see that man's attempt to explore the world and to give it a conceptual order so that he can behave in it according to his ideas and aims is nothing but a generally observable faculty and predestination to live with his fellow men in a reasonable manner.

According to an institutional-realistic conception, to which I subscribe, law appears to be an (institutionally) organized whole of social relationships that is governed by a set of principles and rules. The constitutional principles, dominating the entire legal system, make rationally consistent legal decisions on all levels possible, not only because of their (formal) priority in the legal system but also because of their far-reaching content.

But if one tries to justify those basic principles rationally, starting from a certain social practice, one will face all objections that have been raised against the logical foundation of inductive inference. Thus one cannot claim that the social (political and legal) experiences we have had up till now necessarily lead to the acceptance of those basic principles of law which we actually practise. This should not provoke the denial of possible rational justifications. No longer are we entitled to assume contrarily, that the chain of rational arguments will end sometime or other and that the original ideas cannot be supported other than by emotive adherence.

From the viewpoint of practical reason we must rather argue that the basic principles of law ought to be justified by historical experience as well as by a particular contemporary practice; in addition the teleological dimension of normative conduct must also always be considered. Furthermore, the historical contingency of the argumentional situation has to be taken into account; we should not fall subject to the naturalistic illusion of a "logic" of history with its objective laws, which forces a predetermined rational foundation upon us. In every legal decision-making process we will have to work with the major ethical and political conceptions of our time and the valid legal principles to arrive at rational justifications.

Thus it is certain, that such rational justifications do not solely deal with the formal structure of argumentation and procedure; in fact substantial foundations of norms of conduct are always sought after. One doesn't search, as I contend, for a (for instance Kantian) general law of freedom from which one can directly derive an individual maxim of actions; it is not the enlightened individual acceptance of absolute general norms that counts; no, decisive is the specific rational argumentation and discursive communication which refer to interests and ideas in the light of a common social practice.

Therefore it is clear that we need societal practical discourse to state more precisely and justify our ethical and political ideas and commitments. That the relativity of our values and convictions is revealed in this way can only be considered natural. But we have to emphasize that this value-relativity is not only proper to a certain cultural environment; it is rather historical and situational within one single ethical and political system. The pluralistic society exhibits that openly and so induces the possibility, yes, even the need for tolerance.

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Rule Following, Rule Scepticism and Indeterminacy in Law: A Conventional Account*

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Saul Kripke (1982) makes the striking claim that rules do not exist; that following rules is like following a mirage because close inspection reveals there is nothing there to follow. This, for obvious reasons, we call strong rule scepticism.

Kripke's argument, which has been noticed in legal circles (Yablon 1987, 613; Bjarup 1988, 39), is of interest to legal philosophers for a number of reasons. First, the argument states the case against the possibility of rule following in the strongest form. Second, consideration of Kripke's problem in the context of law leads to an elaboration of the role of conventions in rule following and this coincides with the current interest in what has been called the convention or coordination thesis in law (Finnis 1989, 97; Reynolds 1989). Finally, an argument like Kripke's would seem to be a natural resource for a radical legal movement like the Critical Legal Studies Movement (CLS) which seeks to establish the indeterminacy of law.

The paper is divided into four sections. The first briefly discusses the meek legal version of rule scepticism advanced by the American Realists and its more aggressive twin, the strong indeterminacy thesis. In the second section Kripke's argument and one possible solution to it proposed by Philip Pettit (1990a, 1990b) are detailed. Pettit's solution is of interest to us because in meeting Kripke's sceptical challenge he introduces the idea that inclinations exemplify unique rules for agents under normal conditions. The conception of normal conditions when placed in the context of rule following in law involves, we argue, the operation of conventions. Section three links Kripke's argument and Pettit's proposed solution with an analysis of conventions and their role in legal reasoning. The final section suggests how we might come to a better analytical understanding of conventions and their role in rule following in law through systems theory. The reason for venturing into systems theory is to try marrying Pettit's explanatory account of rule following to a theoretical approach

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which might eventually provide an analytical account of what it is to follow a legal rule in a given context. Pettit is careful to distinguish analysis and explanation (Pettit 1990a, 15–16). His account of rule following is an explanation of the conditions under which rule following is possible and not a reductive analysis of rule following. Our argument is that conventions play a central role in any such analysis and that the tool of analysis should be the analytical systems sociology of Niklas Luhmann.

I. Rule Scepticism in Law

The Realists distrusted claims that rules were the most important factor in judicial decision-making or could safely serve as the basis for predicting legal outcomes.[1] According to Karl Llewellyn a characteristic feature of Realism was the rejection of simple (by which he meant general) rules and the substitution of more detailed classificatory schemes which better captured the specific nature of judicial rule-making (Llewellyn 1931, 1237). On Llewellyn's account, rule scepticism emerges as a set of doubts about the veracity of legal actors' claims to be following the legal rules they say they are. This is not rule scepticism in the strong sense of denying the existence of rules, however. Legal actors may simply be following some other rules. The rule scepticism of American Realism could perhaps be more accurately described as rule cynicism. Realist scholarship made it difficult to deny that rule manipulation and policy creation were endemic features of judicial decision-making. However, even Jerome Frank (1949, 155), like many of his Realist colleagues, was prepared to concede that rules had a settled meaning which sometimes disposed of cases. But demonstrating the existence of rule manipulation does not turn one into a rule sceptic in the strong sense. Realism, for all its radical vigour, retained the view that rules had a core of certainty and a modest penumbral region (Hart 1961, 119).

In recent years, American legal theory has once again witnessed the use of scepticism as an assault weapon; this time the CLS movement (Singer 1984, 1; Spann 1984, 473; Peller 1985, 1151). For CLS, scepticism takes the form of a claim about the radical indeterminacy of law and is, we are told, the one claim on which all CLS scholars agree because of its importance in their total critique of liberalism (Hutchinson and Monahan 1984, 206–7). Sadly, there is, in the words of one CLS scholar, confusion "about what we mean when we say that law or rights or legal theory is indeterminate" (Singer 1984, 10).

This confusion exists partly because the thesis comes in many shapes and sizes and partly because CLS is an eclectic concoction of philosophical influences which includes nihilism and deconstructionism. The former, in particular, as a general philosophy of negation could support a derivation of strong rule scepticism. Whether deconstructionism can also support it is a difficult question. The deconstructionist supposes there are meanings to deconstruct, yet an existential commitment to meaning, no matter how fleeting, seems to run contrary to strong rule scepticism. In any case giving analytical precision to the indeterminacy thesis is a genuinely Herculean task. Sometimes the claim of indeterminacy is made in relation to selected individual legal rules (Spann 1984) while at other times it appears as a general conclusion about legal reasoning (Kennedy 1973). On yet other occasions it is used to characterize a particular area of scholarship such as constitutional law (Tushnet 1984). In its most extreme form the thesis seems to amount to the claim that legal doctrine is never able to provide a determinate answer with respect to a given fact situation (Dalton 1985). Stated in this way the indeterminacy thesis seems susceptible

[1] For reasons of space we do not deal with Scandinavian Realism. Their analysis of legal language in terms of performative utterances has affinities with the sceptical tradition, however, and it deserves separate treatment.

to a quick refutation. As Solum (1987, 471–72) points out, there are some easy cases in law which are determinate. For example, walking one's dog does not offend against competition laws any more than this sentence constitutes a conspiracy to commit a crime. There are a range of easy cases which the legal rules take care of, in the sense of providing determinate outcomes.

Clearly proponents of strong indeterminacy need to meet the argument from easy cases since the argument suggests that, at the very worst, legal rules merely possess the quality of *under*determinacy (Solum 1987, 474). In other words, legal rules do still operate to reduce possible outcomes to something smaller than the set of all possible outcomes. In order to dispose of the argument from easy cases, proponents of strong indeterminacy must go further than hitherto. They must demonstrate as false the claim that words and rules have an inner core of certain meaning because it is this claim which gives the easy cases argument its grip.

What is needed is a meta-argument that disposes of both rules and rule following. Is there such an argument?

II. Kripke's Sceptical Argument

Kripke (1982) claims to have discovered an argument in Wittgenstein's *Philosophical Investigations* which has as its conclusion a profound scepticism about the existence of rules. Although Wittgenstein and Kripke discuss mathematical rules, exactly the same argument applies to other kinds of rules such as legal rules.

It should be said at once that exegetical devotees of Wittgenstein have vehemently denied that his work bears the argument or conclusion suggested by Kripke (Baker and Hacker 1984). This paper's focus is on the philosophical argument advanced for rule scepticism rather than the accuracy of Kripke's interpretation of Wittgenstein's delphic pronouncements.

Kripke's argument is simple enough to state. Imagine that I have not previously computed 68 + 57. I do so and obtain the answer 125. I am confident, says Kripke, that I have understood the plus function and that this example illustrates the fact. Along comes a sceptic and claims that I have misunderstood my own previous linguistic usage of the plus function and that I meant to give the answer 5. All that my past computations show, says the sceptic, is that I was actually using the "quus" rule and under this rule the correct answer is 5. An obvious reply is to say something about the rules of arithmetic and the fact that plus means that function which gives me the answer 125! But this persistent and irritating sceptic is not satisfied. She says that while you may *now* be talking about a new present usage of plus, in the past you meant quus. After all, says the sceptic, what is it in the past that you have done that makes you so sure that it is the plus rule you dealt with. The fact that you have in the past carried out a series of computations does not establish anything since any finite mathematical series can be used to support an indefinite number of rules or functions. The next number in the sequence 3, 6, 9, 12, . . . is any number at all. If you want the answer to be 16 you can say that the rule was to jump by three until you reach 12 and then jump by 4.

The central point which Kripke's sceptic hammers home is that a statement of a rule like the plus rule can only be supported by a finite number of examples and those examples are consistent with any number of rules, such as the quus rule. I am no more justified in picking the plus rule than the quus rule in a statement of which rule I can be said to be following by virtue of my past computations. There is no point in my furiously pointing to my past computations such as 1 + 1 = 2, 2 + 2 = 4 and so on for the sceptic will reply: "Yes, and you were right under the quus rule to respond in that way, but now the quus rule requires you to say that 68 + 57 = 5 and you are not doing

it." I might respond by counting out heaps of marbles and say that a heap of 68 and 57 equals 125. This does not help for Kripke's sceptic simply says that by count I meant "quont" and now I should have a heap of 5 marbles in front of me. There is, in other words, no point in relying on other rules to support the plus interpretation since all rules are infected by the same problem; namely a reliance on a finite number of examples. They can always be given alternative interpretations. Kripke states the sceptic's position in this way.

> This, then, is the sceptical paradox. When I respond in one way rather than another to such a problem as "68 + 57," I can have no justification for one response rather than another. Since the sceptic who supposes that I meant quus cannot be answered, there is no fact about me that distinguishes between my meaning plus and my meaning quus. Indeed, there is no fact about me that distinguishes between my meaning a definite function by plus (which determines my responses in new cases) and my meaning nothing at all. (Kripke 1982, 21)

The consequences of this argument, if valid, are shattering. Rules turn out to be no more than leaps in the dark and the whole notion of rule following seems illusory. Not surprisingly, Kripke does not leave the argument there but goes on to discuss a possible solution to this "insane and intolerable" sceptical problem (1982, 60), a solution which continues to be derived from Wittgenstein. The solution, Kripke (1982, 66) says, starts by acknowledging that the sceptic's claims are unanswerable but asserts that there is simply no need to provide the justification sought by the sceptic. The solution involves merely accepting that the practice of rule following is a matter of brute agreement.

Clearly, this sceptical solution holds little joy for philosophical realists. Successful rule following now seems to have nothing to do with grasping some objective meaning of the rule. Meaning has less to do with using language to name objects and truth conditions for linguistic statements and is more to do with conditions under which we make certain assertions. These conditions of assertion or justification exist relative to a particular community. So, a community can claim to be following the plus rule and not the quus rule when a majority of the members of that community are inclined to follow the same procedure and give the same response to computational problems. An individual can be said to be following the plus rule when her responses regularly match the responses of others.

Kripke does not shirk from the consequences of his argument:

> There is no objective fact—that we all mean addition by +, or even that a given individual does—that explains our agreement in particular cases. Rather our license to say of each other that we mean addition by + is part of a language game that sustains itself only because of the brute fact that we generally agree. (Kripke 1982, 97)

These kinds of dramatic conclusions have an obvious attraction for legal scholars crusading for an end to legal formalism and arguing that law, legal rules and legal reasoning are indeterminate. Nevertheless, Kripke's argument may turn out to be something of a Trojan horse in the CLS camp since it appears to give formalism another chance. The Kripkean argument does not prevent people from *saying* that they are following rule X. Rather, it stops them from being able to justify the existence of that rule by reference to some objective meaning. This still leaves the practice, as opposed to the justification, of successful rule following to be accounted for. Kripke's account suggests that once rules are seen to function within a particular community under conditions of assertion which determine their use, their existence as a communal entity is secured. So, while rules cannot be justified their existence as practice cannot be doubted. Formalism, conceived of as a kind of "language game" in which legal conclusions or responses are arrived at through a specified set of rules,

survives intact provides it has a sufficient number of like-minded players. This is not the kind of conclusion that CLS writers have been clamouring for in their attacks on formalism. Yet it is clearly open on Kripke's sceptical solution. The cause of rule scepticism and indeterminacy in law does not, after all, seem to have made a major advance under the Kripkean banner because anti-sceptics can point to a determinacy of outcome in law based on agreed practice.

But perhaps Kripke's argument offers little comfort to supporters of formalism either. Saying that there are no rules to follow, only social practices, means that propositions about the law are potentially open to wild fluctuations. The argument also puts paid to any possibility of a correspondence theory of truth in law.

The radical nature of Kripke's challenge should not be underestimated. As Philip Pettit has stated:

> Deny that there are such things as rules, deny that there is anything that counts strictly as rule-following, and you put in jeopardy some of our most central notions about ourselves. (Pettit 1990a, 5)

Here we need to sketch quickly Pettit's non-sceptical response since his argument helps us to detail the relationship between rules and conventions in law. There is one important preliminary point to make, however. Pettit does not purport to give a reductive analysis of what it is for an agent successfully to follow a rule. He offers an "explanatory or genealogical account" of the conditions under which rule following becomes possible (Pettit 1990a, 15–16; see also Pettit 1990b, 435). An example may help to illuminate the distinction. One might say that in order for science to be possible certain conditions must obtain such as the possibility of making observation statements. This is not an account of what science is in reductive terms, but rather an explanation of how science might get going as a form of activity. The distinction is crucial for us because we claim later that the analytical component in a theory of rule following can be built using the systems approach of Luhmann.

Pettit's approach to the sceptical dilemma is to focus on the capacity of individual examples to exemplify uniquely a rule for rule followers. While a set of examples potentially instantiates an infinite number of rules, that set may "for a particular agent [. . .] exemplify just one rule" (Pettit 1990a, 9). Examples can produce an inclination in a rule follower, whether or not she is aware of the inclination or the process that led to it. The rule user may only be aware of seeing that one type of rule-governed response is appropriate in a given situation.

Crucially important in this strategy is the relationship between rules and inclinations. An account of this relationship has to avoid saying that rule-governed responses always match inclination because that would make it impossible for rule followers to make mistakes in rule following. To allow for the possibility of human fallibility in rule following Pettit proposes the following *a posteriori* relationship between rules and inclinations:

> What other way is there for a rule to relate to my inclination? It can only relate as that which fits my inclination but only so far as certain favourable conditions are fulfilled: in particular favourable conditions such that I can discover that in some cases they are not fulfilled, and that I got the rule wrong. (Pettit 1990a, 12)

This account of the relationship allows rule users to say that in certain cases they made a mistake in the application of some rule, because the particular response was not given as part of the usual or normal conditions of the inclination, but was rather influenced by some perturbing factor such as tiredness, drunkenness, lack of

concentration and so on. As a result, the link that normally exists between inclination and rule is uncoupled and a "mistake" is made.

An important consequence of arguing that inclinations select certain rules under normal conditions is that rule following becomes a highly interactive enterprise (Pettit 1990a, 17). The reason for this lies in the qualification that the rule is selected under normal conditions of operation. In order to know what constitutes normal conditions we have to interact with other users of the rule.

Law is, in many respects, a paradigmatic example of the interactive nature of rule following. By virtue of their training within some given legal tradition, the court process, their allegiance to notions of precedent, hierarchy and authority, lawyers are continually confronted by the interactive nature of rule following. Yet this feature of rule following in law is often only subliminally perceived or even completely displaced by a belief that legal rules are primarily a product of logical analysis and the grasping of objective meaning. This belief captured and tagged either as formalism or conceptualism has been rightly criticized. Unfortunately, the deeper problem with formalism lies not so much in the inadequacy or inherent limitations of its rules of inference, but rather in the fact that it obscures the communal nature of the enterprise of rule following and decision-making within a given legal system.

III. Conventions

The next stage of our argument involves an analysis of the relationship between rules and conventions in law. Our account begins in a simple and stipulative fashion. Conventions are a type of rule used to fix or interpret the meaning of other rules. As with other rules conventions have to run the gauntlet of scepticism and as with other rules the reply has to be that examples and their associated inclinations exemplify certain conventions. But conventions have certain features which make them a distinct species of rule.

Although examples and inclinations can establish a particular rule for a rule user and allow the claim that she or he has grasped that rule, understanding the use of that rule is another matter. For example, in some jurisdictions there exists a rule of statutory interpretation which says that where general words follow a group of specific words which comprise a class the meaning of the general words should be confined to that class. A person may grasp this rule and then apply it in an algorithmic fashion to all apparent instances of its application in ignorance of the fact that it is used by others as only a secondary tool of interpretation. We can describe that person as having rule knowledge but not rule understanding. Rule understanding, we would say, is a matter of absorbing conventions relating to rule use.

The example we have given is one where the rule in question depends for its correct application on knowing and understanding other rules. Both Kripke and Pettit are concerned with primitive rules; that is, rules which do not depend on other rules for their application. In law, however, rules never exist as isolated monads but form part of an interconnected system. Within this system there are rules which determine the application of other rules and these we call conventions.

While some simpler legal rules are ostensively learnt, these ostensive procedures confer, at best, rule knowledge. They only allow an agent to make an epistemically weak claim about having knowledge of a rule. Rule understanding, however, is only conferred once conventions relating to rule use are learnt and internalized.

Conventions, because they function as part of the normal conditions of operation for other rules, can be distinguished from those rules by the positional value they have in a given system of rules. They operate on other rules to produce stability of meaning and can only be understood as part of a system of interconnected rules.

Within legal systems, conventions help their users develop domains of understanding which make those users internal participants within the system and provide the foundation stone for authority and influence within the system. A person who has mere rule knowledge stripped of the conventions which regulate it is more likely to be judged incompetent or deviant.

As an aside, it might be argued that the problems facing those who wish to automate legal reasoning flow from the difficulties of representing rule understanding rather than rule knowledge. Before one can automate legal reasoning some satisfactory way of representing legal knowledge in an expert system has to be developed. While statutes and perhaps case law can satisfactorily be represented using production rules (Tyree et al. 1988, 232), these production rules only allow the builder to achieve first base—rule knowledge. The problem then is how to represent with tolerable accuracy the positional value of conventions which confer rule understanding.

Although we have suggested the distinction between rule understanding and rule knowledge in the context of legal rules it need not apply only there. For example, some forms of valid argument utilize sentences which have deceptive surface appearances with the consequence that the logical form of such sentences needs to be separated from the sentence itself. As Tennant (1978, 12) points out Quine in dealing with this problem has suggested the maxim—we would say convention—of shallow analysis: uncover enough logical form to show the argument valid and no more. Here we have an example of a convention about rule knowledge in a different discipline that ensures some convergence amongst its practitioners.

Apart from the different positional value they possess, conventions usually have the following features. First, conventions about applying rules are not always articulated. When they are, it is usually as restatement rather than explanation. Second, conventions are not readily apparent to outsiders or inexperienced rule users; the uninitiated. They may even exist in such a diffuse form that they are not recognized by a user, although they are nevertheless correctly applied by the user. Conventions are internal to some particular community and are in part constitutive of that community.[2] We use community in a broad sense to include any group of persons interacting for some temporary purpose such as the teaching of a law subject or the hearing of a case. Finally, although we see conventions as having a different positional value to rules we do not see them as high level abstractions emanating from ideology, accessible only through deconstructionist techniques. Ideology as an explanation for the faithful reproduction of rules is a much overworked notion. Between ideology and the day to day activity of people in the legal system we would want to interpose some mechanisms of mediation, including conventions. The vast bulk of conventions are to be found tied to the myriad of legal rules utilized by people on an everyday basis.

IV. Conventions and the Sociology of Law

Kripke suggests that the utility of shared rules is obvious. Where individuals all follow the plus function, they match and predict their expectations under the shared rule so that, for example, obtaining the "correct" change in a shop becomes possible. Kripke's suggestion is, of course, hardly new. Talcott Parsons (1965) argued that in order for any social subsystem (social systems themselves being subsystems of a

[2] The idea comes from a notion suggested by Wittgenstein which has since become popular within much philosophical and linguistic writing, namely that "the speaking of language is part of an activity, or form of life" (see Wittgenstein 1968, 23).

general system of action) to remain stable over a period of time that system has to orient persons within it towards a mutuality of expectations. In that way they can attribute meaning to behaviour and evaluate the behaviour according to a common set of standards. Meaning, in short, is only possible on the basis of shared norms and values.

In Parsons' approach to social systems, such as law, the emphasis is on understanding the internal structure of the system and then characterizing in functional terms the relationship between it and other social subsystems; for example, the relationship between law and politics. Important for present purposes is that social subsystems for Parsons have a relationship of openness with their environment, their environment being other social subsystems. The result of this openness is that systems like law are part of a complex of interpenetrating and interdependent subsystems (Parsons 1978, 37). In the hands of Niklas Luhmann (1985) systems thinking in law has moved away from ascribing the property of *openness* to social systems favouring instead the radical *closure* of systems. Paradoxically this shift has been made in order to understand better exchanges between social systems and their outside environments.

The analytical argument for the radical closure of the legal system has been developed around *autopoiesis*, a concept imported from biology. The key idea here is that a system engages in self reproduction through a continuous reorganization of its internal elements. Transferring the idea to law, we can see that a legal system reproduces itself through the continuous self-referential selection of its internal elements (Luhmann 1986, 1988). The legal system perpetuates itself through a reproductive loop: Legal acts produce legal rules and legal rules produce legal acts. An example of the self-referential nature of the legal system can be found in Hart's claim that the legal system is a union of primary and secondary rules (Teubner 1988, 224). Changes to primary rules are dependent upon rules relating to change and recognition. In turn, these secondary rules are functionally tied to the production of primary rules. (Hart, of course, did not present his thesis in the context of systems theory but arrived at it principally through the methodology of ordinary language philosophy.)

We need momentarily to retrace our steps. Kripke's argument, if successful, represents an analytical destruction of rule following. It does basic violence to our belief that rules carry a meaning which we are able to grasp. Pettit offers a plausible reply but it has costs. Rule following turns out to be highly interactive and precarious. Individuals can never be sure that their particular inclinations have targeted them on the right rule. On top of Pettit's defence of rule following we have proposed, in the context of the legal system, a distinction between rule understanding and rule knowledge. The correct application of some given legal rule involves a rule follower in the application of conventions. The legal system copes with the fragility of rule following through conventions. Without the constraint of conventions the application of even an apparently simple legal rule could be the subject of wild fluctuations without the possibility of saying that some of these fluctuations constitute errors in application. In short, conventions provide the legal system with a form of protection against radical disjunctive change. Without a convention, on one day a given maxim of statutory interpretation could be a secondary guide, on another a primary guide and yet on another no guide whatsoever. A convention about its use, which forms part of the normal conditions of application of the maxim, allows rule users to make claims of normative error or mistake.

The operation of conventions in this way is captured by the notion of closed self-referential operation. For determinacy of outcome (or at least limits on outcome) legal rules have to be referred to other types of rules, namely conventions. For actors within the system this need not be a conscious mechanical process and typically is not. Rather, it is simply "the way in which results are arrived at." From the perspective of actors within the system, conventions are beliefs about the correctness of applying a given rule in that way. Conventions as beliefs secure the existence of the legal system. (Here we would part slightly from Luhmann 1988, 342, and say that the legal system consists not only of communications but also beliefs.)

There is another insight to be gained from the combination of systems thinking with a conventions approach to law. Much theorizing about the legal system tends to assume that it is a whole, albeit a complex one, capable of subdivision. Our approach suggests another way of thinking about it. With some support from Parsons (1965) we would say that social subsystems spring into existence whenever there is a mutuality of orientation between two or more individuals on the basis of shared values. Social subsystems can be fleeting, transient, temporary creations and above all highly *local*. Within law we would say that there are a multiplicity of subsystems which are distinguishable one from another while still being part of the broader legal system. Two ways of promoting uniformity of rule knowledge are by controlling legal education and having hierarchical court structures. Rule understanding is always potentially fragmented because conventions are essentially local in their operation.

Although conventions help overcome the fragility of rule following they are also rules and therefore subject to that fragility. Conventions, like other rules, depend on interactiveness and so their sphere of influence tends to be local rather than universal. They pertain to particular subsystems of which there are many in any given legal system. So while there can be substantial agreement on rule knowledge within a given legal system there can be, in relation to that rule knowledge, considerable variance in rule understanding across the different subsystems in that legal system because of the existence and application of different local conventions. The same apparently simple legal rule applied to identical situations can produce different outcomes if distinct groups of agents using that rule have encrypted that rule with a different set of conventions. Legal reasoning is for us a far more territorial enterprise than commonly thought, characterized more by local practices at variance with one another, rather than the faithful reproduction of universally held rules.

It should also be clear that the identification of conventions within any given legal subsystem is a matter of micro-sociological investigation. The philosopher can provide a highly abstract explanation of the conditions under which rule following is possible; systems sociology can provide an analysis of rule following in a particular context and the role of conventions in that process; but locating conventions is an empirical task. We want to emphasize that locating and identifying conventions is not a simple matter of dragging the general ideological superstructure. Such an exercise might net some conventions but because of their high positional value within the system they would not provide much information about the way in which the many legal rules that are involved in peoples' daily lives are successfully (or unsuccessfully) followed by those people.

Whether or not a particular legal rule is indeterminate is also an empirical question. Conventions are pledges by interacting rule followers to extrapolate a rule in one unique way. So long as the conventions which are linked to a specific rule remain in place the rule can be said to be determinate. Conventions, for many reasons, can break down and when this happens the rule in question may be extrapolated in many different ways; it can be accurately portrayed as indeterminate. There is, we suggest, no way in which we can inductively infer the indeterminacy of legal reasoning or law, as CLS are wont to do, from a small group of individual examples. And certainly we cannot expect indeterminacy to be a matter of analytical demonstration. Explanation

and analysis can alert us to the *possibility* of indeterminacy within a given system of rules, but that is all.

The conclusion of our piece is that rule following in law is a matter of convening. The systems approach of Niklas Luhmann seems to hold, for the time being, the most promise of being able to come to an understanding of the special character of conventions that underpin rule following in law.

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