' in VR Benjamins et al (eds), *Law and the Semantic Web* (Springer, 2005) 125; cf Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2011-12) 22 *Duke Journal of Comparative and International Law* 349, 349-54.

[77] Kahn, *Origins of Order* (n 12) 9.

[78] See also, Douglas E Litowitz, 'Internal versus External Perspectives on Law: Toward Mediation' (1998) 26(1) *Florida State University Law Review* 127, 143 *et seq.*

[79] Borrowing from Nietzsche (n 82).

In each agent's or group of agents' internal points of view of law, each agent has a view of and reasons why they would abide by the law, or not abide by the law. They would also have a view about and reasons why law should be preserved or changed. These views and reasons would be replete with claims, in the instances of abiding by law and preserving its *status quo*, that those laws are normatively authoritative (or more normative, authoritative and legitimate) and just; and in the case of not abiding by law and advocating for change, that current laws are not normatively authoritative or otherwise unjust, and the new rules advocated for are more normatively authoritative. In persuading others and officials to recognize their views and reasons, these agents or groups of agents will necessarily have to either accept or reject (and criticize) the legitimacy other agent's or groups of agents' views and reasons. There is an assumed capacity to cognize versions of their reality and the wider social reality.

However, one is only able to describe and give value judgments (to accept, reject or criticize) about another agent's or group of agents' 'power seeking wills' and their views and reasons if one speaks from another point of view, and assesses the other agent's or group of agents' 'power seeking will' against certain values on one's own part. The transcendental condition of our being able in this way to criticize the 'power seeking wills' of another agent or group of agent's normative project is for one to be *conscious*[80] of his or her normative project of 'power seeking' such that if the other's normative project was somehow merged into his or her normative project, he or she would know how to see the other's as not authoritative.[81] One can criticize another's normative project only because one has substantive beliefs about the normativity, authority and legitimacy of one's normative project. Similarly, in Nietzschean philosophy, central to the attrition between different power-seeking wills' normative projects is the oscillations between affirmation and negation of each will, of 'opposition and resistance, and therefore, relatively speaking, *unities which encroach on one another's spheres*

[80] Del Vecchio posits that an adequate theory must cater for 'transubjective form' of consciousness: see, HLA Hart, '*Justice*, by Georgio del Vecchio' (1953) 28 *Philosophy* 348, 349-50: '(1) Each individual is conscious of his own existence, (2) if an individual is thus conscious of his own existence, he must necessarily be aware not only of objects (as critical idealism has always claimed) but must conceive himself both as subject and as an object for other individuals' consciousness. This "objective consciousness of self" whereby the subject self is necessarily conscious of other selves is not only of a theoretical value but also of practical value for from it "results" an inter-subjective "coordination of selves" and the notions of parity and reciprocity between them; See also, Hart (n 8) 157; cf Adam Balmer, 'Transcendent Reality and the Consciousness Problem' (2017) 7(1) *Journal of the Philosophy of Life* 1.

[81] Shiner (n 38) 124 *et seq.*

… And they must be localized … in order for A to have an effect on B, A must first have a separate location from B'.[82]

If we accept these two propositions, sophisticated legal positivism can account for the normativity of positivist law. Sophisticated legal positivism can also reveal the rifts between legal positivism and natural law as a theoretical account of the nature of law, and the moral metaphysical reality of the nature of law, by exposing the presuppositions that are at work.

IV Explaining Positivist Law's Normativity Through The Imaginaries Of Project And System

A *Cultural Analysis of Law as Epistemology: Making Sense of Law's Social Reality*

Unless the idea of explaining the social reality of law through simple legal positivism that sharply distinguishes between description (positivism) and normativity (natural law) is discarded, the normative problem-solution cannot take shape.[83] Accurately making sense of law's social reality must involve an attempt to imagine a new knowledge framework to cope with the deficiencies of simple legal positivism.[84]

In *Origins of Order: Project and System in the American Legal Imagination*, Professor Kahn[85] imagines (models) order in the 19th century American socio-political and legal life ('social imaginary') through two alternate imaginaries (symbols or epistemic devices[86]) – project and system.[87] The methodology behind Kahn's social imaginary is markedly different from the analytical tradition of legal philosophy. He adopts a hermeneutic epistemology based on social science and social cognition – what he calls the 'Cultural Analysis of Law' (CAL).[88]

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[82] Friedrich Nietzsche, *The Will to Power: Selections from the Notebooks of the 1880s*, ed R Kevin Hill, tr R Kevin Hill and Michael A Scarpitti (Penguin Classics) 394 §693 (emphasis in italics original).
[83] cf Koskenniemi, *From Apology to Utopia* (n 149) 498.
[84] Ibid 498.
[85] Robert W. Winner Professor of Law and the Humanities, Yale Law School.
[86] See further, Makysimilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart Publishing, 2020).
[87] Kahn, *Origins of Order* (n 12) 5; See further, Carli N Conklin, '*Origins of Order: Project and System in the American Legal Imagination*' (2021) 41(1) *Journal of the Early Republic* 129, 129.
[88] Kahn, *Origins of Order* (n 12) 3, 259 (n 8); See especially, Daniel Bonilla Maldonado, 'The Cultural Analysis of Law: Questions and Answers with Paul Kahn' (2020) 21 *German Law Journal* 284, 285,

Developed in his earlier book *The Cultural Study of Law*,[89] CAL draws on disciplines that have generally been eschewed and regarded as 'alien' by the analytical tradition of legal philosophy in their explanation of the legal phenomenon: psychology (philosophy of mind), history, anthropology, theology, literature, social science, ethics and biology.[90] Kahn says, 'while philosophy can observe difference, it [alone] cannot offer proof [of reality]'.[91] CAL is not merely analytic, but hermeneutic.[92] It is an 'epistemological attitude'[93] of 'imagination'.[94] CAL facilitates a 'fiction theory' account of law that simulates the social imaginary 'as if' it was real.[95] Works adopting CAL as epistemology attract criticisms from analytic philosophers that 'nothing useful can be learnt from it'[96] because none of their imaginaries captures the whole truth.[97] While there are merits in those criticisms, they miss the point. CAL's 'interests [are] not in [correct] outcomes, but in bringing to light the way in which [possible] outcome situates itself in an entire world of meaning'.[98] As Penner says, "as if" representations are not fictions – they carry information about what they represent.[99] Imaginaries are perfectly sound sources of knowledge of what they depict.[100] To regard all projections of meaning revealed by 'imagination' as

287, 296 (n 44); cf Geoffrey Samuel, 'Can Social Science Theory Aid the Comparative Lawyer in Understanding Legal Knowledge' (2019) 14(2) *Journal of Comparative Law* 311.

[89] Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 1999).

[90] Eg, Kelsen's *Pure Theory of Law*: Frew (n 29) 286; Hart (n 8) 88.

[91] Kahn, *Origins of Order* (n 12) 4; The Anglo-American tradition of analytical legal philosophy is not as robust as their continental counterparts in accounting for the normativity of law: Nunez (n 53) 631.

[92] See also, Litowitz (n 78) 127, 127 (n 1).

[93] Kahn uses a similar descriptor of 'epistemic attitude': Kahn (n 12) 112; Penner (n 95) 450, referring to Geoffrey Samuel, *Rethinking Legal Reasoning* (Edward Elgar, 2018).

[94] Kahn, *Origins of Order* (n 12) 112.

[95] James Penner, '*Rethinking Legal Reasoning* by Geoffrey Samuel' (2019) 78(2) *Cambridge Law Journal* 450, 451; See further, Litowitz (n 78) 143 (n 60).

[96] R C Cottrell, 'Kahn, Paul W, *Origins of Order: Project and System in the American Legal Imagination*' (2020) 57(8) *Choice Reviews* 920, 920; Penner (n 95) 451, 453; cf Massimo La Torre, 'Institutionalism as Alternative Constitutional Theory: On Santi Romano's Concept of Law and His Epigones' (2020) 11(1) *Jurisprudence* 92, 99. 'A fiction would be a still too subjective experience to be translatable as collective knowledge'.

[97] Paul Kahn, 'Project and System' (Blog Post, AEON, 9 December 2019) <https://aeon.co/essays/is-the-world-ordered-as-a-system-or-as-a-project>, archived at< https://perma.cc/9C3M-F4E4>; Hoffer (n 124) 329.

[98] Maldonado (n 88) 289.

[99] Penner (n 95) 453.

[100] Ibid; In this regard, Kahn's CAL bears a lot of similarity to Makysmilian Del Mar's methodology of imagination. See, Del Mar (n 86); Kahn's *Origins of Order* echoes a lot of the sentiments set out in Litowitz's paper. Litowitz's paper draws from Hart's articulation of the hermeneutic perspective and suggests how this perspective might be understood as a way of mediating the excesses of purely internal and external approaches to law: Litowitz (n 78) 127 (n 1); Kahn's *Origins of Order* draws on

'fictional' is not a 'foundation of an epistemology of any kind. Its negation by fiat'.[101]

B *Origins of Order as Simulation of Law's Social Reality*

In *Origins of Order*, Kahn draws on a wide range of sources to color, give content, and contextualize the discourse that make up the social imaginary.[102] Unlike analytical legal philosophy (especially legal positivism) where epistemic and moral enquiries are treated separately, Kahn, consistent with the reality of law's practice, hermeneutically treats them as one enquiry.

Written in CAL's genealogical (historical)[103] and architectural (using symbols as representations) traditions of inquiry,[104] *Origins of Order* attempts to give a conceptual account of order in a social institution that is a legal system. Adopting a genealogical (historical) analysis account for the breadth, scope and totality of the discourse that informed the construction of the social imaginary as it related to the deliberation, creation and renewal of law.[105] Kahn's genealogical analysis identifies causes and reasons for what social order was, how it came to be, and what it could be.[106]

By casting the social imaginary through alternate imaginaries or 'Wittgensteinian pictures' of 'project' and 'system', Kahn shows how the differences between these two alternate imaginaries reveals tensions in ideas about social organization and law. By showing that the dominant ideas of social organization and law continually shifted from imaginaries of project to system and system to project, Kahn reveals the nature of those differences. The social imaginary is in a constant state of moral (political) and metaphysical (metaethical[107]) tension.[108] In the moral dimension, tensions have contributed to a continuous cycle of conflict, attrition, resolution, and ultimately, change. In the metaphysical dimension,[109] tensions have contributed to a continuous cycle of

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this hermeneutic perspective in its use of 'imaginaries'; See also, Zoran Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press, 2018).

[101] Penner (n 95) 453.

[102] Kahn, *Origins of Order* (n 12) 2; See also, Hoffer (n 124) 328-9; See also, Litowitz (n 78) 146 (n 72).

[103] In a vein similar to Friedrich Nietzsche, Michel Foucault and Ernst Cassirer.

[104] Kahn, *Origins of Order* (n 12) 2-3; See especially, Maldonado (n 88) 289.

[105] Kahn, *Origins of Order* (n 12) 111-4; See also, Maldonado (n 88) 287, 290.

[106] Kahn, *Origins of Order* (n 12) ix-x, 37.

[107] Also metaethical, since it is a metaphysics of morals.

[108] Kahn, *Origins of Order* (n 12) 33; Max Weber came to a similar finding, expressing that law had a moral (legal) and sociological dimension: Litowitz (n 78) 127 (n 1)

[109] Also sociological and anthropological: Litowitz (n 78) 127-9 (n 1).

classification and reclassification, conceptualization and reconceptualization, interpretation and reinterpretation, critique and reconciliation, and ultimately, change. 'The project-system tension is not resolved, then, but replicated in contrasting analogies of political order to machine and to organism'.[110] This, in Kahn's view, is the fundamental nature of law. Tensions between 'project' and 'system' as alternate imaginaries of the social imaginary 'expose the character and operation' of the legal phenomenon, revealing the *origins* of order.[111]

As will be explained, Kahn's alternate imaginaries of 'project' and 'system' and the tensions between the two imaginaries can explain the normativity of positivist law in a legal system. It can explain the methodological differences in the way internal legal statements and external legal statements approach the question of normativity. Moral tensions reveal that law presupposes a normative dimension. Metaphysical tensions reveal that conceptual accounts of the nature of law (ie, legal theory) operate on methodological presuppositions that affect how objective law is conceived.

C *Project*

Kahn posits that a project of law begins with an abstract norm, which then takes shape through a designed plan.[112] A project of law has both a creator and a beginning.[113] It is an idea embodying and manifesting will, motivations, aspirations, and values of a simulated community. The purpose of the project is the material realization of the norm: 'it is an effort to realize an idea or set of ideas'.[114] 'Project' in this sense, imagines law as an intentional act – intentionally imposed (created), fulfilled and preserved.[115] 'The politics of projects is a politics of endless reform to preserve the project'.[116] It imagines law as the product of authors who are free but conscious agents of *will* capable of cognition – that is,

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[110] Kahn, *Origins of Order* (n 12) 11-2.
[111] Kahn, *Origins of Order* (n 12) 3-5; See also, Litowitz (n 78) 146 (n 72).
[112] Conklin (n 87) 129.
[113] Ibid 129.
[114] Kahn, *Origins of Order* (n 12) 7.
[115] This usage is apparent in a recent article: Maryam Jamshidi, 'How Israel Weaponizes International Law' (Web Page, *Boston Review*, 24 May 2021) <http://bostonreview.net/law-justice-global-justice/maryam-jamshidi-how-israel-weaponizes-international-law>, archived at <https://perma.cc/9TMH-EFV9>.
[116] Kahn, *Origins of Order* (n 12) 45; Hansen (n 119) 1.

acting with intention after some deliberation.[117] A project is best understood as a first-person narrative of those who created it.[118] Narratives tell a story about what happened, or what should happen; they represent a simulated community's understanding of reality, the way their account of law is, and the way they would like law to be.[119] Law, insofar as it orders projects into some hierarchy, is the product of the simulated community's will (intent) and cognition.

D *System*

Kahn claims that systems, in contrast, are understood not by narrative but by structural (systemic) analysis.[120] A system has no known creator and no known beginning. It is a set of immanent principles of order. Its purpose is not to fulfil or preserve any intentionally created abstract norm. Instead, systems of law are value-free.[121] It is autopoietic.[122] The ethos of a system is to maintain itself. In this sense, the purpose of a system of law is to preserve its own empirical existence – ie, preserve the existence of *some* order, not necessarily a particular type of order.[123]

E *Tensions Between Alternate Imaginaries of Project and System*

Kahn mentions at several points in the book that the alternate imaginaries of project and system are often in tension and not always mutually exclusive.[124] Professor Kahn illustrates this by using the common law as an example.

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[117] Kahn, *Origins of Order* (n 12) xii, 111-41; See also, Paul Kahn, 'Project and System' (Blog Post, AEON, 9 December 2019) <https://aeon.co/essays/is-the-world-ordered-as-a-system-or-as-a-project>, archived at <https://perma.cc/9C3M-F4E4>; See also, Mitchell (n 165) 636.

[118] Kahn, *Origins of Order* (n 12) 40.

[119] Hans Hansen, *Narrative Change: How Changing the Story Can Transform Society, Business, and Ourselves* (Columbia University Press, 2020) 1.

[120] In the sense of *systemdenken*, an episteme of aggregating discrete ideas. See, Martti Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline' (2011) 15(1) *Redescriptions: Yearbook of Political Thought, Conceptual History and Feminist Theory* 45.

[121] A close reading of the text indicates that it is highly likely Kahn thought of 'system' in the sense of general systems theory. See Kahn, *Origins of Order* (n 12) 39; See also D'Amato (n 122) 651.

[122] Kahn, *Origins of Order* (n 12) 174; Kahn uses the word 'autonomous'; See also, Anthony D'Amato, 'Groundwork for International Law' (2014) 108(4) *American Journal of International Law* 650, 650-1.

[123] International Law Scholarship on legal systems (and on international law as a legal system) have for some time insisted that, axiomatically, the primary purpose of the international legal system is not to regulate international relations but to preserve itself. 'Systems' here are value-free. It refers to a descriptive model – a social science description of an order: D'Amato (n 122) 651 (nn 9, 10), 652, 678; cf Hillary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65(3) *Modern Law Review* 377, 380.

[124] See, Conklin (n 87) 130; Williamjames Hull Hoffer, 'Origins of Order: Project and System in the American Legal Imagination' (2021) 126(1) *American Historical Review* 328, 328.

Professor Kahn starts off by positing that the common law expounded by Blackstone is the paradigmatic example of 'system' order in a social institution.[125] Law is not *law* unless promulgated by officials (judges). In adjudication, judges attempt to mediate and instill order amongst discrete projects of law. In doing so, judges, through reason, make decisions and evaluations of a project vis-à-vis other projects, ultimately promulgating one or more of elements within them as law. In common law jurisdictions, judges decide individual cases by relying on precedents (as judgments about law). In relying on precedent, judges interact with and rely on past evaluations (decisions) about the law in their reasons – ie, prior acts of the same sort that they are pursuing.[126] Out of these countless individual decisions of evaluations, a system of order emerges.[127] This system has identifiable dominant legal norms, created through this continual process of referring back to past decisions. Because evaluations strive to mediate between projects and do not necessarily take part in discrete projects, norms that arise out from judge's evaluations in common law adjudication appear not to be intentionally created and have no apparent creator.[128] Here, precedent involves the continuous 'mixing' of past evaluations of law in the pursuit of new expressions of law. This can be conceived of as a 'mixing' of wills. Expressions of law through adjudication can on one hand be characterized as being of the collective 'will' of all discrete projects, or since it does not strictly belong to any one community *per se*, 'unwilled'. The emergent system of order was therefore not in itself the product of an intentional act.[129] Judges evaluate projects from afar from a perspective-neutral third-person vantage point. In this way, the common law is an 'immanent *system* of artificial reason that establishes the order of a political community maintaining itself as a single whole over time immemorial'.[130] As Kahn posits, '[b]ecause we stand in that artifice, which is creation, laws appear immanent to us: they are not the product of our deliberate acts'.[131]

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[125] Kahn, *Origins of Order* (n 12) 157-71.
[126] Ibid 165, 176, 181.
[127] Paul Kahn, 'Project and System' (Blog Post, AEON, 9 December 2019) <https://aeon.co/essays/is-the-world-ordered-as-a-system-or-as-a-project>, archived at <https://perma.cc/9C3M-F4E4>.
[128] Kahn, *Origins of Order* (n 12) 172; See eg, *The Republic of the Philippines v Maler Foundation* [2013] SGCA 66, [96] (Chao Hick Tin JA). Objective law (as found by judges) did not strictly have any necessary connection with the moral claims (moral projects) of the victims.
[129] Kahn, *Origins of Order* (n 12) xv; Kahn, 'Project and System' (n 127).
[130] Kahn, *Origins of Order* (n 12) 170 (emphasis added).
[131] Ibid.

However, Backstone's conception of the common law adjudication as paradigmatic of system order can also be characterized as one of project order.[132] Kahn says that Blackstone had conceptualized common law adjudication in the same type of 'architectural terminology' that is usually attributed to projects. By relying on precedent and fulfilling precedent, judges' evaluations (decisions) become not only evidence of law the source of the authority and will (ie, an abstract norm).[133] Cases continually reapply and reproduce this authority and will.[134] Judges create a project of preserving precedent.[135] System is a social science whose objects are projects.[136]

In common law adjudication, systemic knowledge is put to use to mediate and order projects – collapsing project into system.[137] Yet, projects are the mechanism by which judges realize adjudication – collapsing system into project. On the former view, project needs system; on the latter, system needs projects.[138] Project and system create paradigmatic suspicions, each tending to undermine each other.[139] Yet, the alternate and paradoxical imaginaries of project and system, together, can be thought of as efforts at synthesis of two forms of co-optation: project and system each try to co-opt the other into a single worldview.[140]

F *Synthesis of Project and System as Account of Law's Epiphenomenon, Sophisticated Positivism*

1 *Explaining Law's Normative Dimension*

With reference to the example of common law adjudication that Kahn furnishes, internal and external legal statements largely correspond to the imaginaries of project and system respectively. A project, like internal legal statements, are ideas embodying and manifesting will, motivations, aspirations and values of a

[132] See also, Litowitz (n 78) 128.
[133] Kahn, *Origins of Order* (n 12) 172.
[134] Ibid 43-5.
[135] Ibid 101, 184-5: 'Judges applying the rules are actually legislating' – reason has been stripped of its theological pretension by which it was imagined as an independent forcing pushing us from behind … Project and system were long the attributes of God's reason, now they have become our own'.
[136] Kahn, *Origins of Order* (n 12) 9.
[137] Ibid 17.
[138] Ibid 10.
[139] Ibid 45.
[140] Ibid 10, 17; See further, Hanna Lukkari, 'Law, Politics and Paradox: Orientations in Legal Formalism' (PhD Thesis, University of Helsinki, 25 September 2020) 4.

simulated community. Internal legal statements, like a project, are first-person narratives of the legal system as cognized from the perspective of an insider of the simulated community.[141] They represent an imaginary about their perspective of the law (as cognized by them). External legal statements are akin to descriptions about the law born out of the social imaginary of system. Decisions and evaluations of judges, as a source of law and authority, are born out of a system that is common law adjudication. In this way, the common law, as statements that describe the law, are external legal statements that describe a system of observable regularities of behavior cognized through judgment.[142] The dual characterization of common law adjudication as being both of project and system demonstrates how descriptive (external) legal statements have a normative dimension. External legal statements, in the way that its truth condition is the existence of a system of observable regularities of behavior, are representative (or imaginary) of the will of those who make them.

Kahn's social imaginary as the synthesis of the two forms of co-optation of project and system: project and system each try to co-opt the other into a single worldview,[143] accurately models law's epiphenomenon and sophisticated positivism as accounts of the epiphenomenon of internal and external legal statements.[144] What Kahn's social imaginary does is that it hermeneutically[145] models internal and external legal statements through an analytical *tertium comparationes* of *will* that both project and system categorically operate on. In relation to common law adjudication, Kahn's imaginaries of project and system produces two corresponding imaginaries: internal legal statements or insider's view of a legal system as constitutive of discrete community's will; common law as a system of observable regularities (external/descriptive statements) of behavior as constitutive of judges' will. The normativity of external (descriptive) statements is explained through the *will* (and authority) of those who make or impose those statements and measured according to how efficaciously they are fulfilled by discrete communities and judges.

The efficacy of the fulfillment of external legal statements are dependent on how much of common *will* there are between those who make those statements

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[141] See further, Litowitz (n 78) 128.
[142] Hart (n 8) 86, 88, cf 96, 99, 244.
[143] Kahn, *Origins of Order* (n 12) 10.
[144] See further, Litowitz (n 78) 128.
[145] See also, Litowitz (n 78) 127 (n 1); Hart (n 8) 89.

and those who are subject to internalizing and fulfilling them.[146] Internal and external legal statements take different attitudes towards norm of legitimacy.[147] Internal legal statements point towards an idea of self-government – or of self-authorship of the law – as the ground of legitimacy. As regards external legal statements as system of observable (descriptive) regularities, the idea of legitimacy as authorship of internal legal statements can make no appearance. Systemic order are not the ends of any particular subject's actions.[148] But as regards external legal statements as an institutional project of states' institutions (in the case of judges: courts), external legal statements point towards the idea of furthering institutional norms. The co-optation of internal legal statements (project) to external legal statements (system) into a single worldview (fusion) reveals that the efficacy of external legal statements being internalized and fulfilled depends, therefore, on the commensurability of institutional norms and the discrete community's idea of self-authorship of law. Kahn's *Origins of Order* explains the normativity of positivist law through the concept of sovereign will as constituent power, and Schmitt's concrete order (*konkreten Ordnung*) theory.[149] The concept of concrete order is Schmitt's alternative to Kelsen's transcendental argument (see discussion in Part III).[150] It explicitly puts emphasis on and incorporates into Kelsen's social science notion of efficacy the social cognition notion of normality which the former presupposes,[151] explicitly taking into account the cognitive mental states of legal actors within a legal system.

Kahn's social imaginary as a co-optation of project into system and system into project, in the example of common law adjudication, rejects the idea of a norm or decision as the fundamental concept of legal theory.[152] In Kahn's social

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[146] In this way, Kahn's theory explains the normativity of positivist law through ideas of sovereign will as constituent power, and Carl Schmitt's institutionalism; cf Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Thought* 218, 219; Marc De Wilde, 'The Dark Side of Institutionalism: Carl Schmitt Reading Santi Romano' (2018) 11(2) *Ethics & Global Politics* 12, 13, 17, 19-20, 22; Carl Schmitt, *On the Three Types of Juristic Thought*, tr Joseph W Bendersky (Praeger, 2004) 11, 20, 27, 48, 57, 65; See further, Jing Zhi Wong, 'No One is Too Small to Make a Difference by Greta Thunberg' (2020) 28(2) *IIUM Law Journal* 641, 648-9 (n 49); cf Hart, 'Del Vecchio' (n 80): 'transsubjective form' of consciousness.

[147] cf Kahn, *Origins of Order* (n 12) 39.

[148] Ibid 40.

[149] Loughlin (n 127); See also, Koskenniemi's analysis of normativity and concreteness: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Lakimiesliiton Kustannus, 1989) 458-60, 460-98 *generally*.

[150] Michiel Besters, 'Mariana Croce & Andrea Salvatore, *The Legal Theory of Carl Schmitt*' (2014) 43(1) *Netherlands Journal of Legal Philosophy* 87, 88.

[151] Ibid.

[152] Besters (n 150) 87.

imaginary, norm and decision are often in conflict and neither captures the whole truth of social reality. Kahn views project (norm) and system (decision) individually to be overly reductionistic and dismissive of the cognitive mental states of actors within a legal system,[153] and ultimately doesn't explain how they individually account for the 'realization of law'.[154] Kahn, like Schmitt, viewed conceiving a set of rules and norms as valid law independent of the sites of cognition (ie, judges and communities) at which law was fulfilled as an absurdity.[155] Law should be conceived of as a 'concrete order' on which the validity and meaning of legal rules depended.[156] In this way, Kahn's social imaginary explains the *origins* of order through a focus on the sites at which law is cognised and fulfilled – a turn from norm or decision towards institutionalism.[157]

2 *Explaining Law's Metaphysical (Metaethical) Dimension*

Kahn's turn from norm or decision to institutionalism places emphasis on the worldviews of sites at which law is cognized and ultimately fulfilled. In this way, the analysis of order through the co-optations of project and system reveals the different attitudes each episteme takes towards each other and towards law's underlying legitimacy' and authority.[158] It shows that behind each imaginary of

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[153] cf Litowitz (n 78) 142.

[154] In this way, Kahn adopts Croce and Salvatore's 'argument [that] in *On the Three Types of Juristic Thought* (n 133), Schmitt attempts to overcome the conceptual impasse between normativism (project) and decisionism (system) by means of developing a third type of juristic thought: institutionalism': see Besters (n 150) 89; See also, De Wilde (n 146) 12, 13, 17, 19-20, 22; Schmitt (n 119) 11, 20, 27, 48, 57, 65; See further, Wong (n 146) 648 (n 49); Joshua Neoh, 'The Rhetoric of Precedent and Fulfilment in the Sermon on the Mount and the Common Law' (2016) 12(2) *Law, Culture and the Humanities* 419.

[155] De Wilde (n 146) 13; Schmitt (n 146) 11, 48; Tschorne (n 157); See also, Hermann U Kantorowicz, 'Zur Lehre vom Richtigen Recht' (1909) 2(1) *Archiv für Rechts und Wirtschaftsphilosophie* 42, 44.

[156] De Wilde (n 146) 13; Schmitt (n 146) 11, 48; Tschorne (n 157).

[157] Institutionalism is the study of how institutions operate. In the context of this review essay, it is the study pf the wills of those sites of cognition where law is fulfilled: Samuel L Tschorne, 'What is in a Word? The Legal Order and the Turn from Norm to Institutions in Legal Thought' (2020) 11(1) *Jurisprudence* 114, 115-6, 124-5; See also, Besters (n 150) 89: 'Croce and Salvatore argue that in *On the Three Types of Juristic Thought* Schmitt attempts to overcome the conceptual impasse between normativism and decisionism by means of developing a third type of juristic thought: institutionalism'.

[158] Paul Kahn, 'Project and System' (Blog Post, AEON, 9 December 2019) <https://aeon.co/essays/is-the-world-ordered-as-a-system-or-as-a-project>, archived at <https://perma.cc/9C3M-F4E4>. The imaginaries of project and system, as creatures of CAL, are 'open to multiple methodological standpoints (participant vs. observer), different theoretical objectives (interpretive explication and conceptual analysis vs. description and empirical explanation), the perspectives of different roles (judge, politician, legislator, client, and citizen), and different pragmatic attitudes of research

project and system lies the hand of an orderer who each adopt in their perspective of the nature of law,[159] epistemic presuppositions. These include starting points, premises, presumptions, schemes of intelligibility, and paradigm; and these epistemic presuppositions are not neutral tools of meta-ethics but is inextricably and intrinsically linked to ethics of the subject matter.[160] The tension between the two imaginaries, of which each are an (partial) account of the nature of a legal system, when juxtaposed with legal positivism as an account of the nature of law, illuminates positive law as 'a metaphysical notion involving a number of *a priori* assumptions'.[161] In relation to adjudication, this tension can be used to assess the legitimacy of adjudication by revealing what narrative of law was assumed and adopted by judges (see discussion in Part III).[162] From the new order that emerges, it is possible to determine whether Judges have remained true to law or whether they have departed from law by assessing whether the new order replicates the normative projects it mediates; and whether judges rule according to extrinsic considerations (eg, by taking into account underlying concrete order considerations which the judge defends as his project). Kahn's social imaginary convey greater insight into analyses of law's legitimacy. It reveals the narrative on which sites of law's cognition and fulfilment (institutions) assumes order, and by this token, more comprehensively and explicitly assesses and explains the normativity of positivist law.

V Conclusion

The schema of alternate imaginaries of project and system as an epistemic framework of law's social reality is of great value not only to legal scholars, but also to philosophers. This schema opens up new avenues for research, and

(hermeneutical, critical, analytical, etc) adapts to changing social reality': cf Jurgen Habermas, quoted in Litowitz (n 78) 146 (n 72).

[159] Kahn, *Origins of Order* (n 12) 39-40, 62, 94, 123-30, 203, 234; See eg, Sue Gonzalez Hauck, 'It's the System, Stupid! Systematicity as a Conceptual Weapon' (Blog Article, Volkerrechtsblog, 29 December 2020) <https://voelkerrechtsblog.org/its-the-system-stupid/>, archived at <https://doi.org/10.17176/20210107-181817-0>; Monica Garcia-Salmones Rovira, 'The Politics of Interest in International Law' (2014) 25(1) *European Journal of International Law* 765.

[160] Heikki-Pekka Innala, 'On the Non-Neutrality of Deontic Logic' (2000) 43 *Logique et Analyse* 393, 393-4.

[161] See Geoffrey Samuel, 'What is (or perhaps should be) the relationship between legal history and legal theory' (2018) 6(1) *Comparative Legal History* 97, 111, pt vii.

[162] See discussion in Part III; see also, Hart, 'Del Vecchio' (n 80) and discussion about 'transubjective form' of consciousness; See also, Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defense of Roach v Electoral Commissioner' (2019) 42(1) *UNSW Law Journal* 91, 96-7.

provides a useful means of not only examining aspects of legal reasoning but of providing a knowledge framework for rethinking the topic.[163] Kahn's book illustrates the potential of 'cultural analysis of law' and 'legal imagination' as methodology of sophisticated positivism.[164] It also illustrates the potential of an epistemic schema based on institutionalism that can be adopted as methodology to more precisely simulate the interactive and collective aspects of human agency in the social phenomena of law, the affective, sensory and interpretive modes of society's participation in their legal and socio-political system (see discussion in Part IV(F)(1)) and more explicitly account for the presuppositions and epistemic assumptions of legal philosophy (see discussion in Part IV(F)(2)).[165]

[163] Eg, Penner (n 95) 450.

[164] And of 'Critical Legal Positivism': Hendrix (n 62) 343; For further discussion of 'imagination', especially in relation to legal reasoning and how law is practiced (adjudicated), See Maksymilian Del Mar (n 86); See also, Geoffrey Samuel, *Rethinking Legal Reasoning* (Edward-Elgar Publishing, 2018); See also, Ian Ward, *Shakespeare and the Legal Imagination* (Butterworths, 1999); Del Mar's theory might be at odds with Samuel: See also, Penner (n 95); Oklopcic (n 100).

[165] See further scholarship on using the imaginaries of project and system as account of law's social reality: Ryan J Mitchell, 'International Law as Project or System?' (2020) 51 *Georgetown Journal of International Law* 623; See also, Lawrence Solum, 'Mitchell on the Legislative Function of International Law' (Blog Post, Legal Theory Blog, 9 March 2020) <https://lsolum.typepad.com/legaltheory/2020/03/mitchell-on-the-legislative-function-of-international-law.html>, archived at <https://perma.cc/NSZ7-RLPL>. Maryam Jamshidi (n 115); D'Amato (n 122).