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# Implicit Law

> The Slithergadee has crawled out of the sea.
> He may catch all the others, but he won't catch me.
> No you won't catch me, old Slithergadee,
> You may catch all the others, but you wo—
>
> Shel Silverstein, "Slithergadee" (1964)[1]

## 1. Introduction.

I borrow the term "implicit law" from H.L.A. Hart's reconstruction of Ronald Dworkin's legal theory. According to Dworkin, as Hart (1987, p. 35) tells it, the law of any community comprises (i) an "explicit part" consisting of enactments, judicial decisions, and settled legal practices; and (ii) an "implicit part" consisting of a set of principles that fit and morally justify the explicit part.[2]

Dworkin inferred the existence of the principles that make up the implicit law by invoking them to explain the ways that judges decide cases that present novel legal questions which had not been answered by the then-existing explicit law. Even in such "hard cases", he observed, judges act as if they are constrained by pre-existing laws. And he argued that judges in such cases inferred answers to novel legal questions by appealing to the principles that make up the implicit law.

Let us begin by bracketing Dworkin's particular conception of the nature and content of implicit law, and by conceiving that notion more broadly in two ways. First, let us use "implicit law" to refer to both the *resultants* – i.e. answers to novel legal questions that are supposedly inferred from the more fundamental elements of the implicit law – and the *determinants* – i.e. the more fundamental elements which Dworkin calls "principles". It follows from this first loosening of the conception of implicit law that hitherto implicit legal resultants can become parts of the explicit law as the result of court decisions explicitly relying on them. Second, let us loosen the relation between determinants and explicit law, so that we do not require a relation of moral justification, as Dworkin does. Some kind of grounding or explanatory relation is all that we are to expect at the outset. For now, in sum, let us think of the implicit law of a community as the set of norms (i)

[1] Quoted and discussed in Walton (1990, pp. 162-65).

[2] In a posthumously published article, Dworkin says: "[I]t is characteristic of all [Hart's] work that his descriptions of my own views are not only scrupulously fair and for the most part very accurate, but that they are often presented with a concision and clarity that I have never myself achieved for them" (Dworkin 1996/2017, p. 2096).

that is a genuine part of the law of that community, and (ii) that is not covered by the community's enactments, judicial decisions, and settled legal practices.

I want to argue for a new conception of the nature of implicit law that fills out the template I have just outlined. I am motivated in this task by my dissatisfaction with the currently prevailing conceptions of implicit law. I believe that we can make progress in thinking about the nature of implicit law by thinking about the nature of implicit *fictional* truths – i.e. truths in works of fiction that are not explicitly specified by authors or artists – and by thinking about the features of human psychology that are ultimately responsible for our engagements with fictions, and for exercises of imagination more generally. What we can infer from such investigations is a hitherto unrecognized conception of implicit law that falls into the space between the currently prevailing conceptions. Or so I will claim. I begin with a very quick overview of the prevailing legal philosophical thinking about implicit law (§ 2). I will next broach the analogy between implicit legal truths and implicit fictional truths (§§ 3-4), and deploy that analogy to cast doubt on Dworkin's influential conception of implicit law (§ 5). I will then spend the balance of the paper (§§ 6-11) thinking and speculating about our psychological makeup that is ultimately responsible for our judgments of implicit fictional truths, and drawing lessons about the nature of our judgments about implicit legal truths. What results, I believe, as I conclude (§ 12), is a new conception of implicit law. I acknowledge from the outset that my conclusion is highly speculative, in a significant part because it relies on some empirical conjectures that would have to be substantiated by empirical investigations. But my primary aim in this paper is to carve out a logical space for a new conception of implicit law. And for that purpose, some empirical conjectures are not out of place, especially those that are buttressed, if not substantiated, by credible empirical studies, as I believe mine are.

## 2. Legal Positivist Reluctance.

In the last sixty or so years, in arguing for their favored conception of the nature of law, legal philosophers drawn to legal anti-positivism or natural law have repeatedly appealed to the existence of implicit law to argue against legal positivism. Aside from Dworkin, Lon Fuller (1964/69, esp. ch. 2) has argued that in any genuine legal system, the rules and practices that amount to the explicit law must satisfy to some requisite degrees eight formal criteria of legality.[3] These eight criteria, which amount to what Fuller calls "the inner morality of law", are meant to be legal norms and they can be outcome-determinative in court cases. Focusing on private law, Ernest Weinrib (1995/2012, esp. pp. 12-14, 24-25, 32-39) has influentially argued that in addition to the explicit legal doctrines and institutions that legal positivism recognizes, there is the goal or *form* of corrective justice that is "immanent" in such doctrines and institutions, and that this goal or form can be invoked to discredit certain legal doctrines and institutions – e.g. loss spreading, strict liability, public no-fault compensation schemes – that some communities have come to adopt. More parochially, in reaction to some influential American constitutional theorists' advocacy of restricting genuine constitutional adjudication to interpretations of the text of the Constitution, Thomas Grey (1975 & 1978) argued that the American constitutional law includes certain values not articulated by the constitutional text, and that appeals to these

[3] The eight criteria are: generality, publicity, prospectivity, comprehensibility, coherence, compliability, stability or constancy, and congruence between norms and administration.

values can make sense of the various landmark decisions of the Warren Court that many critics deem unduly activist and even lawless.

Such arguments from implicit law assume that legal positivists are handicapped or hampered in accounting for implicit law. And it is fair to say that legal positivists have in general been reluctant or resistant to recognizing the existence of implicit law. Some avowed legal positivists acknowledge that judges sometimes go beyond the explicit law in deciding cases. But they usually characterize judges in such cases as appealing to *extra-legal* considerations. The most famous version of such a position is Hart's, according to which judges exercise *discretion* in deciding "penumbral cases".[4] But such a characterization is in tension with the fact that judges behave and arguably understand themselves as completely constrained by the law even in some hard cases.[5]

Some legal positivists have argued, in reaction, that when in hard cases judges act as if they are constrained by pre-existing implicit law, they are probably either confused or disingenuous.[6] But we should not readily resort to such a debunking explanation, especially when it is primarily motivated by a theory, which in the first instance should be aimed at explaining the data that includes the thoughts and behavior of judges.[7]

Other legal positivists argue in effect that despite appearances, judges do not really ever go beyond the explicit law in deciding cases, or that the implicit law they appeal to is so tightly related to the explicit law as to make appeals to them licit and even anodyne. John Gardner for one opts for this position when he says:

> The implicit law to be found in the cases exists, according to Dworkin, in virtue of the fact that it provides a sound moral justification for whatever explicit law there might be in those same (and other?) cases. . . . [T]his is a mistake. It is true that case law is implicit law in the sense that it is not made by being expressed. Nor is it always made intentionally. The rule in the case has to be worked out by examining the judge's argument, to see what rule he implicitly, and maybe accidentally, relied upon. Nevertheless, the judge brings the rule into existence by relying on it. So implicit law, like explicit law, is still brought into existence by someone. It is still positive law. For there is no such thing as non-positive law. There are no legal norms that come into existence without being brought into existence by someone. (2008, pp. 85-86)

But such a severely narrow conception of implicit law is problematic. For one thing, notice that it matters what Gardner means by "rely" when he speaks of judges relying on rules. It seems doubtful that Gardner would require judges' reliance on rules to be actual psychological events. That *might* be plausible when we are dealing with a rule that explains a single decision. But a significant part of case law is inferring general rules from lines of decisions, and the inferred general rules need not be any that judges were actually guided by, even tacitly. Also notice that for any single judicial decision or line of decisions, there are likely to be

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[4] See Hart (1961/94, ch. 7). See also Raz (1972 & 2004, esp. pp. 193-194).

[5] As Dworkin's early papers (1967 & 1972) forcefully argued. For the purpose of making the point in the text, we need not deny, as Dworkin for one did, that the law of a community can have gaps. It is enough for our purposes to think that the explicit law does not necessarily exhaust the law of many communities.

[6] See e.g. Leiter (2009). There are supposedly some theorists who are even more radically skeptical, who believe that judges never *find* the law, but always make them up as they go. Sachs (2019, part I) reports that such theorists are legion, and is meant to be responsive to them.

[7] As I argued at some length in Toh (2019). Leiter's reply is in Leiter (2019).

multiple rules that fit the decision(s) equally well. If judges were to infer from a line of cases one such rule, and to identify it as the applicable law in a particular decision, it is not clear in what sense that that law was *made*, or "brought into existence", before that moment of identification or application.[8]

What explains this pattern of resistance to or discomfort with implicit law among legal positivists? At bottom, I suspect, what motivates legal positivists is the idea that laws are human artifacts.[9] Insofar as implicit law is not readily explained as manmade, legal positivists appear motivated to resist recognizing it. And looser the relation between acts or processes of manufacturing laws on the one hand and the existence of implicit law on the other, it seems, greater their resistance.

## 3. Implicit Fictional Truths.

The artificiality of laws alone, however, does not appear to warrant denial of the existence of implicit laws. It is helpful here to analogize laws to works of fiction. Works of fiction too are artificial. Yet, it appears that we have little problem recognizing the existence of what could be called "implicit fictional truths". By "works of fiction", I here mean to include novels, plays, and films, but also other works of representational art such as paintings, sculptures, and even some works of pure music.[10] And by implicit fictional truths, I have in mind what is true in works of fiction that are not explicitly specified in those works, respectively, by authors or artists. Our engagements with works of fiction, it seems, are saturated with our recognition of implicit fictional truths.

Consider, for example, the following question:[11]

(1) Did Sherlock Holmes live closer to Paddington Station or to Waterloo Station?[12]

In trying to answer questions like (1), we are after implicit fictional truths. Some hypotheses about such unspecified or implicit fictional truths strike us as plausible or even correct, whereas some others seem implausible or incorrect. Since Conan Doyle tells us that Holmes lived on Baker Street, and Baker Street is closer to Paddington Station than to Waterloo Station in the actual London, we can conclude that Holmes lived closer to Paddington Station than to Waterloo Station. That seems obvious. (It is also quite obvious what happened to the boastful narrator in Shel Silverstein's poem "Slithergadee" with which I began this paper.)

There are some questions about implicit fictional truths that are not so easily answered. Here is an example:

(2) What motivated Iago?[13]

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[8] For some helpful discussion of the points like the two I listed above in interpretations of "meaningful material", see Føllesdal (1979).

[9] An elegant discussion of this theme is provided in Hart (1973, esp. pp. 23, 26).

[10] [See Walton, Levinson on the fictional nature of pure music.]

[11] Much of what follows in this section and the next two are taken from Toh (2018).

[12] This example is taken from Lewis (1978).

[13] This is a question that Marjorie Garber posed in her class on Shakespeare's later plays at Harvard University some time in Spring 1991.

Iago does all kinds of horrible things to Othello and Desdemona, and at considerable risks to himself to boot. But Shakespeare does not really tell us why Iago acts as he does. There is an initial indication that Iago feels slighted by Othello for being passed over for promotion. But the magnitude of his eventual actions seems to go well beyond what such a motivation alone could plausibly prompt. So, we may wonder, what is *really* motivating him? Why does he do such terrible things? What is in it for him? In case (2) does not work for some readers, here are some other ones to consider:

(3) Is Mona Lisa's smile "innocent" or "inviting"?

(4) Do Henry Higgins and Eliza Doolittle get romantically involved with each other after the events depicted in *Pygmalion*?[14]

(5) Is Rick Deckard in the film *Blade Runner* a replicant?[15]

(6) Is Tony Soprano shot dead at the end of the final episode of *The Sopranos*?[16]

What is important for my purposes is the thought that not all such questions about implicit fictional truths are idle or pointless. To be sure, there are some that are. Here is one such I can think of:

(7) Did Hamlet shave on the day he uttered his famous soliloquy?

This question appears inapt, and it seems pointless to try to answer it. And not so much because no benefit could be gotten from answering it, nor because we lack epistemic access to the correct answer, but because there does not seem to be an answer to be accessed. My point is that not all questions of implicit fictional truths are like (7). At least some questions about implicit fictional truths, arguably including (2)-(6), are worth discussing; and there are correct answers to be discerned, or at least some answers to such questions are better than others. In fact, the nature of our engagements with works of fiction (and with works of art more generally) would be quite a bit different than it is, different enough to be unrecognizable, if all questions like these were considered pointless and idle. The works that we find most compelling are the ones that enable and stimulate questions of implicit fictional truths like these; and the poor works that we find boring and wasteful are those that do not allow for such inquiries.[17] We may go so far as to say that someone who thinks that all such speculations and discussions about implicit fictional truths are pointless and idle, and hence uniformly like those about (7), is someone who does not really understand the point of works of fiction or engagements with them.

## 4. Principles of Generation.

[14] George Bernard Shaw was sufficiently irritated by the audience and directors' presumption of a happy ending to the play to add a postscript to a later edition explaining why the two characters could not marry.

[15] By adding some additional scenes, the final cut of the film answers this question in the affirmative. Many fans of the film do not consider this particular aspect of the final cut an improvement.

[16] Thanks to Mitch Berman for this example.

[17] According to Fried (1980), Diderot influentially celebrated and advocated those works of art (principally, plays and paintings) that enabled audience members to simulate intense participations in the goings-on depicted in the works, and that presumably often allowed questions to be raised about implicit fictional truths.

We can think of the propositions that make up works of fiction – i.e. fictional truths – as norms. This is what Kendall Walton has suggested: "[A] fictional truth consists in there being a prescription or mandate in some context to imagine something. Fictional propositions are propositions that are *to be* imagined – whether or not they are in fact imagined" (1990, p. 39). When Arthur Conan Doyle tells us that Sherlock Holmes lived on Baker Street in London, we are to imagine that there was a man of Holmes's description who lived on Baker Street in the late nineteenth century London. Given that works of fiction are artificial, and the propositions that make them up can be conceived as norms, we can further conceive these propositions as artificial norms. Laws (or legal truths) and fictional truths are then alike in being both artificial norms.

The similarity could be thought to run deeper, actually. Fictional truths, as Walton suggests, are norms meant to regulate our imagination. And Walton (1997 & 1999) conceives imagination in terms of psychological simulation or something quite like it. On the law side, Joseph Raz has repeatedly observed, following Hans Kelsen, that legal claims are best conceived as pretended or simulated normative claims.[18] These are claims, which Raz calls "detached statements", by which speakers, who are not necessarily committed, pretend or simulate their commitments to the norms that they avow. Both fictions and the law, in other words, could be conceived as sets of norms calling for and regulating imagination or psychological simulation. Of course, the law consists of prescriptions not just to simulate certain psychological attitudes; they also call for certain behavior. But we can be "moved" by fictions in a literal sense as well, and we should recognize that many simulated thoughts have behavioral outputs as well as psychological outputs.[19]

Given these (to my mind) striking similarities between legal and fictional truths, there is a distinct possibility that we would learn things about first-order legal reasoning by examining the way that we reason about fictional truths. Here is a question of implicit legal truth, raised in *Commonwealth v. Burgess*, a 1997 Massachusetts Supreme Judicial Court case,[20] that is analogous to (1)-(6). Imagine a criminal defendant who is accused of defrauding an insurance company by submitting to it copies of falsified U.S. federal tax returns that were meant to show injury-induced income reduction. Consider:

> (8) Does a court order requiring a criminal defendant to sign an Internal Revenue Service (IRS) form requesting that the IRS release his tax records to the state attorney general's office violate the defendant's privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution?

The Fifth Amendment merely states that no one "shall be compelled in any criminal case to be a witness against himself". And in interpreting this provision, the U.S. Supreme Court has over the years taken the position that the privilege against self-incrimination does not proscribe compelled production of every sort of incriminating evidence. Only when a defendant is compelled to "testify" against himself, the Court has said, is the privilege infringed.[21] Compelling defendants to undergo a field sobriety test, to stand in a lineup, to

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[18] Or this is how Toh (2007) reconstructed Raz's discussion of the relevant issues in various places. See e.g. Raz (1975/90, pp. 170-177; 1977; 1980; 1981).

[19] See Walton (1997); Velleman (2000); Cohen (2008, ch. 4); Gendler (2008). [Reconsider the paragraph in light of Moran?]

[20] 426 Mass. 206 (1997).

[21] *Fisher v. United States*, 425 U.S. 391, 408 (1976).

furnish a voice exemplar or blood sample, etc. have not been considered violations of the privilege; whereas compelling defendants to furnish a variety of subpoenaed documents such as diary entries and personal financial papers have been. On which side of this distinction would a court order of (8) fall?

If the foregoing argument analogizing implicit legal truths to implicit fictional truths is on the right track, then it does not make sense to think that there is never a correct answer to be sought and discerned in answering questions like (8) just because no pre-existing explicit law addresses them. At least for some such questions, we should think, there are correct answers to be sought and discerned. And in understanding what we are up to in trying to discern such implicit legal truths, we are likely to benefit further from studying how implicit fictional truths are sought.

As our reactions to questions (1)-(6) above indicate, we are disposed to discriminate between different hypotheses about implicit fictional truths. Some strike us better than others. And given these dispositions to discriminate, we may think that there are some principles that we rely on in doing so. David Lewis (1978) and Nicholas Wolterstorff (1980) suggest that we think of fictional truths as analogous to counterfactual truths, and argue that in determining unspecified fictional truths we should determine what would be the case if the explicitly specified fictional truths were the case. But this proposal leaves open the possibilities of employing many different kinds of principles for generating such counterfactual truths – i.e. different possibilities as to what kind of world should be conceived as the actual world, nearest to which the counterfactual world obtains. Consider the following list of possibilities, which is not meant to be exhaustive:

(9) *The Reality Principle*: The fictional world should approximate as much as possible the real world as the specified fictional truths allow.[22]

(10) *The Belief Principle*: The fictional world should approximate as much as possible the author's contemporaries' common beliefs about the real world as the specified fictional truths allow.[23]

(11) *The Optimality Principle*: The fictional world should approximate as much as possible the world that would make the relevant art work as aesthetically satisfying as the specified fictional truths allow.[24]

These are just the principles that we *usually* apply in generating implied fictional truths. As both Wolterstorff and Walton say, little industry would be needed to uncover yet more principles of generation that we rely on. And it seems that we rely on some combinations of these and other principles, many of which are specific to particular genres, to discriminate between plausible implicit fictional truths and implausible ones. In reaction to question (2), for example, we are inclined to reject the hypothesis that Iago was motivated to do such horrible things to Othello and Desdemona merely for being passed over for promotion because the hypothesis strikes us as psychologically implausible, thus violating the Reality Principle. An alternative hypothesis that Iago was just motivated by his evil nature seems uninteresting and ad hoc, and thus violates the Optimality Principle.

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[22] See Lewis (1978, p. 270); Wolterstoff (1980, pp. 120-122); Walton (1990, pp. 144-150).

[23] See Lewis (1978, p. 273); Wolterstorff (1980, pp. 122-124); Walton (1990, pp. 150-161).

[24] Stevenson (1950) is often cited for this principle or the idea behind the principle, but I am not sure that that is an apt reading. A related idea can be found in Walton (1979, p. 212).

What principles of generation to apply depends *partly* on what principles are "in play" or "in force" in the relevant community. Walton explains as follows:

> I do not assume that principles of generation are, in general or even normally, "conventional" or "arbitrary," nor that they must be learned. Nevertheless, what principles of generation there are depends on which ones people accept in various contexts. The principles that are in force are those that are understood, at least implicitly, to be in force. (1990, p. 38)

Some principles like (9)-(11) seem to be always in play in varying degrees, and they may in some sense even be biologically programmed into us.[25] Some other principles may actually be "conventional" and "arbitrary" in the sense that artists and their audiences have reached certain specific, and oftentimes genre-specific, understandings as to how the relevant works are to be interpreted. In some cases, charismatic artists seem able to legislate the applicable principles of generation that are novel or against the grain. And even when the determinative principles are (9), (10), and (11), and not much else, the exact mixture and weights assigned may be partly conventional and arbitrary. People, both creators and consumers of representational art, accept certain principles of generation. Walton seems to think that their commitments to the principles are conditional on others being committed to the same principles. By creating a new work of representational art, an artist prompts the relevant audience to imagine certain things. A skillful artist is one who is sensitive to the principles of generation that prevail among his audience, and exploits (implicitly, more often than not) those principles to prompt them to imagine unexpected propositions. Similar things could be said of what the audience does. An audience member would explicitly or (more likely) implicitly rely on the prevailing principles of generation to appreciate or engage with a work of representational art. His imaginings would be functions of the prevailing principles of generation, and he is likely to adjust his imaginings should he come to realize that the principles that actually prevail are different from what he had initially thought they were. (I will discuss the source and nature of principles of generation at a much greater length in Sections 6-11 below.)

What is plain is that the applicability of principles of generation – i.e. which is applicable when, in what combination, and in what weights – is something that often cannot be figured out easily. Walton observes at one point:

> Implications seem not to be governed by any simple or systematic principle or set of principles, but by a complicated and shifting and often competing array of understandings, precedents, local conventions, saliences. Sharply divergent principles, answering to different needs, are at work in different cases, and it seems unlikely that there are any very general or systematic meta-principles for determining which is applicable when. Experience and knowledge of the arts, of society, and of the world will sharpen the critic's skills. But in the end he must feel his way. (p. 169)

## 5. The Optimality Principle for Law.

The preceding section could be thought to have ended on a very pessimistic note. If generation of implicit legal truths works the way that generation of implicit fictional truths works, and there is no "simple or systematic principle or set of principles" by appeals to which we can infer implicit fictional truths, then we

[25] For some fascinating related discussion, see Tooby & Cosmides (2001).

would be prompted to reach a similar conclusion about generation of implicit legal truths, and to think that the best we could do is to "feel our ways".

Even if we stopped here, and made no further theoretical headway, I believe, we would have made important progress in our thinking about implicit law. For the foregoing discussion of implicit fictional truths suggests that we should be suspicious of any view that characterizes generation of implicit legal truths as governed by a principle or set of principles that is easily discerned and applied. Dworkin (e.g. 1975a & 1986) for one defends a position that should strike us as too simple-minded in light of the preceding discussion. According to him, the correct implied legal truths are those that would be implied by the set of moral principles that would best fit and justify the explicitly stipulated laws, as well as the relevant community's mores, traditions, and social practices. In other words, Dworkin sees an analogue of (11) as invariably the sole correct principle of generation for implied legal truths. That analogue could be formulated as:

(12) *The Optimality Principle for Law*: The legal system should approximate as much as possible the system that would make the relevant community as ethically optimal as the explicit laws, mores, traditions, and societal practices of that community allow.

If generation of implicit legal truths is anything like generation of implicit fictional truths, then this is a wildly simplifying and ultimately distorting picture. As Walton and others point out, generation of fictional truths cannot proceed on such a simple and algorithmic way; it is a much messier and system-resistant affair.

Of course, this argument by analogy is nothing close to a knock-down argument against Dworkin's conception of implicit law. There may be important differences between law and fictions that warrant conceiving generations of implicit norms in the two domains quite differently. But the force of the analogical argument is strengthened considerably when it is combined with a perennial worry about Dworkin's conception of the nature of law, which conception was summarized at the very beginning of this paper. The initial appeal of Dworkin's (1967; 1975a; 1986) conception of the nature of law, and his conception of adjudication, stemmed largely from the impression that the Optimality Principle works quite plausibly in generating implicit legal truths in cases like *Riggs v. Palmer*[26] and *Henningsen v. Bloomfield Motors, Inc*.[27] In these cases, implications of the moral principles that best fit and justify the explicit law and societal practices of the relevant communities generally yield conclusions of implicit law that we find compelling. Dworkin often speaks as if these and similar cases he relies on were chosen casually and almost randomly from law school textbooks, and that there is nothing really atypical about them. But there is a reason that he returned to these specific ones repeatedly. For the Optimality Principle (by itself) does not yield such compelling outputs in many other cases. This is *spectacularly* illustrated in the line of American antebellum cases involving the Fugitive Slave Acts discussed in Robert Cover's *Justice Accused* (1975). Cover's book chronicles the story of judges sitting in the Northern states who had to decide cases involving the Fugitive Slave Acts. Almost without exception, despite their very strong ethical objections to what the Fugitive Slave Acts required of them, and in some cases at considerable political costs to themselves, these judges decided to return the runaway slaves caught in the Northern states to the slave-owners in the South. In his review of Cover's book, Dworkin (1975b)

[26] 115 N.Y. 506 (1889).

[27] 32 N.J. 358 (1960).

puzzles over these cases, and eventually concludes that the judges behaved as they did because they mistakenly overlooked a plausible legal theory -- namely, one that relies on the Optimality Principle for generation of implicit legal truths -- that would have enabled them to be true to both their ethical convictions and their legal scruples. This is less than persuasive, and the fact that the judges involved almost uniformly decided the relevant cases contrary to what the Optimality Principle predicts, and the fact that most lawyers who read Cover's account agree with these judges' legal assessments, illustrate the problem with relying exclusively on that principle for generation of implicit legal truths.[28]

Our discussion of generation of implicit fictional truths in the preceding section furnishes us a compelling diagnosis of what ails Dworkin's conception of implicit legal truths. Most likely, generation of implicit legal truths is a complex and system-resistant affair much like generation of implicit fictional truths. Reliance solely or primarily on the Optimality Principle, or on any other single principle of generation for that matter, may yield the correct results in some cases, but it is unlikely to work well across the board. It is considerable progress to develop a suspicion or resistance to misleadingly simple-minded and distorting conceptions of the nature of law like Dworkin's. And the analogy of law to fictions helps us with such development.

## 6. Whence Principles of Generation?

I suspect that some readers have been thinking that a crucial question needs to be raised and squarely addressed. This is the question about the status of principles of generation, where they come from, whether they are artificial or natural. In other words, we can ask about the nature of principles of generation for law what legal philosophers have been asking about the nature of laws. And since I have been arguing that the issue of the nature of law turns on the issue of implicit law, and that the latter issue turns on principles of generation for law, it may be thought that the issue of nature of law ultimately turns on the nature of principles of generation.

Legal positivists, I suspect, would be attracted to the view that principles of generation for law are artificial and even conventional. And as can be seen in the passage quoted in the penultimate paragraph of Section 4 above, Walton, for one, has sometimes given an impression, albeit an ambiguous impression, of such a take on principles of generation for fictional truths.[29] In the same paragraph, I laid out some conjectures about the source of principles of generation for fictional truths. And my comments there too could be thought to suggest a conception of principles of generation for fictions as artificial and even conventional.

In the course of a lengthier discussion hereinafter, I want to dispel this impression. Notice that it is reasonable to believe that even some moral and epistemic norms are artificial and even conventional. The most fundamental or basic moral and epistemic norms, we are inclined to believe, are natural or non-artificial,

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[28] See Dworkin (1986, pp. 111-113; 1987, p. 20) for some of his subsequent discussions of the same issue.

[29] See more generally, Walton (1990, ch. 4). In private conversation, Walton indicated to me that this is not an impression that he meant to give. A notably different impression can be gotten from the earlier Walton (1979, esp. p. 212).

but many subordinate norms that implement those basic norms are often artificial and even conventional.[30] Similarly, it may very well be that some subordinate principles of generation – e.g. those specific to a specific genre or sub-genre of art works – are artificial and even conventional. But that alone does not imply that the most fundamental or basic principles of generation for fictional truths are themselves artificial or conventional. Like understanding of principles of generation *for law* appears reasonable. It may well be that for some specific types of laws – e.g. commercial codes governing financial instruments, constitutional provisions securing fundamental rights – all parties, including lawmakers and courts, have reached some common understandings as to how implicit legal truths related to those types of laws are to be generated. But that alone does not imply that we should conceive the most fundamental principles of generation for law as artificial or conventional.

As for the most fundamental principles of generation for fictions and law, my surmise is that they are some very fundamental features of human psychology. Or at least that they are principles that implement the more fundamental principles governing imagination that are fundamental features of human psychology. We can think of the principles of generation for fictions and law as those regulating specific types or "genres" of imagination that fictions and law afford or call for, respectively. That is my surmise. Unfortunately, I do not (yet) have a compelling argument for that conclusion. What I have instead is a mere scaffolding of an argument, or an argumentative schema. Let me go on to lay out my argumentative schema. I think that would be worthwhile for a number of reasons. First, my primary goal in this paper, as stated in the introduction, is to carve out a logical space for a new conception of implicit law, and the argumentative schema would be helpful in that regard. Second, some of the premises are significantly reliant on empirical considerations. While I cannot say that the argument I schematize is fully supported by empirical research, I can say that it is *buttressed* by a portion of the empirical psychological and cognitive science literature I have so far consumed. Third, some of the gaps in the argument arises from the absence of empirical findings addressing the relevant issues. Setting out the schema then could be useful in spotting some issues on which some possible future empirical research could be carried out.

Here is the argumentative schema. Not all premises will make sense before I comment on them, which I will go on to do in the following sections. In particular, I here employ some special terminology that will have to be explained by and by.

(13) Principles of generation are applicable only for dramatic imagining, not for mere hypothetical imagining.

(14) We rely on dramatic imagining (or simulation) to construct scenarios of counterfactual and alternative situations.

(15) Certain rules regulate our constructions of scenarios for counterfactual and alternative situations.

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[30] Both David Hume (1839-40, bk III, part ii, § 5) and John Rawls (1971, § 52), for example, proposed so-called practice theories of promises, according to which promissory obligations demand adhering to a beneficial or just social practices or conventions. It follows from such theories that existence of specific promissory obligations depends on local community practices or conventions. It also seems that the specific content of the norm of credulity that one ought to follow depends, at least partly, on the locally-prevailing standards of testimonial accuracy and sincerity.

(16) The status/nature/source of the most basic principles of generation for *fictions* is likely the same as the status/nature/source of the rules that regulate our constructions of scenarios of counterfactual and alternative situations.

(17) The most basic principles of generation for *fictions* are likely fundamental and innate features of human psychology.

(18) The status/nature/source of the most basic principles of generation for *law* is likely the same as the status/nature/source of the most basic principles of generation for *fictions*.

(19) The most basic principles of generation for *law* are likely fundamental and innate features of human psychology.

(19) is the conclusion we want. Notice what it would imply about the nature of implicit law. On the one hand, implicit laws would be *partly* products nonoptional aspects of human psychology, and in that respect they would not be *wholly* artificial or conventional. They would be only partly artificial or conventional because the explicit law that would be their partial determinants are artificial or even conventional. On the other hand, they would also be very different from moral or epistemic norms, or any implications thereof. Moral and epistemic norms, or the most basic of them, are not fundamentally generated by features of human psychology. They are more plausibly conceived as grounded in mind-independent features of the world. It would follow in effect that implicit laws would be "natural" in a different sense from the way that moral and epistemic norms are natural.[31] What we would end up with is a hitherto unrecognized conception of implicit law.

Let me now discuss each of the steps of the above argument in the hope of making it as plausible, or appear as good a bet, as my current limited resources allow.

## 7. Dramatic Imagination.

*(13) Principles of generation are applicable only for dramatic imagining, not for mere hypothetical imagining.*

There are at least two different kinds of imagining, and I will use Richard Moran's (1994, p. 24) terms "hypothetical imagining" and "dramatic imagining" to refer to them. After observing that uses of figurative language, which is very different from the everyday vernacular, are often conducive of vivid imagining, Moran says:

> The sense of "imagination" I have been drawing attention to in the examples of the effects of figurative language has less to do with simply imagining something to be the case, or imagining doing or feeling something, and more to do with what we ordinarily think of as "imaginativeness." This concerns the ability to make *connections* between various things, to notice and respond to the network of associations that make up the mood or emotional tone of a work. (p. 11)

[31] In many respects, the conclusion that I favor here is similar to the one reached by Robyn Carston (2013) who explains the so-called canons of legal interpretation in terms of the maxims of pragmatics. Such pragmatic maxims, or at least the accurate versions of them, are generated by deep non-optional features of our cognitive systems the way that I am arguing that the basic principles of generation for fictions and laws are. The two conclusions would match up even closer if we assumed that the law is, or is fully determined by, the pragmatically-enriched contents of legal texts or utterances of legal claims. While some (e.g. Soames 20XX) make such an assumption, it is one that should be rejected. See [Greenberg; Berman & Toh; Toh].

Simply imagining something to be the case, or imagining doing or feeling something, is mere hypothetical imagining. Whereas *imaginative* imagining, which activates associative connections, is what dramatic imagining is.

It is not completely clear that by speaking of associative connections, Moran is here invoking associationist psychology, but it is quite likely that he is. According to associationists, an individual's mind consists of a network of ideas or thoughts, where the link between any pair of ideas or thoughts is established and maintained by co-occurrences of things in the environment that causes those ideas or thoughts to arise in the individual's mind. The strength of each link is determined by the frequency of the co-occurrence of the relevant pair. And ideas or thoughts could have affective and behavioral aspects as well as representational ones – e.g. smiling often prompts happy thoughts, and seeing the word "vomit" tends to cause facial expressions of disgust. What is *dramatically* imagined then is a content that *activates* a particular branch of a network of representational, affective, and behavioral contents. It would be activated in the sense of being geared up to achieve or maintain associative coherence within the relevant branch in light of the content inserted or turned on by the episode of imagining (see Kahneman 2011, p. 51). On the other hand, no such activation would be effectuated by a mere *hypothetical* imagining, which does not put up its content for associative coherence. One can hypothetically imagine a content in such an associatively-confined way, for example, as an initial premise of a reductio argument.

Intuitively, it makes sense to think that principles of generation are applicable only when dramatic imagining is involved. We employ such principles to generate certain fictional truths additional to explicit ones in order to achieve associative coherence. It makes little sense to imagine, for example, that Iago did all the horrible things he did to Othello and Desdemona without some deep and powerful motive, and we cast about to find one that would make all the goings-on in the play hold together.[32] No such striving to make sense – i.e. to achieve associative coherence – is called for by mere hypothetical imagining.

This intuitive assessment is shored up by a consideration of the so-called puzzle of imaginative resistance.[33] The puzzle, in the first instance, has to do with the apparent asymmetry between: on the one hand, our readiness to entertain even sharp departures in fictional works from the real world's descriptive facts; and on the other, our resistance to any clear ethical deviances in fictions. Readers, for example, display no hesitancy in accepting the existence of unicorns or the availability of time travel in works of fiction, but

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[32] What we do here is much like what experimental subjects did after reading:

> After spending a day exploring beautiful sights in the crowded streets of New York, Jane discovered that her wallet was missing.

When given a recall test, the subjects very frequently came up with the word "pickpocket" despite its absence in the sentence (Kahneman 2011, p. 75). Apparently, many subjects filled out the story, and came up with a cause of Jane's loss. And in doing so, they associated the elements of the sentence more strongly with "pickpocket" than with words that would have been parts of alternative possible causal stories – e.g. that the wallet slipped out of pocket, was left at a restaurant, etc. Kahneman suspects that "crowded streets" and "New York" played decisive roles.

[33] See e.g. Moran (1994); Walton (1994); Gendler (2000). The term is Gendler's. These and other philosophers trace at least some aspects of the puzzle to the discussion in the last five paragraphs of Hume (1757).

invariably would resist chattel slavery being just or headhunting being glorious. Some clarifications are in order. First, what we resist in such instances is not chattel slavery being *considered* just or headhunting being *deemed* glorious by fictional characters or even by narrators, but instead chattel slavery *being* just or headhunting *being* glorious in fictional worlds. What we resist are deviant ethical facts, not deviant psychological facts.[34] Second, the resistance can be overcome by skillful authors and artists. What calls out for an explanation is the greater *relative* difficulty in establishing certain kinds of fictional facts compared to other kinds. Third, as the recent discussion shows, the relative difficulty in the final analysis is not limited to ethical facts, but is characteristic also of some others, including shape facts and humor facts. It is difficult to accept that a surface that is described in a fiction as having three angles is rectangular, or that a dumb knock-knock joke is hilarious.[35] There is no settled view in the literature about what best explains the relative greater difficulty of accepting certain kinds of fictional facts. But it seems reasonable to think that the asymmetry is generated by the workings of principles of generation. The Reality Principle appears to work quite powerfully when it comes to certain ethical and some other kinds of facts. And the Principle may not only mandate "imports" of certain facts from the real world to the fictional world, but also "exports" going in the other direction. And at least some of our resistance may be rooted in our rejection of some exports.[36]

What is important for our purposes is that the puzzle is generated by only one kind of imagination, and not by the other kind.[37] We are not resistant to hypothetically imagining any ethical or other kind of proposition – e.g. to start a reductio.[38] Any resistance is encountered when we imagine *dramatically*, in ways that are more vivid, that involve our sort-of-stepping-into the fictional world, that create possibilities of getting "caught up", so to speak. If the puzzle is generated by the workings of principles of generation, and occurs only when dramatic imagining takes place, then it appears likely that those principles are at work only in the context of that sort of imagining.

## 8. Situations and Scenarios.

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[34] I use "ethical facts" and like locutions in this paper for convenience's sake. I do not presume any particular metaphysics of ethical or normative facts.

[35] See Yablo (2002); Weatherson (2004); Walton (2006). An astute reader may have inferred from the initial description of the puzzle that fictional facts cannot deviate from certain of real ethical facts. And going along with my analogy between law and fictions, he may have further inferred that legal facts cannot deviate from certain of real ethical facts. What we would have here would be Reality Principles for fictions and laws that specifically concern certain ethical facts. Something like:

> The fictional world/legal system must duplicate certain of the real world's ethical facts, no matter its deviations from the real world in other respects.

This conclusion, in effect, would vindicate a type of natural law theory, which is different from the one like Dworkin's based on an Optimality Principle. The second clarification of the puzzle in the text, however, discredits such an inference.

[36] As argued forcefully in particular by Gendler (2000 & 2006).

[37] See Moran (1994, pp. 11-17, 24-25); Gendler (2000, pp. 201-202).

[38] In Waltonian terms, we can recognize a fictional truth in the sense of recognizing that something is *to be* imagined, without actually imagining that something. The former recognition is what I am calling "hypothetical imagining" in the text.

*(14) We rely on dramatic imagining (or simulation) to construct scenarios of counterfactual and alternative situations.*

The associative network of ideas or thoughts that an individual maintains could be deemed a model of the world, and it is responsible for the individual's interpretations of the here and now, and his expectations of the over there and hence. I will hereinafter use the term "situation" to refer to any part or snippet of the world, either static (states) or temporally-extended (events). And I will use "scenario" to refer to any representation of a situation of either kind.[39] An individual, or his associative network, constructs scenarios of the goings-on around it as it navigates the world, all the while striving to achieve and maintain associative coherence.

What is important for our purposes is that not only does an individual construct scenarios of *actual* situations around it, but also generates scenarios of *counterfactual* and otherwise *alternative* situations. Once we begin to think about it, it is astounding just how much of our everyday thinking is about counterfactual or alternative situations, and also how much such thinking is intertwined with our thinking about actual situations. First, as Michael Bratman (1992) observes, significant portions of our everyday practical reasoning is conducted not in light of our beliefs, which are context-independent cognitive commitments, but instead in light of what we accept only in specific contexts – i.e. attitudes that take as their objects scenarios of alternative situations. People assume, for example, that they will live at least until the age of eighty in planning their retirements. Even after just one drink, I take for granted that I am too impaired to drive. Opposing lawyers may stipulate certain putative facts in order to focus their dispute on a different set of issues. In all such cases of contextual "acceptances", we are constructing and relying on scenarios that may very well vary from what is actually the case, and we do so in order to make headway in our practical reasoning in specific contexts. We would abandon these scenarios and switch to different ones regarding the same issues in other contexts. Second, whenever person is collaborating with or competing against another (as in the third of the examples used above to illustrate Bratman's point), he has to construct scenarios from that other person's point of view, which may diverge from the person's own, to carry on our collaboration or competition.[40] Third, constructions of scenarios of counterfactual or alternative situations is prevalent not only in our forward planning, but also in our backward assessments. Many of our backward-looking emotions, such as regret, frustration, relief, and satisfaction are based on comparisons of what actually transpired with what could have been, thus requiring constructions of scenarios of non-actual situations.[41]

Daniel Kahneman and Amos Tversky (1982) have influentially argued that scenarios of counterfactual or alternative situations are constructed using what they call "the simulation heuristic". Our scenarios of

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[39] Thanks to Nick Allott, Eliot Michaelson, and Nick Zangwill for help in finding suitable terminology, which was initially much more complicated and cumbersome than it is now. I understand that the term "situation" is already in circulation in the philosophical literature, used by situation-semanticists to refer to roughly what I have in mind. See e.g. Barwise & Perry (1983). I also understand that there are controversies about the exact nature of situations as they use the notion. See Kratzer (2007/19). I intend my commitments to extend only to what is said in the text, and well clear of those controversies.

[40] See e.g. the papers collected in Davies & Stone (1995a & 1995b).

[41] See Kahneman & Tversky (1982); Moran (1994, pp. 4-7).

actual situations could be thought to feature certain operating parameters. To come up with scenarios of counterfactual or alternative situations, we change the values of some of those parameters and mentally trace out the outcomes. We can, for example, set certain parameters to anticipate whether two strangers would get along well with each other. Simulations can be run in the other direction as well, by specifying a counterfactual outcome, and tracing back to see which of the parameters would have had to be different in values. We can, for example, try to figure out what would have prevented a certain disaster by setting the outcome at absence of the disaster, and tracing back to see what should have been different. Here, what Kahneman and Tversky call "simulation" is, or is a type of, dramatic imagination. What we trace back and forth as we simulate are the associative links or patterns that are activated by dramatic imagination. Certain outcomes are deemed more easily produced from certain initial conditions and operating parameters than others, or the other way around. And the level of *ease* is a function of the strength of the relevant associative links, the degree to which associative coherence can be achieved. Simulation is none other than, or at least a species of, dramatic imagining.

## 9. Construction Rules.

*(15) Certain rules regulate our constructions of scenarios for counterfactual and alternative situations.*

In investigating the simulation heuristic, Kahneman and Tversky focused on episodes of simulation involving some of our backward-looking emotions, such as regret, remorse, relief, etc. Such emotions involve comparisons of what actually happened with what could have been, thus requiring constructions of scenarios of non-actual situations. Such constructions involve changing some of the parameters of the scenarios for actual situations, or "undoing the past", as Kahneman and Tversky (1982, p. 204) evocatively put it. Kahneman and Tversky observe that certain cognitive rules can be discerned in our undoings.

Here is an example that they use to illustrate the point, one that has since become famous enough to be a ubiquitous anecdote:

> Mr. Crane and Mr. Tees were scheduled to leave the airport on different flights, at the same time. They traveled from town in the same limousine, were caught in a traffic jam, and arrived at the airport 30 minutes after the scheduled departure time of their flights.
>
> Mr. Crane is told that his flight left on time.
>
> Mr. Tees is told that his flight was delayed, and just left five minutes ago.
>
> Who is more upset? (p. 203)

Mr. Tees was the answer given by 96% of the test subjects who answered the question. Kahneman and Tversky suspect that the level of frustration is a function of how *close* one feels that one came to arriving at a better outcome. Mr. Tees would have been more frustrated, we judge, because it would have been easier for him to imagine how he could have arrived five minutes earlier than it would have been for Mr. Crane to imagine how he could have arrived thirty minutes earlier. Kahneman and Tversky then strikingly observe:

> There is an Alice-in-Wonderland quality to such examples, with their odd mixture of fantasy and reality. If Mr. Crane is capable of imagining unicorns – and we expect he is – why does he find it relatively difficult to imagine himself avoiding a 30-minute delay, as we suggest he does? Evidently, there are constraints on the freedom of fantasy . . . . (pp. 203-204)

The question in the second sentence is unmistakably similar to the question raised by those concerned with the puzzle of imaginative resistance, discussed in Section 7 above. And as we suspected there that principles of generation impose imaginative resistance for imagining certain kinds of fictional truths, Kahneman and Tversky hypothesize that certain rules regulate constructions of scenarios for non-actual situations – i.e. "constraints on the freedom of fantasy".

In classifying changes we make to scenarios of actual situations in the process of undoing the past, Kahneman and Tversky (p. 205) call any change that removes a surprising or unexpected aspect of the scenario for the actual situation a "downhill change", and any that adds a surprising or unexpected aspect an "uphill change". In this skiing metaphor, exceptional states and events are peaks, and normal states and events are valleys. One salient rule of construction that they infer based on their experiments is "the downhill rule". We have a marked preference for downhill changes in our constructions of scenarios of non-actual situations. Ruth Byrne (1997 & 2005), who has pursued the same line of research, has discerned a number of other rules of construction. Evidently, we prefer to remove: (i) actions rather than omissions (e.g. taking of a vaccine rather than neglecting to get vaccinated); (ii) flouting of some obligations or expectations, rather than deontically innocent events (e.g. stopping for a drink rather than dropping in on a friend); (iii) components of causal compounds over which we have control, rather than those over which we lack control (e.g. airport security officials' oversight rather than hijackers' malevolent intent); (iv) recent events rather than earlier events (e.g. the missed goal in the last minute rather than missed opportunities for the first 89 minutes of the game); etc.

## 10. Associative Coherence.

*(16)* *The status/nature/source of the most basic principles of generation for fictions is likely the same as the status/nature/source of the rules that regulate our constructions of scenarios of counterfactual and alternative situations.*

*(17)* *The most basic principles of generation for fictions are likely fundamental and innate features of human psychology.*

After announcing that we have a decided preference for downhill changes to our scenarios in undoing the past, Kahneman and Tversky notes that this preference "embodies the essential constraints that lend realism to counterfactual fantasies" (1982, p. 205). It is important to note that what they mean by "realism" here may diverge from reality. For what is "uphill" or "downhill" in terms of changes to our scenarios is a matter of levels of cognitive strain and ease, and those are in turn functions of the strengths of the relevant associative links. The peaks, the exceptional states and events, are those that introduce cognitive strain; and the valleys, the normal states and events, are those that allow cognitive ease.[42] What we are implicitly motivated to construct then are scenarios that involve least cognitive strain, or most cognitive ease. Another way of putting that is to say that our overriding goal is associative coherence. This explains our reliance on the downhill rule, and I suspect also our reliance on other construction rules.

As I argued in Section 7 above, when I commented on the difference between hypothetical and dramatic imaginings, we are after associative coherence also when we rely on principles of generation in our

[42] For a development of the "norm theory" that undergirds this view, see Kahneman & Miller (1986).

dramatic imaginings involving fictions. The similarity here is not surprising. The simulations that we employ to construct scenarios of non-actual situations are, or are a species of, dramatic imaginings. Works of fiction amount to a special technology we have devised to facilitate dramatic imaginings. Principles of generation that regulate the associative patterns in our dramatic imaginings involving fictions are plausibly conceived as belonging to a set of rules governing construction of scenarios of non-actual situations, which rules are meant to regulate the associative patterns involved in any dramatic imaginings in the direction of associative coherence.

It seems reasonable to infer that the nature, status, and source of principles of generation for fictions are no different than those of construction rules for scenarios for non-actual situations in general. Both kinds are norms that we rely on to realize or maintain associative coherence. They are all grounded in or engendered by a very fundamental feature of human psychology, which is that we are designed to pursue associative coherence in representing non-actual situations.

11. Principles of Generation for Law.

*(18) The status/nature/source of the most basic principles of generation for law is likely the same as the status/nature/source of the most basic principles of generation for fictions.*

*(19) The most basic principles of generation for law are likely fundamental and innate features of human psychology.*

Any argument is only as strong or persuasive as its weakest step, and I suspect that (18) is the measure of my argument's (or argumentative schema's) strength. Back in Sections 3-4, I broached the analogy between legal and fictional truths to promote the idea that there are implicit legal truths. What stood in the way of recognizing implicit law, I supposed, was the apparent artificial nature of laws. Works of fiction too are apparently artificial, I figured, but it is quite plausible to think that those works come with implicit fictional truths in addition to explicit ones. The same could be said for laws, I argued.

Still, while I have enumerated some principles of generation for fiction that philosophers have identified, and which are quite credibly seen as some of the means by which we generate implicit fictional truths, I have not ventured to identify any such principles for implicit legal truths. And this may be thought to diminish or undercut the force of my analogical argument. I want now to respond to this possible skeptical challenge by delving a bit into how reasoning about implicit legal truths actually works, with the goal of showing that law and fictions work more analogously than would be allowed by a skeptic.

Let me first bring up Justice Stevens's dissenting opinion in the U.S. Supreme Court case *Doe v. United States*,[43] a privilege against self-incrimination case that was a forerunner of the Massachusetts case *Commonwealth v. Burgess*, which I discussed back in Section 4. *Doe* concerned a federal district court's order that a criminal defendant sign a consent decree authorizing foreign banks to release his financial records to the court. Arguing that such an order would violate the defendant's privilege against self-incrimination under the Fifth Amendment, Justice Stevens drew a distinction between compelling a witness to surrender a key to a safe and compelling him to reveal a combination to a safe. Compelling a defendant to surrender any physical

[43] 487 U.S. 201 (1988).

evidence is like the former, he reasoned, whereas compelling him to sign a consent decree is like the latter, and thus coerces a defendant to use his own mind to testify against himself. Specifically addressing this argument in *Burgess*, Justice Fried, writing for the Massachusetts Supreme Judicial Court, rejected the analogy. He opined that production of many kinds non-testimonial evidence requires a defendant to use his mind, even if production of some do not.[44]

We do not here have to adjudicate this dispute. What is more pertinent for our purposes is to consider what the two judges are up to in pushing their respective positions. Recall Moran's discussion of the effects of figurative language on dramatic imagining, which I quoted in Section 7 above. Dramatic imagining activates associative patterns, Moran observed. And figurative language often does that when it prompts the reader or the audience to see something in terms or the guise of something else. When Romeo declares that "Juliet is the sun", for example, an associative pattern in which the sun figures is set off in the audience's understanding of how Romeo thinks of Juliet. Stanley Cavell once noted that, in understanding Romeo's utterance, we infer something like:

> that Juliet is the warmth of [Romeo's] world; that his day begins with her; that only in her nourishment can he grow. And his declaration suggests that the moon, which other lovers use as an emblem of their love, is merely her reflected light, and dead in comparison; and so on. (1965, pp. 78-79, quoted in Hills 1997, p. 121)

Justice Stevens was attempting something quite similar with his similes. By likening compelling a defendant to produce various physical evidence to compelling him to surrender a safe key, and likening compelling a defendant to sign a consent decree to compelling him to surrender a safe combination, Stevens was trying to highlight or activate an associative tension between the order to sign a consent decree on the one hand, and various commitments that American judges have against compelling a defendant to use his mind to incriminate himself. And Justice Fried was trying to smother such an associative pattern, and to instigate instead an associative coherence between the order to sign an IRS release form on the one hand and American judges' oppositions against self-incrimination on the other.

Similar moves can be discerned at more macro-level legal discussions too. For example, there has been a struggle between two ways of conceiving Section 1 of the Sherman Act,[45] the primary antitrust law statute of the United States, the dominant conception seeing it as aimed primarily at fostering competition to induce economic efficiency, and the other recessive conception seeing it as also significantly aimed at protecting small businesses.[46] And much of private law theorizing in the Anglophone legal world in the last sixty or so years has been marked by a contest between those who see private law as having the goal wealth-

[44] 426 Mass. 206, 220 n.5.

[45] 26 Stat. 209, 15 U.S.C. § 1 (1890).

[46] The latter position was famously championed by Justice Brandeis, writing for the unanimous court in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). Thanks to Mike Carrier for taking time out from writing a brief for a Supreme Court antitrust case to help me recall a bit of the antitrust law I learned decades ago.

maximization or economic efficiency,[47] and those who see it as constituted by the goal of corrective justice.[48] Each side in each of these legal disputes is an attempt to portray one thing in terms of another, and thereby to activate an associative pattern.[49] In this respect, such attempts resemble what we try to do by employing metaphors and other tropes of figurative language.[50] They also resemble scientists' reliance on scientific models to study aspects of the real world.[51] What Moran has observed in the following passage, with verbal metaphors particularly in mind, is true of these attempts as well:

> There are more ways of changing someone's mind than changing his or her beliefs. Although this may be most easily seen in the case of rhetoric, it is quite generally true for both philosophy and literature that much of what they aim at is not on the level of specifically altered beliefs but, rather, such things as changes in the associations and comparisons one makes, differences in the vivid or "felt" appreciation of something already known, or changes in one's habits of attention and sense of the important and the trifling. (1989, p. 37)

In such instances, what speakers ask of the audience is not so much to *believe* something, but to *imagine* something. Moreover, what they ask, according to Moran (1994, pp. 13-16), is not a new *content* for imagining, but a new *manner* or *mode* of imagining. Such requests or invitations are ubiquitous in, even characteristic of, judges and others' pitches for implicit legal truths. These are attempts at instigating associative coherence.

It is easy and sometimes tempting to be skeptical and cynical about such attempts, to deem such attempts incapable of correctness, or even of being better than others.[52] But notice that we often accept some metaphors or similes as apt or even true, while rejecting some others as inapt or even false.[53] There is much right, for example, about the thoughts that Machiavelli was the Dante of the Italian prose, that coffee is consciousness in a cup, and that the Austro-Hungarian Empire limped its way from crisis to crisis. Whereas we are inclined to deny that any man is an island, that black is the new black, and that Princeton is still the northernmost outpost of the Confederacy. And we are disposed to make such judgments in legal and very

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[47] See e.g. Coase (1960); Posner (1972).

[48] See e.g. Weinrib (1995/2012); Honore (1995).

[49] Each moreover is an attempt to attribute a purpose or goal to a body law, and in this respect resembles our attempts to discern Iago's true motive. [Michotte (1945/63) & Heider & Simmel (1944), discussed by Kahneman (2011, pp. 76-77).]

[50] For a rich and stimulating discussion drawing parallels between uses of figurative language and common law legal argumentation, see Barfield (1947).

[51] There is much debate among philosophers of science about the nature of scientific models. According to one prominent view, such models are fictions. As Roman Frigg (2010) explains, in using a model, a scientist usually presents a hypothetical system as an object of study, and imagines, but crucially does not believe, that it is accurate of the real world, hoping to draw lessons about the real world from such an exercise. Frigg explicitly draws on Walton's theory of fictions to elaborate this view. There is also a long tradition in philosophy of science of conceiving scientific representations in general as metaphorical. For an instructive recent study, see Camp (2020).

[52] [Talk about priming and framing effects.]

[53] According to Hills (1997, esp. pp. 127-128), truth and aptness are two distinct and interrelated modes of assessing metaphors. The first deals with linguistic competence, whereas the second deals with imaginativeness.

consequential contexts. In the recent second impeachment trial of Donald Trump, one of the salient issues was whether Trump's speech at the rally that immediately preceded the rallygoers' attack on the U.S. Capitol, which alleged that the 2020 presidential election was fraudulent, and urged them to march to the Capitol to stop the certification of the election, was protected free speech under the First Amendment of the U.S. Constitution. Under the standard set out by the Supreme Court in *Brandenburg v. Ohio*, government cannot proscribe and punish even inflammatory speech unless that speech is akin to "shouting *fire* in a crowded theatre"[54] – that is, aimed at inciting imminent lawless action and is likely to produce such action. Responding to the former President's defense counsel's invocation of the *Brandenberg* standard, Congressman Jamie Raskin, the lead impeachment manager, averred that Trump's actions were even worse than those of the proverbial shouter of "fire" in a crowded theatre. He argued that Trump's provocative speech at the rally, and his failure to intervene for many hours during the ensuing attack on the Capitol were akin to the actions of a municipal fire chief who instigates a mob to set the theatre on fire, and then refuses to dispatch fire engines to put out the fire. *The Washington Post* recently reported that Raskin worked quite some time with his fellow impeachment managers to hone the metaphor and get it right (Demirjian & Hamburger 2021).

In making claims about implicit legal truths, judges and lawyers try to instigate the right associative patterns in their audience's minds, to get them to arrive at new associative coherences. They can do good or bad jobs of doing so, and their successes and failures are much like other successes and failures of attempts at managing dramatic imaginings, including claims of implicit fictional truths. For the latter endeavors, we have some credible proposals about what kinds of principles people rely on to make discriminations between good and bad attempts. So far, we do not have similarly credible proposals about principles of generation for implicit legal truths. But this regrettable state of affairs, I surmise, is due to the lack of sufficient relevant jurisprudential and psychological research, and one that could be cured with some. Even in our rude state, I believe, we can make a reasonable conjecture about the nature, status, and source of the principles of generation for implicit legal truths that await our discovery. They, like the principles that govern generation of implicit fictional truths, are those that regulate associative patterns, and are meant to be productive of associative coherence. And they stem from a fundamental feature of our psychological makeup.

## 12. Conclusion.

What results is a hitherto unrecognized conception of implicit law. According to this conception, the implicit law of a community is grounded partly in the community's explicit law and partly in principles of generation which are products of a fundamental feature of human psychology. Unlike explicit law, principles of generation are not so much of human-*making*, but instead of human *makeup*. The resulting picture departs from the standard legal positivist view that all laws are artificial or manmade. At the same time, the picture is not one that natural law theorists would endorse. Natural law theorists too recognize that some law, i.e. explicit law, is of human-making. But they argue that there is implicit law that is not of human-making, but

[54] 395 U.S. 444 (1969). The *Brandenburg* Court was here rephrasing and redeploying a phrase used by Justice Holmes in an earlier seminal free speech case, *Shenk v. United States*, 249 U.S. 47 (1919), which it was partially overturning.

instead is natural. While principles of generation that are responsible for implicit law are natural, in my conception, they are "natural" in a sense that is different from the sense of "natural" that natural law theorists employ. Principles of generation are products of human psychological nature, not of the mind-independent parts of nature that we usually or standardly deem the ultimate grounds of the most fundamental moral and epistemic norms.

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