

# Part 1: Introduction



# § 1 Ways of Thinking about Objectivity

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## I. Introduction

People tend to see lawyers in very different ways. Some see them as legal mechanics that apply the law as it is – others as servants of the powerful that fill legal notions with whatever serves their interests. Accordingly, they either conceive the law as an objective reality, a concretization of justice, subject to *discovery* – or as a tool without content on its own, shaped by the *discretion* of those in power. These different perspectives on what the law is and how it operates within society not only characterize the day-to-day experience of lawyers. They equally divide legal thought as it exists between the poles of objectivity and power. This is true even though objectivity as an ideal of science is a relatively young concept, born

in the middle of the 19th century.<sup>1</sup> Indeed, we can reconceptualize older (legal) theories and translate their concerns into modern language.

To grasp this (eternal) tension between what we might now call objectivity and power, it is helpful to clarify the notion of objectivity from the very outset. We will understand objectivity as an ideal – the ideal of acquiring ‘knowledge that bears no trace of the knower’<sup>2</sup>, the ideal of ‘suppression of some aspect of the self’<sup>3</sup> in the processing and communication of legal information. It is the countering of the other pole, subjectivity, which can be explicated as the imposition of one’s self.<sup>4</sup> Subjectivity therefore is closely related to the concept of social power (*Macht*), understood as the chance to carry through the own will within a social relationship.<sup>5</sup> In that sense, objectivity and power open up a tension field within each legal decision. Objectivity limits power, just as power threatens objectivity. This book wants to explore the phenomenon of law within this tension field. It explores the presence of different *active* selves – the selves of lawmakers, adjudicators, or contracting parties – in the decisions they take.<sup>6</sup> It thereby aims to reflect the different views one can have about law, objectivity, and power – depending on the theoretical position, the area of law, and the general predispositions. My introductory chapter aims to provide some no-

1 Lorraine Daston and Peter Galison, *Objectivity* (Zone Books 2010) 27.

2 *ibid* 17.

3 *ibid* 36.

4 *ibid* 36–37. This definition brings us close to how Kent Greenawalt, *Law and Objectivity* (Oxford University Press 1992) implicitly uses objectivity (especially in Parts I and III). It is broad enough to encompass aspects of metaphysical, epistemological, and semantic objectivity, without requiring a clear distinction. On these different perspectives, cf Brian Leiter, ‘Law and Objectivity’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press 2002) 970–976; Andrei Marmor, *Positive Law and Objective Values* (Clarendon Press 2001) 112–134; Brian Leiter (ed), *Objectivity in Law and Morals* (Cambridge University Press 2001). For further references on objectivity, truth, and law (also from the German discourse), see Carsten Bäcker, ‘Einleitende Bemerkungen’ in Carsten Bäcker and Stefan Baufeld (eds), *Objektivität und Flexibilität im Recht* (Franz Steiner 2005) 11.

5 cf Max Weber, *Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie* (Johannes Winkelmann ed, 5th edn, Mohr Siebeck 1980) pt 1 ch I § 16 (only the elements of the definition considered relevant in this context are quoted). On that definition Isidor Wallimann, Nicholas C Tatsis and George V Zito, ‘On Max Weber’s Definition of Power’ (1977) 13 *Australian and New Zealand Journal of Sociology* Canberra 231, 232.

6 This excludes another possible perspective: the extent to which *passive* selves (and their subjective traits) are taken into consideration by the law, cf Greenawalt (n 4) 91–160 (Part II – How the Law Treats People).

tional clarifications and classifications. In that vein, it will suggest different ways of thinking about objectivity. It further outlines the importance of objectivity in legal thought and proposes an approach to the topic.

I will start with contrasting two ways of thinking about objectivity within the law (II.), which both deal with the possibilities and limits of suppressing the self – but on different levels of the legal process. Whereas the first way explores the issue on the level of lawmaking (*productional objectivity*), the second way scrutinizes the question on the level of the application of law (*applicational objectivity*).<sup>7</sup> Practically each institution of a legal system engages in both, norm production and application. Consider, for example, a parliament that not only creates new law through statutes but also applies constitutional norms. Likewise, judges apply the constitution, statutes, precedents, and contractual norms but also create law through new precedents. The same is true for individuals who apply the law but also create law through contractual stipulations. In other words, production and application of law is understood in functional, not in institutional terms.

Then, I will outline why it is important to examine the possibility of (productional and applicational) objectivity within the law and how we should deal with the theoretical disputes from the perspective of a lawyer (III.). In doing so, I will first suggest that the importance of talking about objectivity stems from its link to legitimacy: where objectivity is achievable, it provides for legitimacy because it allows a substantive justification beyond the self. Where objectivity is beyond our reach and power determines content, we have to strive for procedural forms of legitimacy and thereby tame the remaining realm of the self. In other words, whether we should aim at substantive or procedural legitimacy depends on the degree of objectivity we can achieve, and in that sense, legitimacy is a relative

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7 The distinction of these different issues is often neglected in theory of law. Nonetheless, there are examples of similar distinctions, cf eg Richard A Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 11, who presents different permutations of natural law and positivism on one axis and formalism and realism on the other and thereby indirectly also distinguishes the productional (natural law vs positive law) and the applicational level (formalism vs realism). See also Marietta Auer, *Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens* (Mohr Siebeck 2005) 214–217, whose ‘applicational positivism’ (*Anwendungspositivismus*) is close to theories upholding applicational objectivity but whose ‘validity-positivism’ (*Geltungspositivismus*) is not the same as productional objectivity. Instead, she refers to the classical positivism debate concerned with the definition of law, which is – as I will explain in a second – not the focus of this essay.

notion (*relativity of legitimacy*). This, however, raises the question of how to determine the areas in which we can achieve objectivity. I will propose that we should approach this theoretical problem in Pragmatic terms: given that each epistemological question has normative implications, it is the epistemological position of the constitution that should educate our answer (*Constitutional Pragmatism*).

Finally, I will point to a third way of thinking about objectivity (IV.). This kind of objectivity refers to the impact that structural arrangements have on our understanding, thinking, and decisionmaking within the law (*structural objectivity*). They lead to objectivity because they impose limits on what power can *in fact* achieve. Indeed, they operate like paths among which we might be able to choose but which we cannot leave. Each of these paths is constituted by bundles of interconnected consequences, thought patterns, and predispositions. Structural objectivity is transversal to the previous two ways of thinking about objectivity in that its structural arrangements operate on the productional and applicational level alike. Even though they limit individual power on these levels factually (and therefore constitute their own form of objectivity), they also threaten to distort communication processes, which are essential for the previously described normative forms of productional and applicational objectivity. In that sense, structural objectivity is necessarily ambivalent.

## II. Productional and Applicational Objectivity

This part of the introductory chapter is dedicated to the distinction between productional and applicational objectivity. Both of them explore the possibilities and limits of objectivity, they are both concerned with normatively suppressing the self – but they focus on different levels of the legal process. Productional objectivity focuses on a stage where no previously posited controlling norm exists and asks whether we can objectivize the making of law (1.). Applicational objectivity is different in that it focuses on a stage where there is a norm that can be interpreted. It is therefore concerned with whether we can objectivize the application of law (2.). Thus, the main difference between both levels concerns the presence or absence of positive law. This has important consequences for objectivity. Whereas the only possibility to (partly) suppress the self of the decision-maker on the productional level is by reference to prepositive concepts, the applicational level allows us to take into account an additional source of objectivity. Indeed, the positive law contains statements of previous de-

cisionmakers, which we can use to push back on the power of subsequent decisionmakers.

### 1. *Productional objectivity*

I will start the inquiry about productional objectivity by differentiating it from the debate around positivism to prevent misunderstandings and misleading associations one might have. Indeed, positivism will play only a subordinate role in what follows (a.). I will then present three modes of achieving (productional) objectivity and show how these modes can be found in principal currents of legal thought (b.). If objectivity is not achievable, we have to deal with subjectivity, which is why a presentation of three ways of doing so will follow (c.). Finally, I will turn to private lawmaking and sketch out how the theoretical divide between objectivist and subjectivist approaches is replicated in contract law (d.).

#### a. *The irrelevance of positivism*

Legal positivism – at least one version of it<sup>8</sup> – makes a definitional claim: law is to be defined without reference to morals.<sup>9</sup> It does not claim that norms of morality do not exist or that they are not intelligible – positivists might decide either way on that point. To put it simply, positivism just argues that these principles are not (necessarily) law and that law remains law even if it contradicts them.<sup>10</sup> In contrast, nonpositivists argue in favour of a connection between law and morals, so that at least extremely unjust

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8 cf Auer, *Materialisierung* (n 7) 214–215, who calls this version validity-positivism (*Geltungspositivismus*), as opposed to applicational positivism (*Anwendungspositivismus*), to which we will turn later.

9 cf Hans Kelsen, *Reine Rechtslehre* (2nd edn, Verlag Franz Deuticke 1960) 68–69 (from the angle of normative positivism); HLA Hart, *The Concept of Law* (Leslie Green ed, 3rd edn, Oxford University Press 2012) 185–186; HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 601, especially n 25, under (2) (from the angle of sociological positivism).

10 Therefore, presenting positivists as voluntarists, as it is often done (eg Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)*, vol 1 (3rd edn, CH Beck 2020) 295–297), is only convincing if one limits the examination to the *legal* realm.



law ceases to be law.<sup>11</sup> This debate, especially from a German perspective, might have some relevance for dealing with the appalling injustices of Nazi Germany<sup>12</sup> or the cases involving marksmen on the Berlin Wall<sup>13</sup>. Beyond these extraordinary cases, however, the dispute between positivism and nonpositivism can be approached as a mere problem of terminology and is as such quite fruitless.<sup>14</sup> At least, it does not add anything to the question of whether a legal decision can be isolated from the decisionmaker and justified by reference to prepositive (legal or extralegal) concepts. In other words, it is beyond the focus of this introductory essay and of the whole book. We might come back to positivists and natural law theorists, but only insofar as they express statements on the possibilities and limits of objectivity. Having narrowed down the perspective of this essay, we can now examine legal thought under the aspect of objectivity and power.

### *b. Three modes of achieving objectivity*

My outline will start with ‘modes of thought’<sup>15</sup> that justify a legal decision not by reference to the self of the decisionmaker but by reference to some

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- 11 From an American perspective Lon L Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630, 644–648 (on ‘the internal morality of law’, notion on 645), 648–657 (on Nazi laws). From a German perspective Gustav Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’ (1946) 1 *SJZ* 105, 107 (so-called ‘formula of Radbruch’); Robert Alexy, *Begriff und Geltung des Rechts* (2nd edn, Verlag Karl Alber 2020) 44; Robert Alexy, ‘The Dual Nature of Law’ (2010) 23 *Ratio Juris* 167.
- 12 See BGHZ 3, 94, 107; BVerfGE 3, 58, 119; 6, 132, 198; 23, 98, 106.
- 13 See BGH NJW 1993, 141, 144; 1995, 2728, 2730–2731.
- 14 cf Posner, *The Problems of Jurisprudence* (n 7) 229 (‘Regarding from a distance of thirty years the debate between H. L. A. Hart and Lon Fuller over the legality of Nazi laws, I am struck by how little was at stake.’). The argument that without claiming the legal nature of prepositive principles, we cannot criticize decisions based on principles (Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *Chicago Law Review* 14, 29–31), can be countered by either suggesting that the law might incorporate them (this being the position of inclusive positivists like Hart, see generally Leslie Green, *Introduction to the Concept of Law* (2012) xxxix) or by pointing to the additional relevance of extralegal concepts for deciding the social issues with which the law is concerned (this being eg the pragmatic answer, cf Posner, *The Problems of Jurisprudence* (n 7) 468).
- 15 On that expression from an anthropological viewpoint cf Wolfgang Fikentscher, *Modes of thought: A study in the anthropology of law and religion* (2nd edn, Mohr Siebeck 2004) 17 ff. It corresponds to the notion of ‘approach’ as opposed to ‘school’ or ‘movement’, see Guido Calabresi, ‘An Introduction to Legal Thought:

substantive criterion beyond the self. Even though these modes share an inclination to objectivity, they differ profoundly in the ways they obtain the necessary normative insights to guide the lawmaker. I will call these modes *observational*, *deontological*, and *consequentialist*.

aa. Observational mode of thought

The first mode of thought is observational. It starts with the idea that by observing reality, we can discern (legal) norms.<sup>16</sup> It therefore is at odds with the modern separation between what is (*sein*) and what ought to be (*sollen*).<sup>17</sup> Classical natural law theories, inspired by the idea that nature can reveal its order and thereby provide guidance for behaviour<sup>18</sup>, contain an observational element.<sup>19</sup> The historical school also applies an observational mode of thought in that it references not nature as such but the ‘spirit of the people’

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Four Approaches to Law and to the Allocation of Body Parts’ (2003) 55 Stanford Law Review 2113, 2131–2132.

- 16 In that sense, it has similarity with what Greenawalt (n 4) 165 ff describes as ‘cultural morality’.
- 17 Established in the Scottish Enlightenment, cf David Hume, *A treatise of human nature* (Lewis A Selby-Bigge ed, Clarendon Press 1896) 469–470 (book III pt I s I). Even stricter applied from the semantic vantage point of Analytical Philosophy, cf George E Moore, *Principia Ethica* (Cambridge University Press 1903) ch II para 24 (naturalistic fallacy).
- 18 Michel Villey, *La formation de la pensée juridique moderne* (Quadrige/PUF 2006) 86.
- 19 From Antiquity Aristoteles, *Politics*, vol 21 (Harris Rackham ed, Harvard University Press 1944) book VII pt I (‘natural order of things’). From the Middle Ages St Thomas Aquinas, *Summa Theologiae* (Fathers of the English Dominican Province ed, 2nd edn, Burns Oates & Washbourne 1920) Prima Secundae, Question 91 (art 2) (‘[...] and this participation of the eternal law in the rational creature is called the natural law.’), but in Question 94 (art 3) already pointing to the immutability of the principles of natural law and in that sense paving the way for deontological natural law theories. See also Francisco de Vitoria, *La Ley* (Luis Frayle Delgado ed, 2nd edn, Tecnos 2009) 29–34 (commentary on question 94). From the current doctrine John Finnis, ‘Natural Law: The Classical Tradition’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press 2002) 3; Villey (n 18) 90, 158, 618 (‘méthode expérimentale’, exaggerating the differences between the classics and the moderns).

(*Volksgeist*) and the legal evolutions connected to it as the source of law.<sup>20</sup> The German line of thought called ‘correct law’ (*richtiges Recht*)<sup>21</sup> contains elements of this historical approach: it analyses the predominant cultural tradition of a certain legal system at a certain time to discern commonly shared norms. Dworkin’s chain novel theory of law<sup>22</sup>, insofar as it considers the ‘standing political order’ as a ‘source of judicial rights’<sup>23</sup>, likewise applies an observational mode and could be described as the American counterpart to German schools of ‘correct law’.<sup>24</sup> Furthermore, the observational mode can appear in particularly anti-liberal theories, like in the national-socialist concrete thinking in orders<sup>25</sup>, or in fundamentally liberal ones, like in

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- 20 For a particularly clear account Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer 1814); Friedrich Carl von Savigny, ‘Über den Zweck dieser Zeitschrift’ (1815) 1 *Zeitschrift für geschichtliche Rechtswissenschaft* 1, 6–7. On the historical school, cf Schröder, *Recht als Wissenschaft* (n 10) 195–198. In a similar sense, the sociological schools described by the same author on 289–290 can be seen as aiming at observational objectivity.
- 21 Notably the later Karl Larenz, *Richtiges Recht: Grundzüge einer Rechtsethik* (CH Beck 1979) 23–32, especially on 31–32 on the cultural relativity of justice. See also Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz: Eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* (2nd edn, Duncker & Humblot 1983) 57 (§ 49); Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz entwickelt am Beispiel des deutschen Privatrechts* (2nd edn, Duncker & Humblot 1983) 18; Walter Schmidt-Rimpler, ‘Grundfragen einer Erneuerung des Vertragsrechts’ (1941) 147 *AcP* 130, 155–156 (seeing the procedure of contract as a means to reach ‘rightness’).
- 22 Ronald Dworkin, ‘Natural Law Revisited’ (1982) 34 *University of Florida Law Review* 165, 166–168 (on the metaphor), 168–169 (applying it to the law), 183–187 (concretizing it by reference to the political order).
- 23 *ibid* 185.
- 24 However, it shall be noted that in other parts, he seems to develop the relevant prepositive norms from a ‘right to concern and respect taken to be fundamental and axiomatic’ (Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 14, also 11), and is therefore closer to the modern natural law theories to which we will turn in a moment when dealing with the deontological mode of thought.
- 25 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (3rd edn, Duncker & Humblot 2006) 11, 17. See also already Carl Schmitt, *Legalität und Legitimität* (8th edn, Duncker & Humblot 2012) 9. After 1945, see Carl Schmitt, *Die Tyrannei der Werte* (3rd edn, Duncker & Humblot 2011) 23. See also the early Karl Larenz, *Über Gegenstand und Methode des völkischen Rechtsdenkens* (Junker und Dünnhaupt 1938) 27 ff. For an analysis that underlines the nonvoluntaristic tendencies, see Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1933–1990)*, vol 2 (3rd edn, CH Beck 2020) 5–7 (NS thinking generally), 42–44 (concrete thinking in orders).

Hayek's spontaneous order (*cosmos*)<sup>26</sup> and its reception in the idea of a Private Law Society (*Privatrechtsgesellschaft*)<sup>27</sup>. In a way, it is also present in the German free-law-movement (*Freirechtswegung*), which describes its 'free law' sometimes in terms of 'correct law', ie culture-dependent natural law<sup>28</sup>, sometimes in terms of spontaneity and unconscious organic law<sup>29</sup>. Beyond these theoretical accounts, we find the observational mode of thought in everyday legal doctrine, when we solve cases on the basis of customary law (*Gewohnheitsrecht*)<sup>30</sup>, the 'nature of things' (*Natur der Sache*)<sup>31</sup>, or the 'normativity of things' (*Sachgesetzlichkeit*)<sup>32</sup>.

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- 26 Most prominently Friedrich A Hayek, *Law, Legislation and Liberty: A new statement of the liberal principle of justice and political economy* (3rd edn, Routledge 1998) 8 ff (evolution vs construction), 35 ff (cosmos vs taxis); Friedrich A Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (University of Chicago Press 1978) 3 ff (ch 1), especially 10. For an application of his theory to arbitration, see Fabio Núñez del Prado, 'Stateless Justice: The Evolutionary Character of International Arbitration' (§ 11).
- 27 Franz Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) 17 ORDO 75. Before him already Justus W Hedemann, *Das bürgerliche Recht und die neue Zeit: Rede gehalten bei Gelegenheit der akademischen Preisverteilung in Jena am 21. Juni 1919* (Verlag von Gustav Fischer 1919) 12. After him Ernst-Joachim Mestmäcker, 'Wirtschaftsordnung und Staatsverfassung' in Heinz Saueremann and Ernst-Joachim Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung: Festschrift für Franz Böhm zum 80. Geburtstag* (Mohr (Paul Siebeck) 1975) 411; Ernst-Joachim Mestmäcker, *Wettbewerb in der Privatrechtsgesellschaft: Erweiterte Fassung der 1. Franz-Böhm-Vorlesung am 19. September 2017 in Freiburg* (Mohr Siebeck 2019) 22 ff; Claus-Wilhelm Canaris, 'Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft' in Peter Badura and Rupert Scholz (eds), *Festschrift für Peter Lerche zum 65. Geburtstag: Wege und Verfahren des Verfassungslebens* (CH Beck 1993) 874 ff; Franz Bydliniski, *Das Privatrecht im Rechtssystem einer 'Privatrechtsgesellschaft'* (Springer 1994) 63 ff.
- 28 Hermann Kantorowicz, using the pen name Gnaeus Flavius, *Der Kampf um die Rechtswissenschaft* (Carl Winter's Universitätsbuchhandlung 1906) 10–12 (with explicit reference to 'correct law').
- 29 *ibid* 15, 18.
- 30 On customary law, cf Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (Springer 1995) 176–178.
- 31 For a definition particularly close to the concrete thinking in orders, see Canaris, *Lücken im Gesetz* (n 21) 118 (§ 107).
- 32 cf Hans Christoph Grigoleit, 'Leistungspflichten und Schutzpflichten' in Andreas Heldrich and others (eds), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, vol 1 (CH Beck 2007) 304; Hans Christoph Grigoleit and Lovro Tomasic, '§ 93 AktG' in Hans Christoph Grigoleit (ed), *Aktiengesetz: Kommentar* (2nd edn, CH Beck 2020) para 36.

## bb. Deontological mode of thought

The second mode of thought is deontological.<sup>33</sup> It respects the separation between is and ought and develops guidance by reference to normative principles.<sup>34</sup> These principles, however, have to come from somewhere. Either one considers them accessible for human reason (which is the approach of modern natural law theories<sup>35</sup>), one appeals to divine revelation (which characterizes theocratic accounts<sup>36</sup>), or one sets them axiologically without reference to God<sup>37</sup>. Yet another possibility is to apply the previously presented observational mode of thought to gain some basic principles and to start from there with the deontological reasoning. For instance, theories of ‘correct law’ and similar theoretical accounts refer

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- 33 The deontological mode of thought is close to what Schröder, *Recht als Wissenschaft* (n 10) 292–295 describes as philosophical currents with an idealistic notion of law.
- 34 It has some similarities with what Greenawalt (n 4) 4, 6, 165 describes as ‘political morality’, even though important differences exist in detail (eg with regard to the qualification of classical natural law theories).
- 35 Even though qualified as modern, these modern natural law theories have origins in the Stoic tradition of Antiquity, see Marcus T Cicero, *De re publica* (Friedrich Osann ed, *Librorum Fragmenta* 1847) 283–284 (lib III cap 22 para 33). From the modern representatives, see Hugo Grotius, *The Right of War and Peace*, vol 1 (Richard Tuck ed, Liberty Fund 2005) 150 (ch I s X.1) (‘Natural Right is the Rule and Dictate of Right Reason [...]’), pointing on 155 (X.5) to its unalterable character and building especially on 156 (X.6) on Aquinas (n 19) Prima Secundae, Question 94 (art 4). See also Thomas Hobbes, *Elementa Philosophica de Cive* (Henricus Bruno 1647) 18 (ch II) (‘Legem naturalem non esse consensum hominem, sed dictamen rationis’), even though his natural law has an extremely reduced content. For more recent accounts of this tradition, see (without interest in the precise content of their moral natural law) Radbruch (n 11), 107 (so-called ‘formula of Radbruch’); Alexy, *Begriff und Geltung* (n 11) 44; Alexy, ‘Dual Nature’ (n 11).
- 36 eg Ruhollah Khomeini, *Islamic Government: Governance of the Jurist (Velayat-e Faqeh)* (Hamid Algar tr, The Institute for Compilation and Publication of Imam Khomeini’s Work 1970) 29. Divine law is often seen in a subjectivist (voluntaristic) tradition because it originates in the will of God. On that point Andrew Blom, ‘Hugo Grotius (1583–1645)’ in James Fieser and Bradley Dowden (eds), *Internet Encyclopedia of Philosophy* <<http://iep.utm.edu/grotius/>> accessed 16 January 2022. However, from the viewpoint of human-posed law, it provides substantive guidelines beyond the self of the lawmaker and therefore allows to be grouped within modes of thought that aim at objectivity.
- 37 As noted, some passages of Dworkin suggest that he follows this approach, see eg Dworkin, *Taking Rights Seriously* (n 24) 14.

to the predominant principles of a certain culture<sup>38</sup> or political system.<sup>39</sup> In doing that, they apply an observational mode of thought at an early stage and unfold a deontological theory based on them. The methodological counterpart of this mode of thought can be described as formalism (*Begriffsjurisprudenz*)<sup>40</sup> insofar as principles are taken as the starting point for conceptual deductions. In contrast, when these principles are operationalized through a flexible balancing-approach and taken in their teleological dimension, the deontological mode leads to the jurisprudence of values (*Wertungsjurisprudenz*)<sup>41</sup> or its American counterpart, the doctrine of reasoned elaboration<sup>42</sup>.

### cc. Consequentialist mode of thought

The third mode of thought is consequentialist since it focuses on the good and bad real-life consequences of each legal decision. Just as the deontological mode could not justify the origin of its principles, the consequentialist mode cannot provide the criterion of how to *evaluate* consequences. Eval-

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38 Larenz, *Richtiges Recht* (n 21) 23–32, especially on 31–32; Canaris, *Lücken im Gesetz* (n 21) 57 (§ 49); Canaris, *Systemdenken* (n 21) 18; Schmidt-Rimpler (n 21), 155–156.

39 Dworkin, ‘Natural Law Revisited’ (n 22) 185. Assuming normativity axiologically from a certain point on is also the purpose of Kelsen’s ‘basic norm’ (*Grundnorm*), see Kelsen (n 9) 23 (‘im juristischen Denken vorausgesetzt’), even though it is not used with regard to prepositive principles but only with regard to posited law.

40 On classical (German) formalism (*Begriffsjurisprudenz*), see generally Hans-Peter Haferkamp, ‘Begriffsjurisprudenz’ in Michael Anderheiden and others (eds), *Enzyklopädie der Rechtsphilosophie* (2011) especially under III. For a neo-formalist American account, see Ernest J Weinrib, *The Idea of Private Law* (2nd edn, Oxford University Press 2012); Ernest J Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 *Yale Law Journal* 949. For a neo-formalist German account, see Florian Rödl, *Gerechtigkeit unter freien Gleichen: Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag* (Nomos 2015).

41 Larenz and Canaris, *Methodenlehre* (n 30) 265. Especially clear also Franz Bydliniski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 1991) 123–139; Schröder, *Recht als Wissenschaft* (n 25) 180–181.

42 cf Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N Eskridge Jr and Philip P Frickey eds, Foundation Press 1994) 145 ff; William N Eskridge Jr and Philip P Frickey, ‘The Making of the Legal Process’ (1994) 107 *Harvard Law Review* 2031, 2042–2043. For a critical presentation, see Roberto M Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (3rd edn, Verso 2015) 5 ff (on 13 pointing to the parallels to Germany).

uation requires at least some values and deontological principles. It also provides no guidance in how to *know* real-life consequences. With respect to this, consequentialist thinking relies on (empirical) observation. But unlike the first two modes of thought, it neither grounds the legal solution on a more concrete normative principle nor on (normative) observation of reality as such. It rather evaluates real-life consequences according to a minimal and abstract normative criterion.<sup>43</sup> In the classical utilitarian tradition, this criterion is maximization of utility, understood as happiness.<sup>44</sup> Given the vagueness of utility or happiness, it is not particularly apt for suppressing the self, ie for objectivizing a legal decision.<sup>45</sup> The same is true for the cost-benefit-analysis of the law and economics movement if everything can potentially be a cost or a benefit.<sup>46</sup> Posner's criterion of wealth-maximization therefore tries to rationalize the cost-benefit-analysis by expressing costs and benefits in terms of wealth only.<sup>47</sup> Once wealth maximization is assumed as criterion for evaluating consequences, it is possible to settle cases on presumably empirical grounds, thereby eliminating

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- 43 In the context of economic analysis of law, see Posner, *The Problems of Jurisprudence* (n 7) 24 ('And to the extent that the economic analyst seeks to shape law to conform to economic norms, economic analysis of law has a natural law flavor.'). For his adherence to consequentialism, see Posner, *The Problems of Jurisprudence* (n 7) 122; Richard A Posner, 'Legal Pragmatism Defended' (2004) 71 *University of Chicago Law Review* 683, 683 para 3. But even beyond the minimal natural law link of all consequentialism, Posner's thinking is not *only* consequentialist, see eg Posner, 'Legal Pragmatism Defended' (n 43) 684 para 4.
- 44 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd edn, Clarendon Press 1879) 2 ('By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.');
- John S Mill, *Utilitarianism* (Floating Press 2009) 14 ('The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.').
- 45 Richard A Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 *The Journal of Legal Studies* 103, 113–114.
- 46 cf Guido Calabresi and Philip Bobbitt, *Tragic Choices* (WW Norton & Company 1978); Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press 2016) 1 ff.
- 47 On wealth maximization as ethical concept, see Posner, 'Utilitarianism, Economics, and Legal Theory' (n 45) 124; Posner, *The Problems of Jurisprudence* (n 7) 24. On economic efficiency as source of objectivity, see also Greenawalt (n 4) 4, 165.

the self.<sup>48</sup> However, the increase of objectivity attained by looking at real-life consequences through the one-dimensional lens of wealth comes itself with a cost: it captures only a part of the normative spectrum and therefore operates at the expense of some intuitive normative truth.<sup>49</sup> Likewise, gathering the necessary information for comparing real-life consequences in an objective manner has its limits.<sup>50</sup> In the German context of legal reasoning, one might consider the jurisprudence of interests (*Interessenjurisprudenz*) as closely related to the consequentialist mode of thought, in that it drew attention to conflicting interests within society<sup>51</sup> – even though beyond

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- 48 That is why this strain of economic analysis is also particularly open for the application of Big-Data-based technologies within the law, for instance in order to personalize legal commands, see Omri Ben-Shahar and Ariel Porat, 'Personalizing Negligence Law' (2016) 91 *New York University Law Review* 627; Ariel Porat and Lior J Strahilevitz, 'Personalizing Default Rules and Disclosure with Big Data' (2014) 112 *Michigan Law Review* 1417). Critically Hans Christoph Grigoleit and Philip M Bender, 'The Law between Generality and Particularity: Chances and Limits of Personalized Law' in Christoph Busch and Alberto De Franceschi (eds), *Algorithmic Regulation and Personalized Law* (CH Beck, Hart Publishing, Nomos 2021) 121 ff; Philip M Bender, 'Limits of Personalization of Default Rules – Towards a Normative Theory' (2020) 16 *European Review of Contract Law* 366, 378 ff.
- 49 On the distinction between mechanical objectivity and truth-to-nature as scientific ideals, see Daston and Galison (n 1) 43 ('Mechanical objectivity was needed to protect images against subjective projections, but it threatened to undermine the primary aim of all scientific atlases, to provide the working objects of a discipline.').
- 50 For this critique close to the Austrian School, see Ernst-Joachim Mestmäcker, *A Legal Theory without Law: Posner v. Hayek on Economic Analysis of Law* (Mohr Siebeck 2007) 43 ('Posner subsumes the law under economics, Hayek incorporates abstract rules of just conduct into his theory of a free order.').; Gerald P O'Driscoll Jr 'Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried' (1980) 9 *The Journal of Legal Studies* 355, 359 ('Though to my knowledge no one else has previously noted it, Posner is actually grappling with the socialist calculation problem.').
- 51 See the fundamental contributions of Heck, especially Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 *AcP* 1, 17 ('Die Gesetze sind die Resultanten der in jeder Rechtsgemeinschaft einander gegenüberstehenden und um Anerkennung ringenden Interessen materieller, nationaler, religiöser und ethischer Richtung. In dieser Erkenntnis besteht der Kern der Interessenjurisprudenz.').; Philipp Heck, *Das Problem der Rechtsgewinnung* (2nd edn, Mohr 1932); Philipp Heck, 'Die Interessenjurisprudenz und ihre neuen Gegner' (1936) 142 *AcP* 129. See also already Rudolf von Jhering, *Der Kampf um's Recht* (Verlag der GJ Manz'schen Buchhandlung 1872). See generally Marietta Auer, 'Methodenkritik und Interessenjurisprudenz: Philipp Heck zum 150. Geburtstag' [2008] *ZEuP* 517; Herbert D Laube, 'Jurisprudence of Interest' (1949) 34 *Cornell Law*



the positive statements of a given lawmaker, it largely lacked a criterion by which conflicts of interest should be decided.<sup>52</sup>

Let us now conclude on this outline of modes of thought aiming at objectivity. Observational, deontological, and consequentialist modes of thought do not represent different theories. As modes of thought, they play together within many given theories of law. These theories normally differ only in the importance they grant to observational, deontological, and consequentialist thinking. One might even recognize a certain common pattern, according to which all three modes of thought play together: first, by (normative) observation, some very general and basic principles are developed, and by (empirical) observation, hypothetical real-life solutions are determined. Second, in application of the deontological mode, principles are transformed into more concrete normative values, according to which we can evaluate each real-life hypothetical. Third, the final choice between possible solutions depends on a comparison of their consequences in terms of our previously discerned values. Thus, it corresponds to consequentialist thought. Some theories skip the (normative) observation by assuming the existence of a certain principle axiomatically or by reference to God. Others largely reduce the development of more concrete values and apply the consequentialist mode by reference to one basic principle, or they minimize the consequentialist step by formulating very concrete values. But they all apply different modes of thought and do so to achieve objectivity.

### *c. Three modes of dealing with subjectivity*

By applying the previously presented three modes of thought, we might achieve some degree of objectivity. But in one way or another, some part of the self will persist. It might even be that one rejects these modes of

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Review 291. The later Heck claimed, under National Socialism, that his method is the same as Carl Schmitt's thinking in concrete orders, see Philipp Heck, *Rechtserneuerung und juristische Methodenlehre* (Mohr Siebeck 1936) 26–34, neglecting one core element of his own theory: the conflicts of interests and the value judgement needed to resolve them.

52 Which is why it made its main contribution to the objectivization of law as a theory of application and not as a theory of prepositive guidelines on the production level, see eg Heck, 'Gesetzesauslegung' (n 51) 13 ('Der Richter hat nun den Maßstab für die Angemessenheit in erster Linie dem in Gesetzesform ausgesprochenen Werturteile der Rechtsgemeinschaft zu entnehmen.').

thought altogether and assumes that the self fully dominates the lawmaking process. In any case, a theory of law also has to face the persistence of the self and its power. *Stat pro ratione voluntas*<sup>53</sup> or *auctoritas, non veritas facit legem*<sup>54</sup> capture this voluntaristic or subjectivist way of looking at law. Two successive developments of Modernity lead to the (partial) decline of objectivist modes of thought, each in particular ways. The first one was the demise of the medieval consensus in some basic religious issues, the *res publica christiana*<sup>55</sup>, triggered by different events such as the confrontation with pagan indigenous people in the Americas<sup>56</sup> or religious wars in Europe<sup>57</sup>. The second development concerns the emergence of scientific positivism<sup>58</sup> and then especially logical empiricism, which rejects

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- 53 The proverb is commonly associated with Decimus I Iuvenalis, *The sixteen satires* (Peter Green ed, Penguin Books 1998) Satire 6, 223 ('sit pro ratione voluntas'), where he cynically describes a scene in which a slave is capriciously sentenced to death.
- 54 This passage clearly appears in Hobbes' *Leviathan* in its Latin version, see Thomas Hobbes, *Leviathan: sive De Materia, Forma, & Potestate Civilitatis Ecclesiasticae et Civilis* (Apud Johannem Tomsoni 1676) 133 (book 2, ch 26) ('Doctrinae quidem verae esse possunt; sed Auctoritas, non Veritas facit Legem.'). But its content is already expressed in the original English version, see Thomas Hobbes, *Leviathan: or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, Lerner Publishing Group 2018) 265 ('That which I have written in this Treatise, concerning the Morall Vertues, and of their necessity, for the procuring, and maintaining peace, though it bee evident Truth, is not therefore presently Law; but because in all Common-wealths in the world, it is part of the Civill Law: For though it be naturally reasonable; yet it is by the Sovereigne Power that it is Law [...].').
- 55 On that notion, see Armin Adam, 'Res Publica Christiana? Die Bedeutung des Christentums für die Idee "Europa"' in Hartmut Behr and Mathias Hildebrandt (eds), *Politik und Religion in der Europäischen Union: Zwischen nationalen Traditionen und Europäisierung* (VS Verlag für Sozialwissenschaften 2006) 25–26; Carl Schmitt, *Der Nomos der Erde: im Völkerrecht des Jus Publicum Europaeum* (5th edn, Duncker & Humblot 2011) 27.
- 56 See generally Schmitt, *Nomos* (n 55) 69–83 (with a special focus on Francisco de Vitoria).
- 57 Particularly on the Thirty Years' War, see Diarmaid MacCulloch, *Reformation: Europe's house divided 1400–1700* (Penguin Books 2004). On religious wars as a reason for voluntaristic currents in legal theory, see also Schröder, *Recht als Wissenschaft* (n 10) 102–103.
- 58 Auguste Comte, *Discours sur l'esprit positif* (Carilian-Goeury et V Dalmont 1844) 12 ('De tels exercices préparatoires ayant spontanément constaté l'inanité radicale des explications vagues et arbitraires propres à la philosophie initiale, soit théologique, soit métaphysique, l'esprit humain renonce désormais aux recherches absolues qui ne convenaient qu'à son enfance, et circonscrit ses efforts

normative and metaphysical issues as nonsensical because they are beyond the scope of logics- and empirics-based science<sup>59</sup>. A theory of law can react in different ways to the presence of the self, of *voluntas*, of power – which again represent three different modes of thought, this time turning around subjectivity.

aa. Decisionist mode of thought

First, a theory of law can embrace the self and praise its charisma<sup>60</sup>. The decisionism of the early Carl Schmitt is representative of such an approach.<sup>61</sup> Likewise, the free-law-movement (*Freirechtsbewegung*), which celebrated the personality of the judge, also as lawmaker, tends to embrace the self.<sup>62</sup> A positive attitude to the self in the process of lawmaking can also follow from a reduction of the content of modern natural law to the

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dans le domaine, dès lors rapidement progressif, de la véritable observation, seule base possible de connaissances vraiment accessibles, sagement adaptées à nos besoins réels.’).

- 59 See notably the Circle of Vienna, eg Rudolf Carnap, ‘Überwindung der Metaphysik durch logische Analyse der Sprache’ (1931) 2 Erkenntnis 219, 220 (‘Wenn wir sagen, daß die sog. Sätze der Metaphysik *sinnlos* sind, so ist dies Wort im strengsten Sinn gemeint.’). See also already Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (CK Ogden tr, Routledge & Kegan Paul 1922) para 6.53 (‘The right method of philosophy would be this: To say nothing except what can be said, *i.e.* the propositions of natural science, *i.e.* something that has nothing to do with philosophy: and then always, when someone else wished to say something metaphysical, to demonstrate to him that he had given no meaning to certain signs in his propositions.’).
- 60 For the Weberian definition of charismatic rule, see Weber (n 5) pt 1 ch III § 2 para 3, § 10.
- 61 See notably the (early) Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (2nd edn, Duncker & Humblot 1934) 42 (‘Die Entscheidung ist, normativ betrachtet, aus einem Nichts geboren’), on 44–46 explicitly building on Hobbes.
- 62 Flavius (n 28) 47 (‘Nur wo statt unfruchtbaren Tüftelns ein schöpferischer Wille neue Gedanken zeugt, nur wo Persönlichkeit ist, – ist Gerechtigkeit.’), 49 (‘So wird die Zeit auch kommen, in der der Jurist nicht mehr dem Gesetze mit Fiktionen und Interpretationen und Konstruktionen zu Leibe zu gehen braucht, um ihm eine Regelung zu erpressen, die sein zu individuellem Leben erwachter Wille selbständig wird finden dürfen.’), and in this voluntaristic spirit also 20, 26, 34 (‘Sollen ist Wollen [...]’).

principle of free will.<sup>63</sup> The presence of the self is then associated with positive attributes such as autonomy and sovereignty. Yet another way of justifying deference to a personal decision comes from a particular training and education the decisionmaker might have received, making her trained judgment superior to other judgments.<sup>64</sup> Finally, we find elements of this positive attitude towards the presence of the self as decisionmaker in a common critique of the algorithmization of law, which points to the intrinsic value of human decisionmaking and empathy, despite some loss of objectivity.<sup>65</sup> Besides theoretical accounts, some concrete institutions of positive law, such as the pardoning powers of presidents<sup>66</sup>, can be interpreted as based on a decisionist mode of thought.

#### bb. Procedural mode of thought

Second, a theory of law can try to tame the persisting self by focusing on procedural rules that structure the decisionmaking process. Procedural approaches can maintain a strong link to substance in case they believe that a certain procedure, a certain coordination of different selves, produces advantageous outcomes. Discourse theories of law generally take this path.<sup>67</sup> Less optimistic procedural approaches will at least try to avoid

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63 For a clear expression of his voluntaristic-positivistic approach, see Thomas Hobbes, *On the Citizen* (first published 1642, Richard Tuck and Michael Silverthorne eds, Cambridge University Press 1998), especially 32–42 (ch II). See generally Finnis (n 19) 6; Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (Daniela Gobetti tr, University of Chicago Press 1993) 97.

64 On trained judgment in science, see Daston and Galison (n 1) 46 and in detail 309–357.

65 cf Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martin's Press 2017) 168; Grigoleit and Bender, 'Generality and Particularity' (n 48) 133 para 61 ('fellow-human empathy'). See also Rebecca Crootof, 'Cyborg Justice' and the Risk of Technological-Legal Lock-In' (2019) 119 *Columbia Law Review* 233, 238 (associating human decisionmaking with flexibility and 'common sense'). On algorithms and objectivity in detail Lucia Sommerer, 'Algorithmic Crime Control Between Risk, Objectivity, and Power' (§ 9).

66 See eg German Basic Law (GG), art 60(2); US Constitution, art II(2), first clause. Generally on pardoning powers and the rule of law, see Christian Mickisch, *Die Gnade im Rechtsstaat: Grundlinien einer rechtsdogmatischen, staatsrechtlichen und verfahrensrechtlichen Neukonzeption* (Lang 1996).

67 The most emblematic contribution in this line is Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*

intentional abuses of lawmaking in a self-interested way by multiplying decisionmakers and dividing power among them. This is the path of Locke<sup>68</sup>, Montesquieu<sup>69</sup>, and the founding fathers of the American Republic<sup>70</sup>, who put their ideas into practice.<sup>71</sup>

### cc. Critical mode of thought

A practical theory of law designed to construct a legal system can therefore either seek to eliminate the self (by providing some criteria of objectivity), to embrace the self (by reference to the charisma, personality, education, or empathy of the decisionmaker), or to tame the self (by providing a certain procedure). But a theory of law can also choose not to be practical in that sense. Instead of showing how a legal system should operate, it can limit itself to criticism<sup>72</sup> or – in the extreme case – to demanding

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(Suhkamp 1992), especially clear on 364 ('diskursive Rationalisierung') and 499. See also Hart Jr and Sacks (n 42) (legal process school); Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) 96–97 (procedural natural law theory).

- 68 John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (Richard H Cox ed, Harlan Davidson Inc 1982) 89 (ch XII para 143) ('Therefore in well-ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers persons who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made [...]') (focusing on the independence of the legislator).
- 69 Charles Louis de Secondat de Montesquieu, *De l'esprit des lois*, vol 1 (Garnier 1777) 312 (book XI ch VI) (developing the tripartite system, in which power is distributed among a legislator, an executive branch, and a judiciary).
- 70 eg James Madison alias Publius, 'Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments' *The Independent Journal* (Wednesday, 6 February 1788).
- 71 As mode of dealing with subjectivity, it is also present in many other theories, eg the free-law-movement, see Flavius (n 28) 41 ('Gegen Exzesse de[r] Subjektivität schützt genügend die ausgleichende Vielheit der Köpfe im Richterkollegium und der Instanzenzug.').
- 72 eg Duncan Kennedy, *A Critique of Adjudication: {fin de siècle}* (Harvard University Press 1997) 155. This, of course, describes only one aspect of the movement. Indeed, as movement, it aims at (positive) political action, see eg Unger (n 42) 199–208, but often remains vague in how concretely an alternative system should be conceived. See also Eugen Paschukanis, *Allgemeine Rechtslehre und Marxismus*:

the abolition of law altogether<sup>73</sup>. It can also give up all normative aspirations and just describe how legal systems work in fact within a society of changing and conflicting ideologies.<sup>74</sup> In a way, this is also the approach of different forms of positivism.<sup>75</sup> Therefore, positivism is best understood not as embracing subjectivity but as redefining the research focus from prescription to description.

#### d. Parallels in private lawmaking

We have seen that theories of law oscillate between objectivity and power. So far, we had in mind lawmakers such as parliaments or judges that elaborate norms for individuals, ie we focused – as legal theory normally does – on heteronomous law emanating from the state. However, individuals are also lawmakers in that they engage in autonomous lawmaking to regulate their private affairs through contracts and wills. They produce norms just as parliaments and judges do.<sup>76</sup> Some scholars suggest that the concept of law strictly speaking should not apply to autonomous private norms but only to heteronomous ones.<sup>77</sup> This leads once again to a (quite fruitless) definitional problem – just as the positivism-debate did.<sup>78</sup> It will suffice to observe that individuals treat private norms at least *as if* they were law, so that – in order to emphasize this functional commonality –

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*Versuche einer Kritik der juristischen Grundbegriffe* (3rd edn, Verlag Neue Kritik 1970).

73 eg Friedrich Engels, *Herrn Eugen Dührings Umwälzung der Wissenschaft* (“*Anti-Dühring*”) (3rd edn, Dietz 1894) 262 (“Der Staat wird nicht “abgeschafft”, er stirbt ab.”).

74 For a recent example of this approach, see Auer, *Materialisierung* (n 7) 219.

75 For some positivists, each with a different focus, see John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) (command theory of law, making the command the object of its description); Hart, *The Concept of Law* (n 9); Hart, ‘Positivism’ (n 9) (sociological positivism, opening the object of description beyond mere commands); Kelsen (n 9) (normative positivism, making hierarchically ordered legal norms the object of description).

76 eg Klaus Adomeit, *Gestaltungsrechte, Rechtsgeschäfte, Ansprüche: Zur Stellung der Privatautonomie im Rechtssystem* (Duncker & Humblot 1969) 18.

77 For a restriction to heteronomous law, see Werner Flume, *Allgemeiner Teil des bürgerlichen Rechts: Das Rechtsgeschäft*, vol 2 (3rd edn, Springer 1979) 5 (§ 1 4); Ferdinand Kirchhof, *Private Rechtsetzung* (Duncker & Humblot 1987) 84–86. This state-centrism is another feature often associated with positivism, an aspect we will not further pursue here.

78 On positivism, see *supra* (text to n 8–14).

we will refer to both, heteronomous and autonomous norms, as law. Since the French Civil Code does the same, we find ourselves in good company.<sup>79</sup> Whether individuals as lawmakers exercise an original freedom<sup>80</sup>, or whether the state granted this authority to them<sup>81</sup>, is yet another question beyond our focus. It is enough that, from a functional perspective, individuals produce norms, regardless of the origin of their power to do so. Having said that, we can concentrate on the area of contract law as the most emblematic example of private lawmaking and sketch out how theories of contract law oscillate between the poles of objectivity and subjectivity as well. They primarily differ in how they answer two sets of questions with which a theory of contract law has to deal: how to determine when the will of the parties is relevant, and how to fill gaps where contractual stipulations are missing.

#### aa. Objectivist approaches to contract law

One possible approach to contract law grants objectivity broad room. According to that approach, not only the will of the parties but substantive principles structure the area of contract law. These principles resolve the two mentioned issues of contract law: they provide the scope and limit of the will of the parties, and they function as gap-fillers. Just like in the area of heteronomous lawmaking, they derive from one of the three modes of thought aimed at objectivity.

First, they might be obtained through an *observational* mode. Referencing (commercial) usage of trade to complete and interpret contract terms fits this category.<sup>82</sup>

Second, they can derive from principles of justice (or rightness) according to the *deontological* mode of thought. In this spirit, contracts are valid

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79 French Civil Code (*Code Civil*), art 1103 ('Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits.').

80 Larenz, *Richtiges Recht* (n 21) 60, Gerhart Husserl, *Rechtskraft und Geltung: Genesis und Grenzen der Rechtsgeltung*, vol 1 (Springer 1925) 39 (on the so-called desert-case).

81 Assuming an authorization *ex ante*, see eg Adomeit (n 76) 19–20. Assuming a reception *ex post*, see eg Flume (n 77) 3 (§ 1 3a), 5 (§ 1 4); Kirchhof (n 77) 139; Jan Busche, *Privatautonomie und Kontrahierungszwang* (Mohr Siebeck 1998) 18–19.

82 eg German Commercial Code (*Handelsgesetzbuch*), s 346; US Uniform Commercial Code (UCC), s 1-303(c).

only because and as long as they serve these higher principles.<sup>83</sup> Theories that try to find the just price (*pretium iustum*) such as the labour theory of value<sup>84</sup> or norms that sanction a mismatch between the parties' obligations based on a contradiction to the principle of equivalence<sup>85</sup> belong here. The same is true for default rules insofar as they are explained based on considerations of equivalence and justice.<sup>86</sup> An advantage of this principle-based approach is that private autonomy only appears as one value among others. It can perfectly be balanced with other more or less concrete principles that are relevant in a given case. For instance, in German law, if an agent acts on behalf of the principal without authorization and the principal is watching and does not intervene, then German law assumes a kind of authority by estoppel (so-called *Duldungsvollmacht*) so that the contracting party has a claim against the principal.<sup>87</sup> One way of explaining this doctrine is to invoke the principle that legitimate expectations ought to be protected – so that despite the lack of will of the principal, the claim of the contracting party is justified.<sup>88</sup>

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- 83 Most prominently in the German context Schmidt-Rimpler (n 21), 145, 147, 155–156 (arguing that contracts serve some sort of ‘rightness’).
- 84 cf Karl Marx and Friedrich Engels, *Werke: Theorien über den Mehrwert*, vol 26 (Karl Dietz ed, 6th edn, Karl Dietz Verlag 1972).
- 85 For initial mismatches, see the institute of *laesio enormis*, cf eg Matthias Rüping, *Der mündige Bürger: Leitbild der Privatrechtsordnung?* (Duncker & Humblot 2017) 41, which survives – as far as real property is concerned – in the French Civil Code (*Code Civil*), art 1674, but also has some similarities with usury, eg German Civil Code (*BGB*), s 138(2). For mismatches due to subsequent or unconsidered events, see the institute of *clausula rebus sic stantibus*, vivid in German Civil Code (*BGB*), s 313. See also the common law doctrine of frustration, based on an implied condition, *Taylor v Caldwell* (1863) 3 Best and Smith’s Report 826.
- 86 This is indeed the position of courts, see eg BGH NJW 1964, 1123; *Hayward v Postma*, 31 Mich App 720, 724, 188 NW2d 31, 33 (1971). See also Charles J Goetz and Robert E Scott, ‘The Limits of Expanded Choice: An Analysis of the Interaction Between Express and Implied Contract Terms’ (1985) 73 California Law Review 261, 263 (especially n 5) (‘For example, the courts’ tendency to treat state-created rules as presumptively fair often leads to judicial disapproval of efforts to vary standard implied terms by agreement.’); Claus-Wilhelm Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Verlag der Bayerischen Akademie der Wissenschaften 1997) 54; Martijn W Hesselink, ‘Non-Mandatory Rules in European Contract Law’ (2005) 1 European Review of Contract Law 44, 58.
- 87 eg BGH NJW 2014, 3150, 3151 para 26.
- 88 For an example of this objectivist explanation, see Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (CH Beck 1971) 40–42.



Beyond observational and deontological reasoning, we also find the third category in contract law, ie the *consequentialist* mode of thought, especially in the form of cost-benefit-analysis. The determination of the content of default rules according to who is the cheapest cost avoider<sup>89</sup> is a perfect example of that way of looking at contract law.

bb. Subjectivist approaches to contract law

In contrast to these objectivist approaches, one can take a subjectivist perspective and focus on the self of contracting parties. These subjectivist theories underline private autonomy as the foundation of all contract law: *stat pro ratione voluntas*.<sup>90</sup> Since autonomous lawmaking only concerns the lawmakers themselves, the presence of their self becomes an advantage. Subjectivist theories of contract law therefore embrace the self of the contracting parties, tamed only through the requirement of consent by the other side – which constitutes some form of procedural justice.<sup>91</sup> Subjectivist theories thus avoid normative discussions about justice by pointing to one single, abstract justification: private autonomy. The limits of freedom of contract therefore have to be based on a lack of consent – either on a *total lack* of consent, eg of a third party (negatively) concerned by the contractual stipulation, or at least on the demonstration that there is *no true* consent due to some deviation from rationality. Likewise, the task of filling gaps of incomplete contacts has to be explained by reference to the hypothetical will of the parties. We find here a certain affinity to the economic analysis of law that justifies mandatory law only in terms of

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89 cf Charles J Goetz and Robert E Scott, ‘The Mitigation Principle: Towards a General Theory of Contractual Obligation’ (1983) 69 Virginia Law Review 967, 971. See generally Bender, ‘Default Rules’ (n 48) 379 (critically presenting this economic approach towards default rules).

90 Flume (n 77) 45 (§ 1 4) (‘Für den Bereich der Privatautonomie gilt der Satz: *stat pro ratione voluntas*.’). See also Eberhard Schmidt-Aßmann, ‘Öffentliches Recht und Privatrecht: Ihre Funktionen als wechselseitige Auffangordnungen – Einleitende Problemskizze –’ in Wolfgang Hoffmann-Riem and Eberhard Schmidt-Aßmann (eds), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Nomos 1996) 16.

91 On the procedural character of *iustitia commutativa*, predominant in contact law, see Canaris, *iustitia distributiva* (n 86) 50.

externalities (lack of consent) or paternalism (lack of true consent)<sup>92</sup> and that designs default rules – at least in most cases – according to what the parties would have wanted<sup>93</sup>.

From this perspective, we can now revisit the previously mentioned institutions and explain them through the will of the parties. The relevance of trade usage, for instance, might not be seen as relevant due to some observational mode of thought but simply as an indicator of what contracting parties would have wanted. Likewise, the cost-benefit-analysis and the question of who is the cheapest cost avoider need not be associated with a consequentialist mode of thought, but they can again be seen as indicator of what rational parties would have wanted.<sup>94</sup> By the same token, instead of analysing distortions in the equivalence of obligations (such as extortionate prices) as a problem of justice, they can as well be understood as indicative of a lack of free will.<sup>95</sup> Finally, the claim against the principal in the case of the German *Duldungsvollmacht* might be justified by interpreting the fact that the principal is watching and tolerating the behaviour of the agent as a tacit authorization, ie by the principle of private autonomy.<sup>96</sup>

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92 On the economic viewpoint on mandatory law, see Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87, 88.

93 On this theory of complete contract eg Alan Schwartz, 'Proposals for Products Liability Reform: A Theoretical Synthesis' (1988) 97 *Yale Law Journal* 353, 361; Porat and Strahilevitz (n 48), 1425 f; Hans Christoph Grigoleit, 'Mandatory Law: Fundamental Regulatory Principles' in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012) 1127; Martin Schmidt-Kessel, 'Europäisches Vertragsrecht' in Karl Riesenhuber (ed), *Europäische Methodenlehre: Handbuch für Ausbildung und Praxis* (3rd edn, De Gruyter 2015) 385 (Rn. 26); Steven Shavell, 'Damage Measures for Breach of Contract' (1980) 11 *Bell Journal of Economics* 466, 466 f; Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th edn, Springer 2020) 426.

94 On the alignment of both, the subjectivist what-the-parties-would-have-wanted-approach, and the objectivist who-is-the-cheapest-cost-avoider-approach, under the assumption that parties are *homines oeconomici*, see Bender, 'Default Rules' (n 48) 379.

95 German Civil Code (*BGB*), s 138(2), for example, requires certain external circumstances excluding a free choice. Also, the unconscionability-doctrine contains a procedural element. Finally, a central aspect of the institution of *clausula rebus sic stantibus* and its modern forms is the hypothetical inquiry in what parties would have contracted for had they considered the unforeseen event, see Dieter Medicus and Jens Petersen, *Grundwissen zum Bürgerlichen Recht: Ein Basisbuch zu den Anspruchsgrundlagen* (27th edn, Vahlen 2019) para 165.

96 For this subjectivist interpretation Flume (n 77) 828 (§ 49 2 a, c).

The reference to the self certainly has some appeal in the area of autonomous lawmaking, but making private autonomy the ‘theory of everything’<sup>97</sup> in the world of contract law has its limits. The main problem is that autonomy is a highly normative concept. The reference to the will of the parties cannot explain the rules of formation of a contract, ie the rules that describe under which conditions one party is bound vis-à-vis the other. It is also unable to explain when exactly consent is needed: both the question of when the effects on a third party are considered a relevant externality and when there is a lack of true consent with the consequence of a need for paternalism require a value judgment.<sup>98</sup> Given this normativity of legal will, the gap-filling is also a normative undertaking.<sup>99</sup> Therefore, we need some objective mode of thought. Referencing the self and its *voluntas* alone risks dissimulating rather than explaining underlying values, ie becoming ‘pseudo-subjective’<sup>100</sup>. Such a private law theory would be based on fictions and empty legal constructions<sup>101</sup>.

With that in mind, it is worthwhile to revisit the previous examples once more. Let us start with the German *Duldungsvollmacht*, which – in the end – is part of the rules of contract formation. Here, the principal did not actually want to give authority, the agent normally knows this fact, and the other contracting party assumes that the principal authorized the agent in the past and therefore necessarily does not understand the passiveness of the principal as a present grant of authority either.<sup>102</sup> Finding the solution

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97 Thus the denomination to describe the efforts in physics to explain the world in one formula, see eg Steven Weinberg, *Dreams of a Final Theory* (Vintage Books 1994) ix.

98 The normative embeddedness of contracts and corrective justice is also the reason why corrective and distributive justice cannot be separated, see Jules Coleman and Arthur Ripstein, ‘Mischief and Misfortune: Annual McGill Lecture in Jurisprudence and Public Policy’ (1995/1996) 41 McGill Law Journal 91, 93. See also Canaris, *iustitia distributiva* (n 86) 60–63 (less far-reaching but still recognizing distributive implications).

99 On the normativity of default rules, see Bender, ‘Default Rules’ (n 48) 385–386.

100 Hans Christoph Grigoleit, ‘Subjectivism, Objectivism, and Intuitionism in Legal Reasoning: Avoiding the Pseudos’ (§ 2) (Statement 1). See also Alexander Krafka and Bernhard Seeger, ‘Vertragsgestaltung im Immobilienrecht’ in Jörn Heineemann (ed), *Kölner Formularhandbuch Grundstücksrecht* (3rd ed, Heymanns 2020) 4 para 12.

101 On this aspect eg Hans Christoph Grigoleit and Philip M Bender, ‘Der Diskurs über die Kategorien des Schadensersatzes im Leistungsstörungenrecht – Teleologische Dogmatisierung auf dem Prüfstand’ (2019) 6 ZfPW 1, 27 (‘konstruktions-positivistische Eigendynamik’).

102 Canaris, *Vertrauenshaftung* (n 88) 40–42.

to this case in the will of the principal is quite farfetched and disguises the actually decisive value: the protection of legitimate expectations. We can now turn to the hardship cases in which paternalism is at place. On what grounds are we able to decide that there is a lack of true will? Isn't it that we have a normative concept of free will, according to which we define when it is lacking? If this is the case, instead of saying that hardship leads to a lack of will, it would be more accurate to say that we want parties to abstain from feeling bound in certain cases of hardship due to some normative principle. We can finally re-examine default rules. If we fill gaps by reference to trade usage, is it really that we do so because parties want us to? Or isn't it rather the case that we want parties to complete contracts with trade usage because we like trade usage – be it because we pursue an observational mode of thought or because we consider it efficient according to our consequentialist approach? This issue can also be formulated without reference to trade usage: do we design default rules according to the criterion of efficiency because parties want efficient default rules or because we want parties to want efficient default rules? Don't efficiency-minded lawmakers actually define free will according to some economic rationality of *homines oeconomici*,<sup>103</sup> ie according to their own normative criterion? Only in that way, it can escape the default rule paradox<sup>104</sup>, which arises when preferences (as defined under some different logic) do not correspond to economic rationality. In this case, avoiding the costs of an opt-out might paradoxically require mimicking irrational preferences (if taken seriously), even though the default rule regime based on these irrational preferences would be inefficient, ie not correspond to who is the cheapest cost avoider. Therefore, we do not even have to turn to classical minoritarian default rules that deviate from the will of efficiency-minded individuals – and aim at forcing individuals either to opt-out and thereby to disclose information (penalty or pushing default rules), or to stick with the default and thereby produce some positive externalities

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103 eg Schäfer and Ott (n 93) 58–59; Fritz Söllner, Alexander Stulpe and Gary S Schaal, 'Politische und ökonomische Theorie- und Ideengeschichte' in Karsten Mause, Christian Müller and Klaus Schubert (eds), *Politik und Wirtschaft* (Springer 2016) 32; Martin Brusis and Joachim Zweynert, 'Wirtschafts- und Gesellschaftsordnungen' in Karsten Mause, Christian Müller and Klaus Schubert (eds), *Politik und Wirtschaft* (Springer 2016) 4. For a critical presentation of *Rational Choice Theory*, see also Herbert A Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *The Quarterly Journal of Economics* 99, 100 ff.

104 Bender, 'Default Rules' (n 48) 379.

(pulling default rules).<sup>105</sup> Ordinary majoritarian, will-aligning default rules already demonstrate the need for normativity. All of this is not to say that the subjective approach is wrong in pointing to the value of the self with its autonomy and its power. But it only covers *one* aspect. Subjectivism and objectivism should not be understood as overarching theories of contract law but as modes of thought that highlight different aspects. In this way, one can point to the decisive values – without the need of discrediting some manifestations of the self as lacking true will.

cc. The objectivist dimension of private autonomy in heteronomous lawmaking

I will now conclude the part on productional objectivity with some remarks on the relationship between autonomous (private) and heteronomous (public) lawmaking. At first glance, there is some coherence in assuming that adherents to the *voluntas*-principle in contract law would also favour subjectivist accounts of heteronomous lawmaking. This is certainly true concerning their scepticism vis-à-vis substantive objectivity. But the contractual *voluntas*-principle can collide with its legislative counterpart. In other words, it is not possible to fully embrace the subjectivity of both the contracting parties and the legislator. Indeed, according to its normative foundations, party autonomy (subjectivity) functions as a minimal assumption of natural law<sup>106</sup> with far-reaching objectivist consequences on the legislative level. This objectivist legislative implication of a subjectivist tradition of contract law is at the origin of the formalist assumption (or myth) that private law is apolitical.<sup>107</sup> Subjectivity in contract

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105 Specifically on penalty default rules, see Ayres and Gertner, ‘Filling Gaps’ (n 92) 95. On minoritarian default rules in general, see Ian Ayres and Robert Gertner, ‘Majoritarian vs. Minoritarian Default Rules’ (1999) 51 *Stanford Law Review* 1591; Cass R Sunstein, ‘Deciding by Default’ (2013) 162 *University of Pennsylvania Law Review* 1, 4; Porat and Strahilevitz (n 48), 1442. On the terminology of pushing and pulling default rules, see Bender, ‘Default Rules’ (n 48) 381.

106 For the natural law foundation of subjectivist approaches, see already supra (n 35).

107 From a neoformalist perspective, eg Weinrib, *The Idea of Private Law* (n 36); Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (n 36) 998 (pointing to freedom and self as foundations of the system of corrective justice). Critically on the apolitical character of *iustitia commutativa* eg Coleman and Ripstein (n 98) 93.

law can be used to immunize private law against legislative intervention.<sup>108</sup> The fact that embracing the self of one actor leads to objectivity from the viewpoint of another is no specificity of the relationship between contracting parties and the legislator. We find this feature as well when we shift the focus from productional to applicational objectivity because the adjudicator somehow has to deal with the self of the lawmaker.

## 2. *Applicational objectivity*

So far, we focused on the self of the lawmaker and the possibility to eliminate or tame it (*productional objectivity*). We examined prepositive constraints that guide the making of law. Let us now shift to objectivity in the application of law (*applicational objectivity*). Once the lawmaker has made a statement, can the adjudicator detect this determinate statement or is each interpretation of it a recreation of the norm?<sup>109</sup> Even though different actors have to deal with different previous manifestations of the self – in that sense parliament applies the constitution when enacting statutes and administrative agencies apply statutes and executive orders – the most emblematic perspective is that of a judge that decides cases on the basis of statutes and precedents. In a theory of law, the predominant (objectivist or subjectivist) mode of thought on the productional level does not need to be the predominant mode of thought on the applicational level as well.<sup>110</sup> One might perfectly be sceptical about objectivity on a productional level but nonetheless believe that the self of the judge in the process of the application of the law plays only a subordinate role. This is because legislative statements constitute higher rules that bind the judge, just as the prepositive commands of reason or God did on the productional level.<sup>111</sup> The existence of these higher rules allows the deduction of additional normative solutions through deontological thinking. In

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108 See most famously *Lochner v New York*, 198 US 45 (1905).

109 Issues of applicational objectivity are therefore also discussed in terms of determinacy, eg Greenawalt (n 4) 11, or in terms of interpretation, eg Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press 1996) 1.

110 See also Daniel Wolff, 'Conceptual and Jurisprudential Foundations of the Debate on Interpretive Methodology in Constitutional Law: An Argument for More Analytical Rigor' (§ 5).

111 On deontological modes of thought, see *supra* (text to 33–42).

other words, legislative statements produced at an earlier stage of the legal process constitute an additional source of objectivity.<sup>112</sup>

Even though norm production and application are to be evaluated independently, it is helpful to combine the insights on both levels to a broader theory of adjudication.<sup>113</sup> Indeed, we have to distinguish application and adjudication. By *adjudication*, I understand the process of deciding cases. One significant part of this process is the interpretation and *application* of existing law. However, if one recognizes the existence of gaps in the law, an adjudicator will decide cases not only by reference to previously enacted law but also by creating new law. Therefore, a theory of adjudication combines norm production *and* application, so that objectivity in adjudication depends on the stance one takes on productional *and* applicational objectivity. Accordingly, I will present applicational objectivity not in isolation but together with possible theoretical positions on the productional level, so that we see the full picture of possible conceptualizations of adjudication. However, before we turn to these permutations of objectivity and subjectivity on the productional and applicational level (b.), it is necessary to clarify the specific use of objectivity and subjectivity in the particular context of interpreting and applying norms (a.). Finally, we will again draw some parallels to contract law (c.).

### a. Subjectivity and objectivity in interpretation

Two notional clarifications are in order before we can present the different permutations of objectivity and subjectivity on the one hand and the productional and applicational level on the other.

The first clarification concerns theories of interpretation that are sometimes called ‘Subjectivist’ and ‘Objectivist’ and to which I will refer with upper-case letters to point to their specific meaning. Whereas Subjectivists focus on the legislative statement when applying a statute, Objectivists (also) take into account the predominant values that motivated the norm production.<sup>114</sup> These theories therefore derive their name from their po-

112 cf George C Christie, ‘Objectivity in the Law’ (1969) 78 Yale Law Journal 1311, 1334, emphasizing statutes and precedents as additional source of objectivity in legal reasoning.

113 For an integral view, cf Greenawalt (n 4) 12. See also Christie (n 112) (objectivity in adjudication).

114 On this notional clarification, see also Hans Christoph Grigoleit, ‘Dogmatik – Methodik – Teleologik’ in Marietta Auer and others (eds), *Privatrechtsdogmatik*

sition vis-à-vis another self – the self of the legislator. It is important to note, however, that *both* theories try to obtain objectivity on the applicational level. They are therefore not subjectivist with regard to the self of the adjudicator. Rather, they are both objectivist in that they seek and deem possible (at least in part) the suppression of the judicial self in the process of applying the law. Differences between Subjectivists and Objectivists originate in their positions on the productional level. In other words, the (applicational) Subjectivists are subjectivists on the productional level, whereas the (applicational) Objectivists are objectivists on the productional level – but both are objectivists on the applicational level.

The second clarification concerns the will of the self. As soon as more than one individual is involved, there is no such thing as a pre-existing intent of ‘the’ legislator or ‘the’ contracting parties.<sup>115</sup> Therefore, also Subjectivist approaches have to objectivize until they reach the entity level (eg the parliament or the group of contracting individuals). This objectivization is common ground in the interpretation of contract law, in that the subjective intent of one party is irrelevant if not known to the other<sup>116</sup>, and it is contrasted with interpretations of wills where the testator is the only person involved. But this minimal objectivization is also required in statutory interpretation. Indeed, Public Choice theories have a long time ago started to analyse the relationships between deputies (and voters more generally) as contractual.<sup>117</sup> In statutory interpretation, one might even consider the people, ie the public, as a further recipient of

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*im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 254.

115 On these problems in detail Franz Bauer, ‘Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Conflicting Concepts in Legal Reasoning’ (§ 3).

116 On the tension-field of subjectivity and objectivity in the area of the interpretation of legal acts, see German Civil Code (*BGB*), s 133 (directing the adjudicator towards subjectivity), and s 157 (directing her towards objectivity). For the degree of objectivization necessary to resolve the conflict between both paragraphs, see the seminal contribution of Karl Larenz, *Die Methode der Auslegung des Rechtsgeschäfts: Zugleich ein Beitrag zur Theorie der Willenserklärung* (Dr Werner Scholl 1930) 70–106.

117 Anthony Downs, *An Economic Theory of Democracy* (Harper & Row Publishers 1957). For lawmaking as dealing, see also Posner, *The Problems of Jurisprudence* (n 7) 276–278.



communication.<sup>118</sup> From there, one might<sup>119</sup> draw the conclusion that it is the ‘original meaning’ of the statutory text that is of relevance – a point to which I will turn in a second. Equipped with these notional clarifications, let us now further examine the possible permutations of objectivity and subjectivity, considering the difference between the productional and the applicational level.

*b. Permutations of objectivity and subjectivity in adjudication*

According to the insight that the mode of thought dominant on the productional level influences the mode of interpretation, I will approach objectivity and subjectivity on the applicational level in relation to the position one might take on the productional level. In other words, I will examine different permutations of objectivity and subjectivity in *adjudication*.

aa. Productional subjectivity and applicational objectivity (‘Subjectivists’)

Let us start with the permutation that I have already mentioned in the introduction to this section. In this permutation, we assume a subjectivist (voluntaristic) attitude on the productional level and an objectivist (non-voluntaristic) attitude on the applicational level (‘Subjectivists’).<sup>120</sup> Accord-

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118 eg Bernd Schünemann, *Gesammelte Werke Band I: Rechtsfindung im Rechtsstaat und Dogmatik als ihr Fundament* (De Gruyter 2020) 53, and also 58 (rejecting the relevance of secret intentions of parliamentarians). Given these insights, it is surprising that he manifests, on the same page, reluctance in drawing parallels to the interpretation of contracts.

119 This, however, is not a necessary conclusion. Schünemann, for instance, at *ibid* 58, still focuses on the legislative intent.

120 This combination is sometimes referred to as ‘association of legal positivism with legal formalism’, see Posner, *The Problems of Jurisprudence* (n 7) 10–11 (positivism on the lawmaking level and formalism on the adjudicative level). See also Schmitt, *Drei Arten* (n 25) 24–33, who describes Positivism as a combination of decisionism and formalistic normativism. See also Greenawalt (n 4) 6–7, who refers to this permutation as the ‘simple positivist conception’. Since ‘positivism’ is often used to describe the problem of how to define law (which is beyond the scope of this essay), and ‘formalism’ is often associated with a specific 19th century theory and its revivals, which has implications on the lawmaking level as well, I prefer to describe this first permutation as a combination of productional subjectivity and applicational objectivity.

ing to this view, whereas the lawmaker is free in shaping the content of the law, the judge *can* and *should* follow the legislative commands. However, theories disagree about how best to follow legislative commands. Should one try to understand and follow the intent or purpose of the legislator (subjectivist-teleological interpretation<sup>121</sup>, intentionalism<sup>122</sup>, or – as applied to the constitution – original intent<sup>123</sup>) or should one focus on the text alone, ie the meaning of the concepts used at the time they were enacted (textualism or – as applied to the constitution – original meaning<sup>124</sup>)? Whether to take a purposive or textualist approach could also depend on what the legislator actually wanted to regulate: the ends (then purpose) or also the means to pursue the ends (then meaning)?<sup>125</sup>

In addition, theories are divided on how to deal with gaps. The idea that gaps do not exist, that the judge is only the mouth of the law (*bouche*

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- 121 Thus the common denomination in German legal discourse, see eg Schüenemann (n 118) 52; Bernd Rütters, ‘Methodenfragen als Verfassungsfragen?’ (2009) 40 *Rechtstheorie* 253, 283. See also Auer, ‘Interessenjurisprudenz’ (n 51) 528.
- 122 eg Michael Zander, *The Law-Making Process* (7th edn, Hart Publishing 2015) 189–191. See also Heck, ‘Gesetzesauslegung’ (n 51) 8 (‘historisch-teleologische Auslegung’).
- 123 This early form of originalism uses the notion of original intent and focuses on judicial restraint, see eg Richard S Kay, ‘Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses’ (1988) 82 *Northwestern University Law Review* 226, 244 (note 77), and 284–292; Robert H Bork, ‘Neutral Principles and Some First Amendment Problems’ (1971) 47 *Indiana Law Journal* 1, 17. However, whereas the former actually seems to follow an intentionalist approach, the latter (at least in other work) rather seems to understand ‘original intent’ as something expressed in the public meaning of words (see reference in n 124). Also Antonin Scalia, ‘Originalism: The Lesser Evil’ (1989) 57 *University of Cincinnati Law Review* 849, 852–853 uses the notion of original intent in the sense of original meaning.
- 124 This is the now dominant version of originalism, see eg the later Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (Touchstone 1990) 143–160, especially 144, and briefly also 12; Scalia, ‘Originalism’ (n 123) 853; Steven G Calabresi and Saikrishna B Prakash, ‘The President’s Power to Execute the Laws’ (1994) 104 *Yale Law Journal* 541, 552; Amy C Barrett, ‘Originalism and Stare Decisis’ (2017) 92 *Notre Dame Law Review* 1921, 1924. For an in-depth discussion of this ‘new originalism’, see Wolff (n 110) (§ 5). For a general textualist account of interpreting legal texts, see Oliver W Holmes, ‘Theory of Legal Interpretation’ (1898–1899) 12 *Harvard Law Review* 417, 417–418.
- 125 Bauer (n 115) (§ 3).

*de la loi*)<sup>126</sup> or applying the law like a machine (*Subsumtionsautomat*)<sup>127</sup>, might have been plausible to some 19th century formalists<sup>128</sup>, but it is now widely rejected so that an interpretative theory has to account for the gap problem. One possible solution consists in saying that the democratically elected parliament should fill the gaps in order to prevent (arbitrary) judicial activism.<sup>129</sup> This approach might have some appeal in some areas of law – for instance, in criminal law, where the lack of punishment favours the individual<sup>130</sup>, or even in constitutional law, where the lack of a constitutional fundamental right favours the democratically elected parliament.<sup>131</sup> But in private law settings, the lack of a right favours one individual at the detriment of another without good reason.<sup>132</sup> Here, the price to pay for the benefit of restricting judges is high. It could be described as a denial of justice as default position in cases of statutory gaps. Another way

126 Montesquieu (n 69) 327 (book XI ch VI) ('Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur.'), also 320 ('Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle.').

127 See generally Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Klostermann 1986) 306–314.

128 On the applicational level, especially the French *école de l'exégèse* (see generally Jean-Louis Halpérin, 'École de l'Exégèse' [2005] *Encyclopedia Universalis* 227 <<http://www.universalis.fr/encyclopedie/ecole-de-l-exegese/>> accessed 3 February 2021) is of interest, since it developed its formalism on the basis of the French Civil Code at a time when elsewhere formalism developed without broader codifications, ie on the production level.

129 This is the main focus of early originalism, eg Bork, 'Neutral Principles' (n 123) 2–3, 10–12, 18, but it is still an important part of modern originalism, see eg Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) 23; Barrett (n 124), 1925. Sceptical on whether originalism actually achieves this goal, Werner Heun, 'Original Intent und Wille des historischen Verfassungsgebers: Zur Problematik einer Maxime im amerikanischen und deutschen Verfassungsrecht' (1991) 116 *AöR* 185, 207–208 (focusing rather on procedure, competency, and public opinion).

130 Therefore, the basic rule *nulla poena sine lege*, enshrined in German Basic Law (GG), art 103(2), as well as German Penal Code (*StGB*), s 1, prohibits the judicial development of the law at the detriment of the potential criminal.

131 Bork, 'Neutral Principles' (n 123) 10–12. On the statutes-requirement in detail Victor Jouannaud, 'The Essential-Matters Doctrine (*Wesentlichkeitsdoktrin*) in Private law: A Constitutional Limit to Judicial Development of the Law?' (§ 7).

132 In that sense, Private Law is reconciliation of interests (*Interessenausgleich*), see Alexander Hellgardt, *Regulierung und Privatrecht: Staatliche Verhaltensteuerung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft, Gesetzgebung und Rechtsanwendung* (Mohr Siebeck 2016) 55.

of dealing with the gap problem is to look at how the legislator has solved similar conflicts of interests (*Interessenjurisprudenz*)<sup>133</sup> or at which policy goals and values the legislator has enacted (*Wertungsjurisprudenz*)<sup>134</sup> and to use these normative insights to close the gaps in the spirit of the legislator. This position has certain parallels with the method of reasoned elaboration of the legal process school.<sup>135</sup> A third way of dealing with the gap problem is to say that the judge switches from the applicational to the productional level, which means – since we look at theories that assume subjectivity on this level – to a subjectivist mode of taking decisions.<sup>136</sup>

#### bb. Productional objectivity and applicational objectivity ('Objectivists')

We can now turn to a second permutation, one that combines a strong belief in objectivity (nonvoluntarism) on both the productional and the applicational level ('Objectivists'). Here, the legislator is engaged in some sort of discovery (*Erkenntnis*), not only in decision (*Entscheidung*).<sup>137</sup> This has three important implications for the process of adjudication. First, judges will interpret statutes as an effort of concretization and therefore understand them in the light of the objective purpose they want to pursue

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133 The idea of guiding the judge by reference to how the legislator solved conflicts of interests, also when filling gaps (so that judicial discretion is the exception), is particularly present in Heck's earlier work, see eg Philipp Heck, *Interessenjurisprudenz: Gastvorlesung an der Universität Frankfurt a. M. gehalten am 15. Dezember 1932* (Mohr (Paul Siebeck) 1933) 20; Heck, 'Gesetzesauslegung' (n 51) 21, already on 16–17 introducing the concept of obedience, on 17 explaining statutes as a resolution of interests. On the (empirical) guidance of judges in the conception of Heck, see generally Auer, 'Interessenjurisprudenz' (n 51) 533; Bender, 'Default Rules' (n 48) 376. On Heck's shifted focus under National Socialism, see already supra (n 51) and especially Heck, *Rechtserneuerung* (n 51) 26–34.

134 Larenz and Canaris, *Methodenlehre* (n 30) 265; especially clear also Bydlinski, *Juristische Methodenlehre* (n 41) 123–139.

135 cf Richard H Fallon Jr 'Reflections on the Hart and Wechsler Paradigm' (1994) 47 *Vanderbilt Law Review* 953, 966.

136 The positivist account of Hart, assuming judicial discretion in hard cases, can be understood in this way, see eg Hart, *The Concept of Law* (n 9) 307 (notes to the third edition, written in response to Dworkin).

137 Hans Christoph Grigoleit, 'Anforderungen des Privatrechts an die Rechtstheorie' in Matthias Jestaedt and Oliver Lepsius (eds), *Rechtswissenschaftstheorie* (Mohr Siebeck 2008). See also Greenawalt (n 4), passim.

(objectivist-teleological interpretation).<sup>138</sup> Second, judges can also fill any gaps by reference to prepositive insights gained by observational, deontological, or consequentialist thought. They become lawmakers – but unlike in the first permutation, this time without proceeding in a (purely) subjectivist manner.<sup>139</sup> Third, it means that the legislator can make incorrect or incoherent statements because lawmakers can be measured against the backdrop of productional objectivity. For the judge, there are two concurring and potentially binding orders: one positive, set by the legislator, and one prepositive, accessible through observational, deontological, or consequentialist modes of thought. It is this order that the legislator tries to concretize. Faced with these two concurring orders, judges must have a rule of how to decide potential conflicts. They can be deferential to the efforts of concretizations of the legislator and use the higher, prepositive order only to fill gaps. Even if the legislator failed in its undertaking of discovery, the judge would accept the legislative decision and abstain from correcting the statute or overruling the precedent. Given the assumption that the legislator actually wants to conform to the higher truth<sup>140</sup>, this deference is not self-evident. Indeed, why should the judge apply a law which is incorrect measured against the assumed productional objectivity? The other way of dealing with conflicts between both orders therefore is to let the higher, prepositive truth prevail, claiming the power for judges to correct a statute. Applied to the constitution, this position opens the door for a continuous update according to dominant popular views<sup>141</sup> so that the constitution becomes a ‘living instrument’<sup>142</sup>. In a way, there is a more or less free competition between statutory and adjudicative efforts

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138 eg Grigoleit, ‘Teleologik’ (n 114) 245.

139 From a deontological (rights-based) perspective Ronald Dworkin, ‘Hard Cases’ (1975) 88 *Harvard Law Review* 1057. From a consequentialist (pragmatic) perspective Posner, *The Problems of Jurisprudence* (n 7) 23.

140 A reasoning well known for positivized higher truths such as constitutional law and especially European Union law (for the latter see BGH NJW 2009, 427, 429 para 25).

141 On popular constitutionalism, see Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004) 3 ff.

142 eg Bruce Ackerman, ‘The Living Constitution’ (2007) 120 *Harvard Law Review* 1737, 1742. See also the chain novel conception of Dworkin, ‘Natural Law Revisited’ (n 22) 166–168 (on the metaphor), 168–169 (applying it to the law), or the Canadian equivalent: the living tree doctrine (eg *Edwards v Canada* (AG), 18 October 1929, [1930] AC 124, 1929 UKPC 86).

of concretization.<sup>143</sup> Of course, an Objectivist theory of interpretation does not need to fully embrace this consequence. Most German objectivist-teleological thinkers will grant legislative statements some weight or, put in other words, some margin of error, so that the argumentative burden for correcting a statute (or overruling a precedent) is high.<sup>144</sup> The need for legal certainty and the protection of legitimate expectations are some reasons for this (at least partial) deference in an objectivist logic<sup>145</sup>, and some subjectivist elements of thought will always persist, which give the democratically elected legislation special weight<sup>146</sup>. Indeed, cases in which we have such strong beliefs in objectivity that we feel confident to declare the legislative statement incorrect are rather rare. Judges feel that the road of deriving solutions from higher law is perilous and can lead to arbitrariness.

cc. Productional subjectivity and applicational subjectivity ('full nihilists')

The third permutation unites subjectivism (voluntarism) of both the productional and the applicational level. In this spirit, one assumes that there are no substantive prepositive principles that guide the legislator and that there is no possibility for the judge to apply the statements of the legislator

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143 cf Günter Hirsch, 'Auf dem Weg zum Richterstaat? Vom Verhältnis des Richters zum Gesetzgeber in unserer Zeit' (2007) 62 JZ 853, 855 (pointing to that a statute can be more intelligent than its author and an objectivized will of the statute). See also Grigoleit, 'Teleologik' (n 114) 249–256 (pointing to the normative relativity of each statutory enactment and the judicial competency to correct legislative statements but criticizing on 256 the idea of an 'objectivized will' as paradoxical). In short already Hans Christoph Grigoleit, 'Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik' (2008) 30 ZNR 259, 266. Even further Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982) 2 (seeing statutes as part of the common law and therefore coming close to free competition, with further references in fn 5). Likewise very free Richard A Posner, 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 5 (regarding 'authorities' such as statutes, precedents, and constitutions only as source of information and as limited constraints).

144 eg Grigoleit, 'Teleologik' (n 114) 256 (presumptive validity), 258 (particularly strict argumentative burden). Similarly already Grigoleit, 'Das historische Argument' (n 143) 266. See also, even though with a different argumentation, Hirsch (n 143), 855 ('some weight').

145 Critically Grigoleit, 'Teleologik' (n 114) 248.

146 *ibid* 256.

– either due to the vagueness of language<sup>147</sup> or because communication about normative issues is considered nonsensical<sup>148</sup>. Interpreting the law means recreating it. The self of the judge is as present as the self of the legislator. Authors with this spirit are sceptical of legal methodology and any sort of objectivity in adjudication.<sup>149</sup> Just like on the level of lawmaking, they criticize, but they cannot offer a positive account of how adjudication should actually work – insofar they could be labelled ‘full nihilists’, without reference to any broader Nihilistic movement.<sup>150</sup> According to that view, law is conceived as an inevitable expression of power, accepted by those who have the same interests or who are coerced to do so. It certainly is a merit of nihilistic currents to unveil certain legal power dynamics and to critically point to the persistence of the judicial self. However, by assuming ideology everywhere, nihilism is as simplistic as imagining the judge as the formalist mouth of the law.<sup>151</sup> It generalizes the ‘hard cases’ and is attractive as theory because distinguishing hard cases from

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- 147 cf Timothy Endicott, ‘Law and Language’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press 2002) 955.
- 148 In that sense the above-mentioned Circle of Vienna, eg Carnap (n 59), 220. For the (related) discussion of semantic challenges and a suggestion of how to overcome them, see Stavropoulos (n 109).
- 149 This *element* of thought can be found in different *theories* (which often also contain other elements of thought and other ways of thinking about objectivity): for sceptical German authors, each with a different focus, see eg Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Athenäum Fischer Taschenbuch Verlag 1972); Theodor Viehweg, *Topik und Jurisprudenz: Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung* (CH Beck 1974). For a critical outline, see generally Bydlinki, *Juristische Methodenlehre* (n 41) 140–175. In the US context, this is a position we often find in more political contributions of the Critical Legal Studies movement, eg Kennedy, *A Critique of Adjudication* (n 72) 155 (‘The judge is an ideological performer willy-nilly’), or 173 (‘The judge with an ideological preference has to deal with the structure of authorities as part of the medium in which he works to frame the question of law, of rule choice, and then to produce an argument that will generate the experience of internal and external constraint on the side he favors.’). See generally Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press 1987). See also (beyond the Critical Legal Studies movement) John Hasnas, ‘The Myth of the Rule of Law’ [1995] *Wisconsin Law Review* 199.
- 150 Posner, *The Problems of Jurisprudence* (n 7) 459 uses this label.
- 151 Similarly *ibid* (‘Moral and legal nihilism is as untenable as moral realism or legal formalism.’). On the classical formalist concept, see already *supra* (n 126–128).

common legal issues is itself a hard case.<sup>152</sup> But it thereby does not provide a complete picture of law – it makes one mode of thought a ‘theory of everything’<sup>153</sup> and thereby misses the point that communication between selves is actually possible. It disregards that the existence of dawn does not make us doubt the existence of day and night.<sup>154</sup> In doing so, it hastily generalizes about the nature of law from view reported cases, which are far from being representative for the totality of legal disputes. Let us suppose, for instance, that someone purchased a used bicycle and that – even though she paid – the seller sold it to a third party who offered a higher price. Let us further suppose that the law in such circumstances grants expectation damages.<sup>155</sup> Then, if these facts are undisputed, it is hard to imagine that practitioners would find a judgment granting expectation damages arbitrary. In the unlikely event that parties do not settle in such a clear case, the judgment would probably not be published anywhere. Given the inadequacy of nihilistic total scepticism, the real ideological battleground on the applicational level runs along the lines of Subjectivist and Objectivist interpretation – both being applicational objectivists.

dd. Productional objectivity and applicational subjectivity (‘partial nihilists’)

There is a fourth possible permutation: the combination of productional objectivity (nonvoluntarism) and applicational subjectivity (voluntarism). Indeed, a theory of *adjudication* can be objectivist, ie belief in the suppression of the judicial self, even though it is subjectivist on the applicational level – it just conceives adjudication as objectivized lawmaking. Some aspects in the thinking of Posner point in that direction in that he believes in the possibility of rationalizing decisions (especially through the consequentialist mode of thought on the productional level) but disregards legal interpretation and the strictly legal point of view.<sup>156</sup> At the same

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152 On hard cases, from different perspectives, see Hart, *The Concept of Law* (n 9) 130; Dworkin, ‘Hard Cases’ (n 139).

153 eg Weinberg (n 97) ix.

154 eg Claus-Wilhelm Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (De Gruyter 1999) 46.

155 eg German Civil Code (*BGB*), ss 280–283; US Uniform Commercial Code (*UCC*), ss 2-711–713.

156 Posner, *The Problems of Jurisprudence* (n 7) 459–461, especially 459 (‘[...] there is no such thing as “legal reasoning.”’), 460 (‘[...] there is no longer a useful



time, however, he also seems to give some weight to authorities<sup>157</sup> so that he might as well fall in the second permutation ('Objectivists'). Just like Posner assumes a (liberal) productional objectivity and disregards interpretation, other methodologically sceptical contributions might be interpreted as actually assuming some kind of (socialist) productional objectivity, which is why they could also be grouped in this permutation.<sup>158</sup> This is no coincidence since the thought of partial nihilists borrows from both Objectivism and nihilism. On the one hand, the combination of productional objectivity and applicational subjectivity leads to a position close to the position that assumes objectivity on both levels but favours free competition between them. Indeed, in both cases, the productional level dominates adjudication: thinking that you can disregard a statute because it does not align with productional objectivity or thinking that a statute has no proper meaning so that you directly refer to productional objectivity will produce quite similar outcomes. On the other hand, the position of partial nihilists also often merges with nihilistic critiques of adjudication, and it is often not clear whether a critique is fully nihilistic or based on some assumption of productional objectivity. Therefore, partial nihilism differs from the position of Objectivists in that it is not an interpretative theory, and it differs from full nihilism in that it believes in adjudicative objectivism. Even though Posner, for instance, is an *adjudicative* objectivist (and therefore rejects full nihilism<sup>159</sup>), he is (at least sometimes) an *applicational* or partial nihilist. It is a position at first glance counterintuitive since it assumes objectivity in the area of norm production in which most people would not, and it rejects objectivity in the area of interpretation in which most people are quite confident with regard to objectivity. But it is perfectly possible to think about adjudication in that way.

In conclusion, one can say that on the applicational level, objectivity-oriented modes of thought dominate. The only question is where to look at to gain this objectivity: to the subjectivity of the legislator or some sort

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sense in which law is interpretive.'). See also (in a similar liberal-pragmatic adjudicative spirit) John Hasnas, 'Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument' (1995) 45 *Duke Law Journal* 84.

157 Posner, 'Pragmatic Adjudication' (n 143) 5.

158 Unger (n 42) 143–178 (criticizing contract law from an altruistic value-basis), 199–208 (proposing social positive action for the whole legal system, even though vague).

159 Posner, *The Problems of Jurisprudence* (n 7) 459 ('Moral and legal nihilism is as untenable as moral realism or legal formalism.').

of further objectivity. Only full and partial nihilists are true subjectivists on the applicational level. But even partial nihilists believe in some sort of adjudicative objectivity, leaving only the full nihilists as adjudicative subjectivists. Having presented all possible permutations, we can summarize our insights in the following table, which presents different modes of thought according to the presence of the self (objectivity vs subjectivity) and the level within the legal process (norm production vs norm application):

	Productional Objectivity	Productional Subjectivity
Applicational Objectivity	<i>'Objectivists'</i>	<i>'Subjectivists'</i>
Applicational Subjectivity	<i>partial nihilists</i>	<i>full nihilists</i>

c. *Parallels in private lawmaking*

With the previously drawn distinctions in mind, we are again able to point to some parallels in the interpretation of heteronomous and autonomous law and reproduce the permutations of the previous lines in the area of contract law. Indeed, adjudication does not only require a theory of statutory interpretation but also a theory of contract interpretation. Therefore, in theories of contract law, we also find a combination of productional subjectivity and applicational objectivity ('Subjectivists'), a combination of productional objectivity and applicational objectivity ('Objectivists'), a combination of productional subjectivity and applicational subjectivity ('full nihilists'), and a combination of productional objectivity and applicational subjectivity ('partial nihilists'). We understand these permutations again as possible *elements* of different theories, not as exclusive theories on their own.

Let us start with the first permutation, ie with those that obtain applicational objectivity by reference to another self ('Subjectivists'). We have seen that they often worry about judicial activism and the threat to democracy. This activism can also be conceived as a threat to the autonomous lawmaking of the contracting parties. Strict rules of interpretation and a (textual) focus on the law itself are means to counter the danger of rewriting the contract for the parties. In that logic, a literal interpretation of

the contract, excluding, for instance, evidence outside its ‘four corners’<sup>160</sup>, might seem convincing – even though other Subjectivists might be fearful to miss the real intentions of the parties. Thus, even the debate between intentionalists and meaning-adherents is somehow reproduced on the contractual level. Furthermore, Subjectivists (though intentionalists not necessarily<sup>161</sup>) will probably be hostile to reinterpreting the contract when circumstances have changed in the application of some sort of *clausula rebus sic stantibus*.<sup>162</sup> They will argue that we do not possess any objective criteria to reshape the contract as the law of the parties and that we should not do so because the contract is in itself worthy of respect. Just as they refer to the democratic legislative process to update statutes, they can point to the possibility (and necessity) of renegotiating a contract. The example therefore shows how the presence of subjectivity on the productional level and the respect for this subjectivity on the applicational level go hand in hand in contract law as well.

Adherents to the second permutation, ie the combination of productional and applicational objectivism (‘Objectivists’), will probably look at these institutions from a different perspective. Objectivists will probably be on the side of those that would like to receive broader circumstantial evidence. The contract is just a concretization of a higher truth – why not bring it as close to it as possible? Principles such as good faith, of which *clausula rebus sic stantibus* is just one application, will provide for some flexibility and allow updating the parties’ stipulations in accordance with their true and present intent.<sup>163</sup>

Adherents of the third permutation (‘full nihilists’) would yet again have a different look on these institutions. They might see contract law as a pure power relation without content on its own and from this perspective, they can only point to the ongoing power struggle.

Mostly, however, this power relation is analysed in its dependence on a dominant (capitalist) ideology. Adherents to the Critical Legal Studies movement, for instance, characterize the contractual link between parties as ‘unsentimental money-making’<sup>164</sup> and thereby go beyond the characterization of the contract as a power relation: they also criticize how the deter-

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160 *State v Wells*, 253 La 925, 221 So2d 50 (1969); KY Supreme Court, *Hartell v Hartell*, 2007-CA-000498-MR.

161 On dynamic statutory interpretation by means of subjectivist-historical arguments, see Bauer (n 115) (§ 3).

162 See German Civil Code (*BGB*), s 313 (codifying this principle).

163 eg *Krell v Henry*, [1903] 2 KB 740 (‘coronation case’).

164 Unger (n 42) 171.

minative power is exercised. In other words, they fall in the category of the fourth permutation ('partial nihilists') since they believe in some sort of productional objectivity, based on substantive values such as altruism or solidarity. From that viewpoint, they will probably embrace an institution such as *clausula rebus sic stantibus* as fairness-based counter-principle that challenges the will-based dominant (liberal) doctrine.<sup>165</sup>

### III. *Why and How to Think about Objectivity*

After having distinguished productional and applicational objectivity, we can now turn to the question of why and how to think about them. I will first answer the 'why' by explaining the importance of productional and applicational objectivity as one source of legitimacy. In that perception, legitimacy is a *relative* concept, which is based on procedure and substance alike (1.). I will then address the 'how' of achieving objectivity and suggest a way to define the scope of objectivity within the law despite all epistemological disputes. I propose that the mode of thought that we should apply depends on the position the legal system itself, and especially the constitution, takes. I call this method *Constitutional Pragmatism* (2.).

#### 1. *Relativity of legitimacy*

Since we explain the importance of objectivity in relation to the notion of legitimacy, we will yet again start this part with some notional clarifications. This is all the more important because much of the confusion in debates about legitimacy stems from notional misunderstandings. We will show how the decline in the belief in objectivity redefined the meaning of legitimacy, just as it also triggered a debate – the positivism-debate – about the definition of law (a.). We will then shift our focus from the meaning to the criterion of legitimacy. In that context, we will see that legitimacy can either come from substantive or procedural criteria and that the decline of objectivity triggered a shift from substance to procedure (b.). However, just as previous theories neglected the necessity of procedure, current approaches neglect the necessity of substance. Legitimacy depends on objectivity in various ways, and objectivity depends on different modes

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165 eg *ibid* 155, in general on 143–178 analysing dominant contract law theories from a Critical Legal Studies perspective.

of thought. Where these modes of thought are inadequate, the source will stem from procedure. Based on these observations, we will present legitimacy as a relative concept (c.).

*a. The meaning of legitimacy and its connection to objectivity*

It is important to distinguish two meanings of legitimacy. On the first account of legitimacy, a decision (or social order) is legitimate when it is acceptable or (at least to some extent) justified in terms of justice and fairness. This definition of legitimacy is normative (*normative legitimacy*). By contrast, on the second account of legitimacy, a decision (or social order) is legitimate when the addressees of the decision (or the individuals constituting the social order – ‘the people’) accept it. This definition of legitimacy is descriptive or empirical (*empirical legitimacy*).<sup>166</sup> Normative legitimacy answers the question what people *should* accept (acceptability), whereas empirical legitimacy answers the question what people *in fact* accept (acceptance). In other words, normative legitimacy refers to what *is* right, empirical legitimacy refers to *beliefs* in what is right. In that sense, one could say, the choice of meaning changes the research perspective from moral philosophy to social sciences.<sup>167</sup> Yet again, questions about the definition of a concept (legitimacy, law, etc) are best understood as questions of research agendas.<sup>168</sup>

Of course, the relationship to the self – the take on objectivity – influences how legitimacy is defined. Strong beliefs in objectivity make it much more likely to adopt a normative meaning of legitimacy (or a meaning of law that includes prepositive concepts) because a normative discourse is not seen as nonsensical or at least unscientific.<sup>169</sup> We already pointed to two successive developments which lead to a decline of objectivity – the disintegration of the *res publica christiana* and scientific positivism.<sup>170</sup> These

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166 cf Peter Fabienne, ‘Political Legitimacy’ (2017) <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>> accessed 1 October 2020 (under 1.). On that distinction, see also Jürgen Habermas, ‘Legitimationsprobleme im modernen Staat’ (1976) 7 *Politische Vierteljahresschrift Sonderhefte* 39, 58; David Beetham, *The Legitimation of Power* (2nd edn, Palgrave Macmillan 2013) 13–14.

167 Beetham (n 166) 13–14. See also Habermas, ‘Legitimationsprobleme’ (n 166) 58.

168 In that way, we also interpreted the positivist struggle over the meaning of ‘law’. See supra (text to n 8–14).

169 See Carnap (n 59), 220; Wittgenstein (n 59) para 6.53.

170 On that see already supra (n 49–52).

developments influenced the research agenda of Modernity: Max Weber paved the way to an empirical, value-free approach to social sciences in general and legitimacy in particular in that he focused on people's 'belief in legitimacy' (*Legitimitätsglauben*).<sup>171</sup> But he still used the notion of legitimacy with a normative meaning. Otherwise, if the notion of legitimacy had already been defined in terms of beliefs, the additional use of 'belief' would indeed not make any sense and lead to a duplication ('belief in belief').<sup>172</sup> Only in a second step, the definition adapted to the new research focus. In contemporary contributions with an empirical research focus, legitimacy is often directly defined in empirical terms, as acceptance or beliefs in moral correctness.<sup>173</sup> This does not mean that all normative use of legitimacy has disappeared<sup>174</sup>, but at least in social sciences, the focus and predominant meaning have shifted towards empiricism.

*b. The criterion of legitimacy and its connection to objectivity*

Let us now turn to the criterion (source<sup>175</sup>, reason) of legitimacy. The criterion of legitimacy answers the question why a decision (or social order) is legitimate. Given the two different meanings of legitimacy, we are actually facing two different questions: why is the decision (or social order) justified (normative legitimacy), and why is it accepted (empirical legitimacy)? In both cases, the criterion of legitimacy can either be substantive, ie based on the correct output according to a set of values (*substantive*

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171 Weber (n 5) 122 pt 1 ch III § 1.

172 The fact that the combination of 'belief' and 'legitimacy' in 'belief in legitimacy' (*Legitimitätsglauben*) actually presupposes a normative meaning of legitimacy is mostly ignored. See, for instance, Beetham (n 166) 8.

173 eg Mattei Dogan, 'Conceptions of Legitimacy' in Mary Hawkesworth and Maurice Kogan (eds), *Encyclopedia of Government and Politics*, vol 1 (2nd edn, Routledge 2004) 110; Seymour M Lipset, *Political Man: The Social Basis of Politics* (Doubleday & Company 1959) 77; John H Herz, 'Legitimacy: Can We Retrieve It?' (1978) 10 *Comparative Politics* 317, 318; Bruce Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (Columbia University Press 2009).

174 For a normative use, see eg John Rawls, *A Theory of Justice* (2nd edn, Belknap 1999) 31, 319, 323 (even though his work is not centred on legitimacy but rather on notions such as justice and fairness). See also Calabresi, *Common Law* (n 143) 91; Habermas, *Faktizität und Geltung* (n 67) 350 ff; Beetham (n 166) 11, 15–16.

175 On that terminology, see Fabienne (n 166) (under 3., but limited to normative legitimacy and with different sub-classifications).

legitimacy), or procedural, ie based on some input (*procedural legitimacy*).<sup>176</sup> Given this, we understand statements about legitimacy as pairs of a certain meaning and a certain criterion, and we risk misunderstanding if we do not clarify the precise meaning first.<sup>177</sup> For instance, the affirmation ‘this system is legitimate because it complies with Christian values’ understands legitimacy in substantive terms, but it is unclear whether the speaker uses ‘legitimate’ in a normative way (‘this system is just because...’) or in an empirical way (‘this system is accepted by the people because...’). On both levels of meaning, the distinction between substantive and procedural criterion makes sense.

Again, it is easy to see the connection between objectivity and the criterion of legitimacy. If we hold strong beliefs in some sort of objectivity, we will evaluate a system against the backdrop of these beliefs. We will require acceptance because we can invoke some sort of objectivity. The self of the decisionmaker disappears because there is a common reference-point (objectivity) for the decisionmaker and the addressee (inside perspective) or the decisionmaker and an external observer who evaluates the decision (outside perspective). Acceptance and procedure in general might be relevant but only insofar as they serve substantive goals.<sup>178</sup> Let us now consider again what happens if our beliefs in objectivity decline,

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176 On substantive and procedural legitimacy particularly clear Thomas Christiano, ‘The Authority of Democracy’ (2004) 12 *Journal of Political Philosophy* 266, 266 (in the context of democratic legitimacy). On the (parallel) distinction between output- and input-legitimacy Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 6, 7 ff (input-legitimacy), 10 ff (output-legitimacy); Fritz W Scharpf, ‘Deconstitutionalization and Majority-Rule: A Democratic Vision for Europe’ (2016) 1–2 <<https://d-nb.info/1124901450/34>> accessed 21 December 2020. Based on Abraham Lincoln’s Gettysburg Address (1863), Scharpf describes both elements as part of democracy. However, whether output-legitimacy in terms of the promotion of the ‘common welfare’ or the ‘protection of life, liberty, and property’ is required by democracy, is a definitional question. The inclusive definition should not mask potential conflicts between majority vote and individual rights, should not lead to the conclusion that output-legitimacy is sufficient for democracy, and should not lead to the assumption that non-democratic systems do not pursue output-legitimacy.

177 Fabienne (n 166) (under 1.).

178 For instance, according to German Rules on Administrative Procedure (*VwVfG*), s 46, errors in the administrative procedure tend to be irrelevant if they cannot be consequential for the result, see Christian Quabeck, *Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung* (Mohr Siebeck 2010) 18 ff. In the adjudicative context, German Rules of Criminal Procedure (*StPO*), s 337, can be interpreted as embracing a vision of the serving function of procedure.

if we live in a pluralistic society in which we disagree on many normative issues. Then, the common reference point of decisionmaker and addressee, of decisionmaker and observer disappears. The self persists. In that case, if more than compliance out of fear, more than power-based decisionmaking is wanted, in short: if a criterion of legitimacy has to be found, the self has to be tamed or embraced. In today's societies, taming the self seems to be more appealing than embracing it (even though, as the pardoning power has illustrated, corners of embracing it persist). Therefore, procedure is of utmost importance. It loses its serving function<sup>179</sup> and becomes the predominant criterion of legitimacy in normative and empirical research alike: normative contributions point to the importance of fair procedure to justify decisions<sup>180</sup>, and empirical contributions show that for the acceptance of people, procedure is more important than substance<sup>181</sup>. This is not to say that all substantive criteria disappeared.<sup>182</sup> But it indicates a shift in focus from substantive to procedural modes of thought.

The attractiveness of procedure gives us the impression that we can avoid taking substantive normative positions and – in a way – empiricize the normative battlefield. This is particularly visible in the approach of Beetham, sometimes presented as a third way: the Beetham-approach explicitly defines legitimacy in normative terms but gives predominant weight to the possibility of justifying a regime in terms of the specific beliefs and values held by the

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179 This is again reflected in German administrative law, where so-called absolute procedural rights are established under the influence of EU law, so that procedure does not only have a serving function any more, see Angela Schwerdtfeger, *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention: Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts* (Mohr Siebeck 2010) 232 ff. We can, once again, draw a parallel to German Rules of Criminal Procedure (*StPO*), s 338.

180 eg Niklas Luhmann, *Legitimation durch Verfahren* (9th edn, Suhrkamp 2013); Habermas, *Faktizität und Geltung* (n 67) 350 ff, especially 364 ('diskursive Rationalisierung').

181 From an empirical account, see Tom R Tyler, *Why People Obey the Law* (Yale University Press 1990). See also Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) *57 Annual Review of Psychology* 375; Tom R Tyler and Jonathan Jackson, 'Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement' (2013) *20 Psychology, Public Policy and Law* 78.

182 eg Rawls (n 174) 45 ('substantive moral conceptions'), even though he gains his principles of substantial fairness by applying a procedural-contractarian thought experiment.



people concerned.<sup>183</sup> It takes a supposedly internal perspective<sup>184</sup>, but it does not take this internal perspective seriously because it transforms it into a criterion of external evaluation.<sup>185</sup> This is true for both ways in which ‘beliefs’ as normative criterion of legitimacy can be understood. We can first understand the reference to beliefs as a criterion of substantive legitimacy, based on observational objectivity: we believe that for a specific people, the predominant values are actually the right values.<sup>186</sup> We embrace these values for a given space at a given time in history. But we still do not adopt a completely coherent internal perspective since we limit system-specific religious claims of universal aspiration to a concrete region and time. We are actually bound to do so when we compare different systems from an overarching perspective based on the proposed criterion. Second, we can understand ‘beliefs’ as a criterion of procedural legitimacy, which defers to the self of a people: we believe that a specific people should be able to choose their values, no matter whether they are right. We take their inside perspective just as a means of being deferential to other selves, but in comparing and evaluating different systems, we actually look at them from the outside.<sup>187</sup> It is this latter, more distanced perspective that seems to inspire the Beetham approach. The specificity consists in transforming the empirical meaning of legitimacy (beliefs in justification or acceptance) into its normative criterion

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183 Beetham (n 166) 11 (‘A given power relationship is not legitimate because people believe in its legitimacy, but because it can be *justified in terms of* their beliefs.’), 15–16 (announcing his three criteria: *legality, justifiability* in terms of beliefs, on which we focus here, and evidence of *consent*, which is another procedural element). See also Habermas, ‘Legitimationsprobleme’ (n 166) 58–59, who takes the internal perspective more seriously (on that point in a moment).

184 On the internal perspective with regard to law eg Dworkin, ‘Hard Cases’ (n 139) 1090 (‘internal logic of the law’). See also Douglas E Litowitz, ‘Internal versus External Perspectives on Law: Toward Mediation’ (1998) 26 Florida State University Law Review 127, 127–128; Michael Mandel, ‘Dworkin, Hart, and the Problem of Theoretical Perspectives’ (1979) 14 Law & Society Review 57, 59–60. In a particularly narrow sense Ulfrid Neumann, *Wahrheit im Recht: Zu Problematik und Legitimität einer fragwürdigen Denkform* (2004 Nomos) 57–58. In the context of legitimacy (and with specific understanding) Herz (n 173), 318–319; Christiano (n 176), 269.

185 Beetham (n 166) 15, on that point deviating from Habermas, ‘Legitimationsprobleme’ (n 166) 59. The latter emphasizes the problem that one acts historically unjust by approaching different systems with a general and abstract concept of legitimacy (‘Wenn man Maßstäbe diskursiver Rechtfertigung an traditionale Gesellschaften heranträgt, verhält man sich historisch “ungerecht”.’).

186 This is the correct-law-approach described above, see *supra* (n 21).

187 Critically Habermas, ‘Legitimationsprobleme’ (n 166) 59.

of procedural justice.<sup>188</sup> Seen in either way, it is not a ‘third way’ of talking about legitimacy but one that can be captured by the previously outlined categories and modes of thought. It is important, though, to pay attention to the different functions that ‘acceptance’ can fulfil in relation to legitimacy: first, acceptance is the meaning of empirical legitimacy (‘this system is accepted by the people’). Second, it can be the *general* procedural criterion of normative legitimacy (‘this system is justified because it is accepted by the people’).<sup>189</sup> Third, acceptance can refer to a responsive (democratic) mode of decisionmaking that enables changes according to changing acceptance. In that case, it is used as a *specific* procedural criterion of legitimacy. This responsiveness-acceptance can in turn occur in empirical affirmations (‘this system is accepted by the people because it is responsive to their acceptance’), and in normative settings (‘this system is justified because it is responsive to the acceptance of the people’).

Even though it is important to distinguish ‘meaning’ from ‘criterion’ and examine separately the shifts from normativity to empiricism and from substance to procedure, it is at the same time worthwhile to point to some connections. Indeed, both shifts reinforce each other: defining the concept of legitimacy in terms of acceptance might create some unconscious bias in favour of acceptance as a normative criterion, and the lack of substantive legitimacy redefines the research agenda in empirical terms. Behind both developments, we see the (theoretical) decline of objectivity-oriented modes of thought.

### c. A field-specific approach

The previous outline has shown that our take on legitimacy depends on our take on objectivity. In other words, legitimacy is a relative notion, which we best understand not in absolute terms but in relation to objectivity (*relativity of legitimacy I*): a strong belief in objectivity implies a substantive criterion of legitimacy, whereas subjectivity requires procedural legitimacy.<sup>190</sup> It is the decline of objectivity which leads to the flourishing of procedural approaches towards legitimacy. However, we have to re-examine this procedure-centrism. Indeed, even though objectivity has de-

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188 Therefore critically Fabienne (n 166) (under 1.).

189 Beetham (n 166) 11, 13–14, 16; Habermas, ‘Legitimationsprobleme’ (n 166) 58–59.

190 Similarly Neumann (n 184) 41–42 (who sees truth and authority as alternative sources of legitimacy).

clined over time, it has not disappeared. Especially beyond the theoretical meta-discourse, objectivity is still present, and objectivity-oriented modes of thought provide arguments for substantive legitimacy. Procedure and substance legitimize decisions and systems together, depending on where objectivity is still alive.<sup>191</sup> In an area in which (productional or applicational) objectivity is dominant, substantive legitimacy is more important. In contrast, in an area in which we perceive legal commands as discretionary, procedural legitimacy has special significance. Both criteria of legitimacy are interconnected like communicating vessels: the stronger the first, the weaker the second, and vice versa. Therefore, a purely procedural approach to legitimacy is inadequate and incomplete. Thus, legitimacy is a relative concept also insofar as it requires both procedure *and* substance, depending on the specific field in question (*relativity of legitimacy II*).<sup>192</sup> It is precisely this claim that we will develop in what follows. To do so, I will first concentrate on empirical legitimacy and then turn to normative legitimacy.

#### aa. Field-specificity and empirical legitimacy

Empirical research has shown that people care about substance but that they actually care more about procedure.<sup>193</sup> Focusing on procedure alone does not, even on the basis of the research conducted so far, allow us to fully explain people's acceptance of a decision in particular or of a system as a whole. People still care about substance to some extent. Understanding legitimacy as a relative, field-specific concept allows us to add more nuances to this research. Indeed, it is likely that people do not always

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191 Against monistic explanations of democratic legitimacy also Christiano (n 176), *passim*, especially 266–269, who convincingly points to the need for both substantive and procedural legitimacy in the context of democracy but does not (explicitly) link both criteria to objectivity and the fields in which they are dominant. In order to describe this connection, I prefer the term 'relativity' or 'relative' over 'dualism' or 'dualistic' (269). Both substance and procedure do not randomly confer legitimacy but in relation to the account of objectivity in a specific field.

192 Just on an aside: legitimacy is also a relative notion in that it comes in degrees, see eg Dogan (n 173) 114. See also Herz (n 173), 320 (in the context of empirical legitimacy, even though the degree-view is also appropriate for normative legitimacy). We could call this *relativity of legitimacy III*.

193 From an empirical account, see Tyler, *Why People Obey the Law* (n 181). See also Tyler, 'Psychological Perspectives' (n 181); Tyler and Jackson (n 181).

care more about procedure. Rather, the importance of substance and procedure for legitimacy depends on their beliefs in objectivity, which in turn depend on the area of law. Three examples will illustrate this point.

The first one shows how strong beliefs in productional objectivity influence the acceptance of a legal decision. Let us suppose the legislator decides to mitigate the economic consequences of the Corona-pandemic by means of private law, eg by temporarily granting a right to refuse performance, by suspending the right to terminate a long term lease for a certain time, or by extending the time for payment.<sup>194</sup> If someone is a neo-formalist and conceives private law as a concretization of corrective justice and private autonomy<sup>195</sup> (contractual subjectivism leading to legislative objectivism, predominantly based on a deontological mode of thought<sup>196</sup>), she will probably reject these measures as illegitimate because they deviate from the ‘correct’ solution. In the same way, someone who believes in the possibility of objectivity based on observation, ie who is particularly deferential to the spontaneous order of the market<sup>197</sup>, will perceive these measures as an illegitimate governmental intervention. Finally, someone who pursues a consequentialist mode of thought<sup>198</sup> might conclude that these measures are actually economically reasonable to avoid the high costs of bankruptcies and therefore legitimate. For all of the three, the fact that these measures were enacted through the procedure of democratic rulemaking will consequently play a subordinate role. In contrast, if someone underlines that private law always has distributive implications, ie that rulemaking in this area requires an open-ended balancing of values<sup>199</sup>,

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194 See the German contract law measures to mitigate the first wave of Corona in spring 2020, contained in the German Introductory Law to the Civil Code (*EGBGB*), art 240 ss 1–3. Out of the excessive literature on Private Law and Corona, see eg Caspar Behme, ‘Miniatur: Krisenbewältigung durch Zivilrecht – Rechtsökonomisch sinnvolle Anpassungen des Leistungsstörungenrechts infolge der Corona-Pandemie’ (2020) 6 *ZfPW* 257.

195 Weinrib, *The Idea of Private Law* (n 36); Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (n 36); Rödl (n 40).

196 See supra (text to n 106–108).

197 See supra (n 26).

198 See supra (text to n 43–52).

199 eg Coleman and Ripstein (n 98). See also Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press 1970) 198 ff; Calabresi and Bobbitt (n 46) 135; Calabresi, *The Future of Law and Economics* (n 46) 1 ff, 131 ff, 157 ff. Specifically in the context of Corona also Sebastian Guidi and Nahuel Maisley, ‘Who Should Pay for COVID-19? The Inescapable Normativity of International Law’ (2021) 96 *New York University Law Review* 375 (for public international law but drawing parallels to private law).

and that the previously existing rules actually freeze a more or less contingent compromise in favour of some (capitalist) ideology<sup>200</sup>, one is more prone to find legitimacy in the democratic procedure that produced the Corona-measures. These different approaches are not only representative of academic legal thought. They unconsciously also explain why citizens accept one policy and reject another. What I illustrated concerning the discussion of Corona-measures is true in many other fields, one of them being the legitimacy of arbitral orders and *lex mercatoria*: if conceived as a spontaneous order (observational objectivity), the lack of democratic legitimacy is less urgent than if arbitral rules are themselves conceived as discretionary.<sup>201</sup>

The second example illustrates how strong beliefs in applicational objectivity influence the legitimacy of the US Supreme Court. For a while now, people talk about its legitimacy crisis<sup>202</sup>, which is mainly formulated in terms of the so-called countermajoritarian difficulty<sup>203</sup>. However, this countermajoritarian difficulty only affects the legitimacy of the Supreme Court if people believe that the self of the judges plays an important role in the decisionmaking process, ie if they perceive their decisionmaking as subjective and political. Then, procedure is the only way to tame the different selves, and of course, in terms of democracy, the legitimacy of nine appointed lifetime Justices has to pale compared to the regularly

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200 Unger (n 42) 143–178.

201 For an observational account, see Fabio Núñez del Prado Ch, ‘The Fatal Leviathan: A Hayekian Perspective of Lex Mercatoria in Civil Law Countries’ (2019) 31 *Pace International Law Review* 423; Núñez del Prado (n 26) (§ 11); Emmanuel Gaillard, *Aspects philosophiques du droit de l’arbitrage international* (Académie de droit international de La Haye, Martinus Nijhoff Publishers 2008) 60 ff. For a rather deontological account, see Santiago Oñate, ‘International Arbitration as a Project of World Order: Reimagining the Legal Foundations of International Arbitration’ (§ 12).

202 Samuel Moyn, ‘The Court Is Not Your Friend’ (2020) <<http://www.dissentmagazine.org/article/the-court-is-not-your-friend>> accessed 1 October 2020. For a more nuanced analysis Richard H Fallon Jr *Law and Legitimacy in the Supreme Court* (Harvard University Press 2018) (relativizing the presumed crisis of legitimacy of the US Supreme Court).

203 On that recently Moyn (n 202). See generally Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Company 1962); Stanley C Brubaker, ‘The Countermajoritarian Difficulty: Tradition Versus Original Meaning’ in Kenneth D Ward and Cecilia R Castillo (eds), *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory* (State University of New York Press 2005).

ected bodies of parliaments.<sup>204</sup> In contrast, if one assumes that the self of the judges can largely be suppressed, it is not the procedure of democratic voting that confers legitimacy but the objective reference point of the law. Then, the Supreme Court is the trustee of another self: the people that spoke in the process of ‘higher lawmaking’<sup>205</sup>, the *pouvoir constituant*<sup>206</sup>. It guarantees the ‘government of laws and not of men’<sup>207</sup>. In short, for people who believe that the application of law can be objectivized, the countermajoritarian difficulty and the lack of democratic legitimacy are beside the point.<sup>208</sup> They might still differ in their perception of productional objectivity, which in turn influences their methodological position on the applicational level. Concretely, they might argue in favour of a strict orientation on previous enactments of law (‘Subjectivists’) or favour an interpretative style that takes into account prepositive principles and values (‘Objectivists’).<sup>209</sup> But they will be united in primarily focusing on substantive legitimacy on the level of the application of law (applicational objectivity).

So far, we referred to the legitimacy of the US Supreme Court as such. Let us give a third example that examines the legitimacy of a particular decision. This will allow combining issues of productional and applicational objectivity and thereby help to summarize the argument. In *Roe v Wade*<sup>210</sup>,

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204 On judicial restraint and monistic procedural accounts of legitimacy Christiano (n 176), 266–267.

205 Bruce Ackerman, *We The People: Foundations*, vol 1 (Harvard University Press 1991) 6.

206 cf Emmanuel J Sieyès, *Qu’est-ce que le Tiers état?* (Éditions du Boucher 2002) 53 ch V (*pouvoir constituant*); Roger Bonnard, *Les actes constitutionnels de 1940* (R Pichon et R Durand-Auzias 1942) 7 (*pouvoir originaire*), 17 (*pouvoir institué*). See generally Arnaud Pillouer, ‘Pouvoir constituant originaire et pouvoir constituant dérivé: à propos de l’émergence d’une distinction conceptuelle’ (2005/2006) 25/26 *Revue d’histoire des Facultés de droit et de la science juridique* 123; Carl Schmitt, *Verfassungslehre* (11th edn, Duncker & Humblot 2017) 75 ff, 102 f.

207 See Constitution of Massachusetts, art XXX (pt I).

208 For a similar substantive legitimation of the power of courts in general, see Calabresi, *Common Law* (n 143) 94–98. On 96–97, he also points to the people actually wanting broad judicial power based on substantive legitimacy. By this move, he embraces a procedural element on a very abstract level and in a way anticipates (and generalizes) Ackerman’s dualist legitimation of constitutional adjudication (see supra n 205).

209 See supra (text to n 114, 120–146).

210 *Roe v Wade*, 410 US 113 (1973). Later relativized, see *Planned Parenthood v Casey*, 505 US 833 (1992).

the US Supreme Court recognized a ‘right of privacy’<sup>211</sup>, which is ‘broad enough to encompass a woman’s decision whether or not to terminate her pregnancy’<sup>212</sup>. If people hold strong beliefs in terms of productional objectivity, substantive arguments will determine the legitimacy of the decision. For instance, if one firmly believes, due to religious convictions, that abortion is wrong, *Roe v Wade* must seem illegitimate. However, if one believes that there is a (natural law) right to abortion, then *Roe v Wade* must seem legitimate. In both cases, it is not the (democratic) procedure that determines legitimacy but the substantive argument. Indeed, even a statute banning or allowing abortion would seem legitimate or illegitimate, no matter its preeminent democratic legitimacy. In contrast, if one does not believe in productional objectivity, in prepositive principles, then the only question is whether the procedure of higher lawmaking decided the issue (whether the right to abortion can be found in the Constitution) or whether the day-to-day procedure of democratic lawmaking should apply. It is still substantive arguments of constitutional interpretation that decide the issue of legitimacy. Only if beliefs in applicational objectivity come in their turn to an end, the lack of democratic procedural legitimacy retrieves importance.

In conclusion, empirical legitimacy is based on substance and procedure alike, depending on how strong beliefs in objectivity are. It is true, empirical research has shown, so far, a dominance of procedural elements. But people not having particularly strong beliefs in objectivity in the area examined might explain this. Tyler, for instance, focused on policing.<sup>213</sup> This might well be an area which does not involve strong beliefs on the productional level and in which broad discretion is granted to the police on the applicational level. In this setting, respecting a fair procedure is of utmost importance.

#### bb. Field-specificity and normative legitimacy

So far, we discussed the relativity of empirical legitimacy. We will now turn to normative legitimacy and demonstrate why it is best conceived as a relative concept as well. Normative legitimacy requires substance, not only

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211 *Roe v Wade*, 410 US 113 (1973) 152.

212 *ibid* 153.

213 cf Tyler, *Why People Obey the Law* (n 181).

if we take the external perspective on a (legal) system but also if we take the internal view. I will briefly explain both in what follows.

If we evaluate the legitimacy of a legal system from the *external* perspective, presumably without our own substantive considerations, we face a dilemma. We can either give particular weight to the (democratic) procedures at place. But then, we equate democracy and legitimacy and ignore a broader procedural criterion: the right of a people to determine its own form of government.<sup>214</sup> Or we can make people's beliefs the normative (procedural) criterion of legitimacy.<sup>215</sup> But then, we lose any possibility of criticizing the legitimacy of barbaric systems as long as they are supported by the people.<sup>216</sup> In addition, in focusing on presumably value-neutral criteria of procedure, we dissimulate its value-implications.<sup>217</sup> A full account of normative legitimacy thus has to be based on substantive and procedural criteria alike.

Let us now turn to the *internal* perspective<sup>218</sup>. If we want to criticize the legitimacy of a decision or an institution from the inside, we have to take into account substantive criteria of legitimacy as well. Indeed, as the discussion of the previously introduced three examples – Corona-aid by means of private law, the legitimacy of the US Supreme Court in general, and *Roe v Wade* in particular – has shown, many arguments in favour or against legitimacy are substantive in nature.<sup>219</sup> We discussed these examples in the context of empirical legitimacy so that it was all about beliefs in objectivity. But once we take the internal perspective, these beliefs become objective truths and grounds for substantive arguments.

It is important to see the difference to the Beetham-approach that takes the internal perspective only as a means of external evaluation<sup>220</sup> and there-

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214 On the right of self-determination, see also UN Charta, ch 1 art 1(2). The approach of Beetham (n 166) 11, 16 is – in the end – also based on this normative assumption.

215 See *ibid* 11, 16.

216 cf Christiano (n 176), 287–290. It is in this context of extremely unjust systems that we also have to see the so-called ‘formula of Radbruch’, see Radbruch (n 11), 107.

217 cf eg Robert S Summers, ‘Evaluating and Improving Legal Processes: A Plea for Process Values’ (1974-1975) 60 *Cornell Law Review* 1, 3–4 (‘process values’). See also Michael Bayles, ‘Principles for Legal Procedure’ (1986) 5 *Law and Philosophy* 33, 50–57.

218 On the internal perspective, see *supra* (n 184).

219 Christiano (n 176), 269.

220 Beetham (n 166) 11, 13–16, and *supra* (text to n 183–188).



by does not take it seriously.<sup>221</sup> Instead of saying that a system is legitimate because it lives up to the values in which people believe (broad procedural criterion), the truly internal perspective argues on the basis of these values directly (substantive criteria). Of course, by doing so, by taking the internal perspective seriously, we can evaluate a system only in terms of its own internal values. We lose the possibility to switch perspectives, and we actually have to choose one perspective.<sup>222</sup> This might be a problem for the social scientist or the moral philosopher. But it is not a problem for the lawyer since the choice of internal perspective is determined by the legal system in which she operates. This brings us to Constitutional Pragmatism.

## 2. *Constitutional Pragmatism*

So far, we have seen that there are different modes of thought which – taken seriously – allow us to obtain objectivity and to deal with subjectivity. We have also seen that legitimacy depends on objectivity since it is the possibility of objectivity which decides over substantive or procedural means of legitimation. However, up to now, we did not provide any answer to how we determine which mode of thought, which criterion of legitimacy, is adequate for which field. What I call *Constitutional Pragmatism* suggests itself as one method to do so. It is apt for the lawyer that operates within a specific legal system. In the following, I will briefly sketch out its Pragmatic (a.) and its constitutional (b.) leg.

### a. *The Pragmatic leg of Constitutional Pragmatism*

The approach that I suggest is, in important aspects, Pragmatic in the sense of classical philosophical Pragmatism, to which I refer (again) with an upper-case letter – even though, of course, not all positions of this quite heterogeneous movement are part of Constitutional Pragmatism.

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221 cf also the critique of Habermas, ‘Legitimationsprobleme’ (n 166) 58–59 (in detail text to n 187).

222 This is precisely why Beetham (n 166) 15 criticizes Habermas, ‘Legitimationsprobleme’ (n 166) 58–59.

aa. Three core aspects of philosophical Pragmatism

For the purpose of this essay, it is enough to concentrate on three core aspects of philosophical Pragmatism.<sup>223</sup> The first aspect refers to the goal of every inquiry, which is described as the ‘settlement of opinion’<sup>224</sup>, the transition from doubt to belief. It is less ambitious than approaches that seek ‘truth’ and more ambitious than nihilists who reject all possibility of knowledge.<sup>225</sup> In that sense, it aims for a workable compromise between truth-seekers and sceptics, for something as ‘inter-subjectivity’<sup>226</sup>, something plausible enough to silence doubt. I will call this aspect *belief-centrism*. The second aspect refers to the preliminary character of beliefs. They are subject to modification if new doubt arises.<sup>227</sup> The main source of modification is the falsification of a theory<sup>228</sup>, which is why I call this second aspect *fallibilism*.<sup>229</sup> Even though Pragmatic philosophers showed a strong inclination towards scientific methods of falsification<sup>230</sup>, the theory is, at least in principle, open enough for other methods of falsification

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- 223 On the following three aspects see generally Jack Knight and James Johnson, *The Priority of Democracy: Political Consequences of Pragmatism* (Princeton University Press 2011) 26–27 (in part with different terminology).
- 224 Charles S Peirce, ‘The Fixation of Belief: Illustrations of the Logic of Science’ (1877) 12 *Popular Science Monthly* 1, 6 (‘Hence, the sole object of inquiry is the settlement of opinion.’); Charles S Peirce, ‘How to Make Our Ideas Clear: Illustrations of the Logic of Science’ (1878) 12 *Popular Science Monthly* 286, 300 (‘The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth, and the object represented in this opinion is the real.’). See also William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (Floating Press 2010) 44 (Lecture II) (‘ideas [...] become true just in so far as they help us to get into satisfactory relation with other parts of our experience [...]').
- 225 Knight and Johnson (n 223) 27, who underline the rejection of complete doubt and therefore call this aspect ‘anti-skepticism’. However, this denomination reflects only one of the two consequences of the pragmatic middle-ground between the strong truth-seekers and the nihilists.
- 226 On intersubjectivity from a phenomenological perspective, see Edmund Husserl, *Husserliana: Gesammelte Werke*, vol 13–15 (Iso Kern ed, Nijhoff 1973). For the use of this notion in the context of legal theory, see eg Grigoleit, ‘Teleologik’ (n 114) 267.
- 227 Peirce, ‘The Fixation of Belief’ (n 224) 11.
- 228 eg James (n 224) 138.
- 229 Knight and Johnson (n 223) 26–27.
- 230 eg Peirce, ‘The Fixation of Belief’ (n 224) 11–15 (on the so-called scientific method); James (n 224) 6 (on him being a radical empiricist and on this position being independent from pragmatism). See also the seminal work of Karl Popper,

such as those we use in law<sup>231</sup> – methods that revive doubt. The third aspect refers to the connection between beliefs and actions.<sup>232</sup> Theoretical positions, which provide for beliefs, are to be judged according to their effects, to the practical differences they make in our lives.<sup>233</sup> Pragmatism approaches epistemological problems in an instrumental way<sup>234</sup>, which is why I will call this third aspect *instrumentalism*.<sup>235</sup> All three aspects fulfil different functions: belief-centrism allows us to settle disputes – to assume some static position on which we can act. Fallibilism allows us to rethink beliefs – to fall back into a dynamic environment of doubt and thereby reach progress.<sup>236</sup> Instrumentalism suggests how we should form beliefs and revive doubt – when to transition from one state to the other.

#### bb. The different perspective of pragmatic adjudication

It is important to see that these premises of philosophical Pragmatism define how we treat epistemological problems. They do not guide – at least

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*The Logic of Scientific Discovery* (Routledge Classics 2005) 17–20, 64–73 (on empirical fallibility and falsification).

231 Claus-Wilhelm Canaris, 'Funktion, Struktur und Falsifikation juristischer Theorien' (1993) 48 JZ 377, 386.

232 Peirce, 'The Fixation of Belief' (n 224) 5.

233 Peirce, 'How to Make Our Ideas Clear' (n 224) 293 ('Consider the practical effects of your conception. Then, your conception of those effects is the whole of your conception of the object.'). 301 ('only practical distinctions have a meaning'); John Dewey, *Logic: The Theory of Inquiry* (Henry Holt and Company, Inc 1938) iv ('But in the proper interpretation of "pragmatic," namely the function of consequences as necessary tests of the validity of propositions, provided these consequences are operationally instituted and are such as to resolve the specific problem evoking the operations, the text that follows is thoroughly pragmatic.'). James (n 224) 36 (Lecture II) ('If no practical difference whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle. Whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other's being right.'). 137–138 (Lecture VI) ('What, in short, is the truth's cash-value in experiential terms?').

234 Especially clear James (n 224) 41 (Lecture II) ('Theories thus become instruments, not answers to enigmas, in which we can rest.'). 44–45 (on his instrumental view on truth).

235 See also Knight and Johnson (n 223) 27, who refer to that aspect as 'consequentialism'. In order to avoid confusion with the consequentialist mode of thought, oriented towards substantive objectivity, I will denominate this aspect 'instrumentalism'.

236 Similarly on doubt and belief Peirce, 'The Fixation of Belief' (n 224) 6.

as such – our concrete decisionmaking, ie they do not imply some sort of pragmatic adjudication. In that sense, Posner is right in that there is no *necessary* connection between a philosophically Pragmatic position and an adjudicative theory.<sup>237</sup> But there certainly is some *affinity* to a certain applied theory of decisionmaking. In that sense, some Pragmatists rightly illustrate the affinity of Pragmatism, especially the fallibilism-aspect, to democracy<sup>238</sup> (but they overconfidently take affinity as necessity). Also, the pragmatic adjudicative theory of Posner<sup>239</sup>, on which I will briefly concentrate, can be seen as an illustration of affinity between philosophical Pragmatism and a pragmatic style of solving problems: Posner rejects both formalism and nihilism<sup>240</sup> and introduces his reasonableness-criterion as epistemological middle ground, building on the Pragmatic belief-centrism. But he goes beyond this epistemological statement by deducing from there that judges should actually decide (at least hard) cases based on considerations of reasonableness<sup>241</sup>, thereby explicitly choosing one of Peirce's four modes of thought – the apriori-mode of which the latter did not have the highest opinions.<sup>242</sup> In addition, Posner embraces the fallibilism

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- 237 Posner, 'Pragmatic Adjudication' (n 143) 3 ('For it would be entirely consistent with pragmatism the philosophy *not* to want judges to be pragmatists [...]'). See also Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 55; Rorty Richard, *Philosophy and Social Hope* (Cambridge University Press 1999) 23.
- 238 eg Knight and Johnson (n 223) 28 (on the political implications of pragmatism), 29 (criticizing the 'Posner-Rorty consensus') 33 (on the radically democratic implications of pragmatism), building on John Dewey, *The Public and Its Problems* (Swallow Press 1927) 169. On the political strain of pragmatism, see generally Richard J Bernstein, 'The Resurgence of Pragmatism' (1992) 59 *Social Research* 813, 815. See also Hilary Putnan, 'A Reconsideration of Deweyan Democracy' (1990) 63 *Southern California Law Review* 1671, 1671 (on 'the epistemological justification of democracy', building on Dewey).
- 239 Posner, *The Problems of Jurisprudence* (n 7) 454–469; Posner, *Law, Pragmatism, and Democracy* (n 237); Posner, 'Pragmatic Adjudication' (n 143); Posner, 'Legal Pragmatism Defended' (n 43).
- 240 Posner, *The Problems of Jurisprudence* (n 7) 459.
- 241 On the reasonableness-criterion, see *ibid* 130–133; Posner, 'Legal Pragmatism Defended' (n 43) 683. However, he complements this rather vague reasonableness-criterion by scientific, empirical tools, see Posner, 'Legal Pragmatism Defended' (n 43) 684. Insofar, he joins Peirce's scientific mode of forming beliefs, see Peirce, 'The Fixation of Belief' (n 224) 11–15.
- 242 Peirce, 'The Fixation of Belief' (n 224) 10–11 ('It makes of inquiry something similar to the development of taste [...]'). For a criticism of Posner's reasonableness-criterion on the basis of its vagueness, see Richard A Epstein, 'The Perils of Posnerian Pragmatism' (2004) 71 *Chicago Law Review* 639, 640.

of philosophical Pragmatism.<sup>243</sup> But he goes beyond this epistemological affirmation by generalizing the doubt towards authority and granting the judge broad leeway in not following statutes.<sup>244</sup> Finally, Posner endorses the Pragmatic instrumentalism. But yet again, he goes beyond the epistemological attitude towards theories in considering the consequentialist mode of thought the adequate way of decisionmaking.<sup>245</sup> Pointing to these affinities between philosophical Pragmatism and Posner's applied pragmatism is at place to distinguish them clearly. They are affinities, not necessary implications. Constitutional Pragmatism builds on philosophical Pragmatism, but it does not embrace Posner's applied pragmatism as a theory of decisionmaking – at least not as a whole. The applied theory of how to take legal decisions has to come from somewhere else. This else is the Constitution.

*b. The constitutional leg of Constitutional Pragmatism*

Philosophical Pragmatism alone does not provide a theory of adjudication. We know that we should be happy with beliefs, that we are ready to fall back into doubt, and that we consider the effects of our beliefs. But we still do not know what to believe. I suggest that we should turn to the constitution of the system of which we take the internal perspective seriously. We should act according to the epistemological statements contained in the constitution and thereby settle epistemological disputes authoritatively. In that sense, Constitutional Pragmatism is not a pragmatic theory of constitutional adjudication but a constitutional theory of Pragmatism.

aa. Pragmatism and the constitution intertwined

Let us examine more in detail how the three premises of philosophical Pragmatism are intertwined with the constitution of a given legal system. Pragmatism provides the philosophical methodology which allows and

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243 On the importance of doubt eg Posner, *The Problems of Jurisprudence* (n 7) 20.

244 eg Posner, 'Pragmatic Adjudication' (n 143) 5 (seeing 'authorities' such as statutes, precedents, and constitutions merely as a source of information and limited constraints).

245 On Posner and consequentialism, see *supra* (n 43, 47).

incentivizes us to turn to the authority of the constitution as arbitrator in epistemological disputes.

The *belief-centrism* of Pragmatism enables us to invoke the constitution. If we were to look for something as truth, we would have to disregard the constitution. But since we are just looking for something that settles doubt, we are perfectly able to invoke its authority.<sup>246</sup> Authority, however, cannot silence real doubt. The only thing that authority can do is to make us act as if we had no doubt.<sup>247</sup> The persistence of real doubt can modify the epistemological compromise contained in the constitution. The *fallibilism* of Pragmatism therefore aligns with and explains the possibility to revise the constitution as soon as a significant part of the people doubts its solutions. Their new beliefs will then dominate. One could also say that the constitutional framework institutionalizes the interchange of belief (belief-centrism) and doubt (fallibilism).

Whereas belief-centrism and fallibilism *enable* us to turn to the constitution, *instrumentalism* even *requires* us to do so. The focus on the effects of a theory draws the attention to the normative implications of an epistemological position.<sup>248</sup> Indeed, each epistemological question has normative implications, also presumably neutral agnostic positions. For instance, the affirmation 'I don't know whether abortion is right or wrong, therefore I think that each one should decide on her own' leads to a substantive right to abortion.<sup>249</sup> Another example: the rejection of productional and applicational objectivity leads to procedural tools of creating legitimacy, especially a strong democratic principle at the detriment of judicial review and the protection of fundamental rights, whereas a strong belief in objectivity limits the scope of democratic decisionmaking.<sup>250</sup> Once we recognize

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246 On the authoritative method of settling doubt, see Peirce, 'The Fixation of Belief' (n 224) 8–9. In the context of truth, see also Neumann (n 184) 41–42.

247 One could also say that we use the epistemological statements of the constitution as 'regulative ideas' in the sense of Kant. On that approach, see Neumann (n 184) 37–41. See also Claus-Wilhelm Canaris, 'Richtigkeit und Eigenwertung in der richterlichen Rechtsfindung' (1993) 50 *Grazer Universitätsreden* 23, 41.

248 Similarly in the context of truth Neumann (n 184) 58.

249 On that, using the abortion example, Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe it' (1996) 25 *Philosophy & Public Affairs* 87, 96–101. See also Ronald Dworkin, *Justice for Hedgehogs* (Belknap 2013).

250 On this tension, see Ackerman, *We the People* (n 205) 11; Moyn (n 202). See also supra (n 176). The German constitutional discourse underlines more the fact that fundamental rights are an integral part of the democratic principle, see eg Bodo Pieroth, 'Das Demokratieprinzip des Grundgesetzes' [2010] *JuS* 473, 478. This is certainly true, but this conceptualization risks to disguise the inherent

these normative implications of epistemological positions, epistemological disputes become just another kind of normative dispute. If seen in that way, it is quite natural – and from the internal perspective of a lawyer even mandatory – to turn to the instrument that normally settles normative disputes: the constitution. Methodological issues become constitutional issues.<sup>251</sup>

In conclusion, one can say that the constitution requires the belief-centrism and fallibilism of Pragmatism, just as the instrumentalism of Pragmatism requires the constitution.<sup>252</sup> In other words, Pragmatism makes it both possible and necessary to turn to the constitution. Let us now examine more closely the epistemological guidance that a constitution can provide.

## bb. Epistemological statements of the constitution

In what follows, we will see that constitutions generally adopt a field-specific approach in answering epistemological issues in which subjectivity and objectivity are both necessary elements on different levels, with subjectivity increasing the higher the level of lawmaking. Constitutions adopt different modes of thought, not one overarching theory, and are each a ‘bundle of compromises’<sup>253</sup> in epistemological terms as well. The duality of subjectivity and objectivity is particularly visible in the constitution of Iran, which combines democratic (procedural) and theological

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tension between popular sovereignty and fundamental rights. One would have to use different notions to refer to this conflict, eg majority vote (as integral part of democracy) and fundamental rights (as likewise integral part of democracy).

251 Like here Rüter (n 121), 272 (‘Methodenfragen sind Verfassungsfragen.’); Karl Engisch, *Einführung in das juristische Denken* (Thomas Würtenberger and Dirk Otto eds, 12th edn, W Kohlhammer 2018) 140–143; Felix Somló, *Juristische Grundlehre* (Felix Meiner 1917) 377–378, 384–391; Joachim Hruschka, *Das Verstehen von Rechtstexten: Zur hermeneutischen Transpositivität des positiven Rechts* (CH Beck 1972) 90; Neumann (n 184) 63. Critically Schünemann (n 118) 75–78 (but he himself refers to the constitutional framework all the time to argue in favour of his methodology, see eg 52).

252 This does not mean that philosophical pragmatism requires a *democratic* constitution – even though there might be some *affinity*, see *supra* (text to n 238).

253 Max Farrand, *The Framing of the Constitution of the United States* (Yale University Press 1913) 201. See also John F Manning, ‘Separation of Powers as Ordinary Interpretation’ (2011) 124 *Harvard Law Review* 1939 (elaborating a field-specific approach for understanding the separation of powers doctrine, rejecting any overarching functionalist or formalist interpretation).

(substantive) elements of legitimacy.<sup>254</sup> But it is also present in the liberal constitutions of Germany and the United States, on which I will focus in what follows.

(1) Epistemological statements on the productional level

Let us start with the making of statutory law (*productional objectivity*). Both the German Basic Law (GG) and the US Constitution grant broad room to the democratic principle, enshrined most prominently in article 20(1) and (2) of the German Basic Law (GG), and in article I(1) of the US Constitution. Democracy provides procedural legitimacy – it institutionalizes the subjectivity of the people and rejects complete substantive determination. Even though subjectivity dominates on the level of parliamentary norm production, we also find significant elements of objectivity on that level, which trigger the logic of substantive legitimacy. Substantive provisions of the constitution are higher law so that the making of ordinary law is never only production but also always application of higher law, controlled by a constitutional court.<sup>255</sup> Most importantly, fundamental rights, contained in the respective bills of rights, and embedded in a system of rule of law, limit the scope of democratic subjectivity.<sup>256</sup> We can understand them

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254 On the duality of Iranian government, see generally Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Belknap 2019) 324 ff. See also Randjbar-Daemi Siavush, *The Quest For Authority in Iran: A History of the Presidency From Revolution to Rouhani* (I.B. Tauris 2018); Neil Shevlin, 'Velayat-e Faqih in the Constitution of Iran: The Implementation of Theocracy' (1998) 1 *Journal of Constitutional Law* 358; Khomeini (n 36) 29.

255 Especially clear *Marbury v Madison*, 5 US 137 (1803) (in the American context); Khomeini (n 36) 29 (in the Iranian context). See further Philip M Bender, 'Solange III? La décision de la Cour constitutionnelle fédérale allemande du 15 décembre 2015 située dans le contexte de son contrôle d'identité' [2016] *Revue des affaires européennes/Law & European Affairs* 93, 97. More in detail on these issues Peter M Huber, 'The Law between Objectivity and Power from the Perspective of Constitutional Adjudication' (§ 4). For a conceptualization, see the dual constitutionalism of Ackerman, *We the People* (n 205) 6–7, which underlines the popular origin of both ordinary and higher law and is valid well beyond the American context. In limiting his approach to revolutionary constitutions, see Ackerman, *Revolutionary Constitutions* (n 254) 362 or Ackerman, *We the People* (n 205) 15, he overestimates the differences between Germany and the US.

256 On the tension between fundamental rights and democracy, see *supra* (n 176, 250).



as positivizations of modes of thought aimed at objectivity. They are substantive principles, manifestations of certain values. In that sense, they implement a *deontological* mode of thought in the spirit of modern natural law theories.<sup>257</sup>

But fundamental rights go well beyond these initial value-enactments since freedom and equality have a transformative function. Let us first dwell on protections of freedom.<sup>258</sup> They force the legislator to defer to private organization, notably through contracts, and they thereby embrace the idea of *observational* objectivity.<sup>259</sup> Indeed, freedom-rights shield significant parts of society against governmental regulation and thereby guarantee its spontaneous development.<sup>260</sup> Here, we find again the correlation between private autonomy and productional objectivity.<sup>261</sup> Let us now turn to the transformative function of equality rights<sup>262</sup>: they measure the legislator against the backdrop of its own present and past value-enactments.<sup>263</sup> The legislator can pursue its subjectivity, but it has to do so in a coherent way that does not hurt legitimate expectations.<sup>264</sup> The

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257 On the deontological mode of thought, see *supra* (text to n 33–42 and specifically on modern natural law theories n 35).

258 For the most general protection of freedom in the German context, see Basic Law (GG), art 2(1). In the US Constitution, we might see a certain equivalent in the due process clause of the 5th Amendment (applicable to the federal government) and the 14th Amendment (applicable to the states).

259 On the observational mode of thought, see *supra* (text to n 16–32).

260 In the *Lochner* era, see *Lochner v New York*, 198 US 45 (1905), the shielding effect was mainly centred on freedom of contract and a substantive understanding of the due process clause. Now, the focus shifted to the First Amendment protections, which play a similar role in shielding tech companies such as Google or Meta (Facebook) from regulation. On that, see Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019) 108–109 (with further references in fn 42).

261 See *supra* (text to n 106–108).

262 For the most general protection of equality in the German context, see Basic Law (GG), art 3(1). In the US Constitution, we find an equivalent in the equal protection clause of the 14th Amendment, applicable to the states. *Bolling v Sharpe*, 347 US 497 (1954) incorporated its protections in the due process clause of the 5th Amendment, applicable to the federal government.

263 On equality as a guarantee of (minimal) rationality, see Grigoleit, ‘Teleologik’ (n 114) 240–241. This aspect also takes a central place in the approach to objectivity of Christie (n 112) 1334–1335.

264 The rule of law requirement to protect legitimate expectations and the principle of equality therefore go hand in hand. The doctrine of *stare decisis* formalizes these considerations. On *stare decisis* in general, see eg Christopher J Peters, ‘Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis’ (1996)

deontological mode of thought thereby receives a much broader scope of application, which goes beyond the initial constitutional value-enactments.

Finally, we also find the *consequentialist* mode of thought as part of the constitutional framework.<sup>265</sup> When the legislator limits fundamental rights, German constitutional law requires her to respect the rule-of-law-based principle of proportionality.<sup>266</sup> Its requirements of suitability, necessity, and adequacy lead to a sort of cost-benefit-analysis (which, however, is not limited to wealth).<sup>267</sup> The same is true for the balancing-tests of constitutional doctrines in the United States.<sup>268</sup>

## (2) Epistemological statements on the applicational level

We will now examine epistemological statements of the constitution concerning the application of statutory law (*applicational objectivity*). Here, it is first important to see that the democratic principle requires some belief in objectivity. If judges or agencies could not understand and apply statutory commands, democracy would be in vain. In that spirit, article 20(3), as well as article 97(1) of the German Basic Law (*GG*) affirm that statutes bind judges, and article II(3) of the US Constitution presupposes the possibility of their faithful execution. It follows from there that democratic constitutions reject the position of both full and partial nihilists.<sup>269</sup>

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105 Yale Law Journal 2031; John Hasnas, 'Hayek, the Common Law, and Fluid Drive' (2005) 1 NYU Journal of Law & Liberty 79, 92–93 (on the historical origins); Sebastian AE Martens, 'Die Werte des Stare Decisis' (2011) 66 JZ 348.

265 On the consequentialist mode of thought, see *supra* (text to n 43–52).

266 On the principle of proportionality in German constitutional law, see eg BVerfGE 100, 113, 175, and the seminal contribution of Peter Lerche, *Übermaß und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (2nd edn, Keip 1999).

267 This understanding of cost-benefit-analysis is close to the understanding of Cass R Sunstein, 'The Real World Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)' (2014) 114 Columbia Law Review 167; Cass R Sunstein, 'Cognition and Cost-Benefit Analysis' (2000) 29 The Journal of Legal Studies 1059. See also Calabresi and Bobbitt (n 46) (for a more normative approach to law and economics). In detail on the different ways of using economics within law, see Philip M Bender, *Grenzen der Personalisierung des Rechts* (2022), forthcoming (ch 8).

268 On balancing in US constitutional law T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943.

269 On full nihilists, see *supra* (text to n 147–155). On partial nihilists, see *supra* (text to n 156–159).

In addition, democratic constitutions also reject the position of strong Objectivists, who believe in the possibility to apply statutes objectively but nonetheless consider judges free to disregard them.<sup>270</sup> The *necessary impossibility* of interpreting statutes and their *voluntary disrespect* are both devastating for democracy.

But the German Basic Law (GG) and the US Constitution also seem to reject a strong Subjectivist version in private law adjudication, which requires a judge to deny justice absent a statute.<sup>271</sup> This follows from a second set of constitutional provisions. In the United States, we can refer to the recognition of the common law.<sup>272</sup> In the German constitutional context, the rule of law principle is interpreted in containing a right to receive a judicial decision (*Justizgewähranspruch*)<sup>273</sup>, which – in private law adjudication – normally does not require to be based on a statute.<sup>274</sup> In addition, article 20(3) of the Basic Law (GG) subjects the judge not only to legislation or statutes (*Gesetz*) but also to law (*Recht*) – which invokes at least some sort of authority beyond statutes.<sup>275</sup> Finally, the punctual welcoming of strong Subjectivism, eg in Criminal Law and in an attenuated version in other areas of public infringement of individual rights,<sup>276</sup> only confirms the general point of rejection for private law adjudication.

We can now turn to a third epistemological statement. In that the provisions of the US Constitution or the German Basic Law (GG) bind judges as higher law (and not just as political recommendations), both constitutions embrace Objectivism to the extent that productional objectivity is constitutionally positivized. This position was prominently articulated in *Marbury v Madison* for the American context.<sup>277</sup> Its reasoning is perfectly valid for

270 On strong Objectivists, see supra (text to n 143).

271 On strong Subjectivists, see supra (text to n 129–132).

272 See US Constitution, eg the 7th Amendment ('In Suits at common law [...]').

273 See generally Bernd Grzeszick, 'Art. 20' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar*, vol III (95th edn, CH Beck 2021) ch VII para 133; Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (12th edn, CH Beck 2020) § 4 para 76.

274 In detail on that point Jouannaud (n 131) (§ 7). See also *ibid* § 2 para 12.

275 *eg ibid* § 4 paras 61–78, interpreting the duality of legislation (*Gesetz*) and law (*Recht*) as an authorization for courts to develop the law beyond statutes. For further interpretations, see generally Bernd Grzeszick, 'Art. 20', *Grundgesetz Kommentar*, vol III (95th edn, CH Beck 2021) para 65.

276 For criminal law, see supra (n 130). For public law infringing upon individual rights, see supra (n 131).

277 *Marbury v Madison*, 5 US 137 (1803).

the German context as well<sup>278</sup> – even though the procedural details in how to react to unconstitutional norms differ.<sup>279</sup>

Beyond these three epistemological statements (following from democracy, the need to adjudicate, and the perception of the constitution as law), we might have difficulties finding authoritative constitutional beliefs in epistemological issues. We are (still) in an area of doubt. This persistence of punctual doubt, however, is not a specificity of epistemological normativity – also other normative issues have not been settled by constitutions. It is inherent in the concept of Pragmatism, notably its fallibilism.<sup>280</sup>

So far, we associated norm production with the parliament and norm application with judges for the sake of simplicity. But we already mentioned that the parliament can be seen as an applier of constitutional provisions. Further pursuing that logic, we can associate norm production with constitutional lawmaking. Then, the respective constitutional nucleus, the eternity clause of the constitutions<sup>281</sup>, is the positivized higher law. Or we can go down a level, referring to administrative rules as norm production and agency decisions as norm application. We might also change

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278 See eg Basic Law (GG), art 1(3), which affirms the binding nature of fundamental rights also for the judiciary.

279 See Basic Law (GG), art 100, which establishes a monopoly of the Federal Constitutional Court in declaring invalid statutory provisions. In contrast, *Marbury v Madison*, 5 US 137 (1803) grants this right to every judge.

280 See supra (text to n 227–231).

281 In Germany this nucleus consists of Basic Law (GG), art 1 and art 20. It is explicitly protected by the eternity clause of art 79(3), see generally Otto E Kempen, 'Historische und aktuelle Bedeutung der "Ewigkeitsklausel" des Art. 79 Abs. 3 GG: Überlegungen zur begrenzten Verfassungsautonomie der Bundesrepublik' (1990) 21 *Zeitschrift für Parlamentsfragen* 354. In the US Constitution, art V (second half-sentence) protects federalism eternally, see Eugene R Fidell, 'The Constitution of 1787: What's Essential?' (2017) 67 *Syracuse Law Review* 605. In Iran, art 177 of its constitution protects the Islamic principles eternally. The list of explicit (eg Italian Constitution, art 139) or judicially created eternity clauses (eg in Columbia and Argentina) could be continued, see for an overview Joel I Colón-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge 2012) 67. Indeed, every constitution has, at least implicitly, an unchangeable nucleus, for if the nucleus of a constitution is changed, it is no longer the same constitution. In addition to these eternity clauses, we also find the idea of constitutional identity in the so-called identity-control, limiting the transfer of competencies to the EU level, cf German Basic Law (GG), art 23, and in the concept of a free and democratic basic order, allowing the prohibition of parties, art 21(2) and (4), see Philip M Bender, 'Ambivalence of Obviousness: Remarks on the Decision of the Federal Constitutional Court of Germany of 5 May [2020]' (2021) 27 *European Public Law* 285, 293.

perspective in that we look for epistemological statements beyond the constitution, examining whether ordinary law grants discretion to judges or not<sup>282</sup> and which type of legitimacy a certain area of law embraces.<sup>283</sup> The Pragmatism pursued here is ‘constitutional’ not in that it only turns to the constitution but in that all epistemological compromises – also statutory ones – have to be compatible with the overall societal compromise contained in the constitution. In that spirit, this book does not only include purely theoretical contributions but also doctrinal analysis of concrete areas of law.

#### IV. Structural Objectivity

Objectivity can also refer to the structures within which we think, enact, and apply the law (*structural objectivity*). It intervenes at both, the productional and the applicational level and constitutes a kind of objectivity different from those with which we were concerned so far. The last part of the essay is dedicated to bringing some light to this specific way of thinking about objectivity. We will do so by first clarifying the notional reference to Structuralism (1.). Then, we will explore three main characteristics of structuralist objectivity in the legal context (2.). We will end by drawing again some parallels to private lawmaking (3.) and by pointing to the importance of structural objectivity, thereby summarizing the argument (4.).

##### 1. Structuralism

The concept of structural objectivity builds on the interdisciplinary movement of Structuralism<sup>284</sup>, which I will characterize – in very simplistic

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282 In detail, see Ben Köhler, ‘The Role for Remedial Discretion in Private Law Adjudication’ (§ 6).

283 Some areas, for instance, assume a serving function of procedure (see supra n 178), embracing substantive legitimacy, whereas others sanction procedural errors independently from the outcome (see supra n 179), embracing procedural legitimacy. Additional insights might be gained by the analysis of the presumption of innocence, see Martin Haissiner, ‘Innocence: A Presumption, a Principle, and a Status’ (§ 10).

284 For an overview, see Gilles Deleuze, ‘A quoi reconnaît-on le structuralisme ?’ in François Châtelet (ed), *Histoire de la philosophie*. Tome 8 (Hachette 1972); John Sturrock, *Structuralism* (With a new introduction by Jean-Michel Rabaté, 2nd edn, Blackwell Publishing 2003) 17–24. For anthropological structuralism, see

terms – with three premises. The first premise is that there is something different from the real and the imaginary, which could be described as symbolic or structural (*distinctness*).<sup>285</sup> The second premise is that these distinct structural arrangements are largely unknown. They influence our thinking without us noticing – unconsciously (*unconsciousness*).<sup>286</sup> The third premise is that to understand an object of inquiry, we have to turn to the system, the structure, within which it is situated, and study the different relations of this system (*relations*).<sup>287</sup>

In the field of law, we find a structural approach towards constitutional or statutory interpretation<sup>288</sup> – an approach which in the German context is part of the classical interpretative toolbox and mostly labelled ‘systematic interpretation’.<sup>289</sup> This structural or systematic interpretation underlines the necessity to go beyond the text of the specific provision at issue and

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the seminal work of Claude Lévi-Strauss, *The Savage Mind* (4th edn, University of Chicago Press 1968) 263; Claude Lévi-Strauss, *Anthropologie structurale* (Plon 1958). See also already Ruth Benedict, *Patterns of Culture* (Routledge & Kegan Paul 1971), eg 21.

- 285 This is the ‘first criterion’ of structuralism in the outline of Deleuze (n 284) under I. (‘Or le premier critère du structuralisme, c’est la découverte et la reconnaissance d’un troisième ordre, d’un troisième règne : celui du symbolique.’)
- 286 Mentioned, for instance, *ibid* under IV. (‘Les structures sont nécessairement inconscientes [...]’). See also Lévi-Strauss, *Anthropologie structurale* (n 284) Chapitre Premier, previously published as Claude Lévi-Strauss, ‘Histoire et Ethnologie’ (1949) 54 *Revue de Métaphysique et de Morale* 363, especially 383 (seeing in the focus on unconscious structures the specificity of ethnology, which allows to distinguish it from history: ‘[...] l’histoire organisant ses données par rapport aux expressions conscientes, l’ethnologie par rapport aux conditions inconscientes, de la vie sociale.’); Donald HJ Hermann, ‘A Structuralist Approach to Legal Reasoning’ (1975) 48 *Southern California Law Review* 1131, 1141.
- 287 Deleuze (n 284) under II. (‘L’ambition scientifique du structuralisme n’est pas quantitative, mais topologique et relationnelle [...]’), further elaborated under III., IV., and V. See also Hermann (n 286), 1144; Sturrock (n 284) 21–22.
- 288 On the method of structural interpretation, see Charles L Black Jr *Structure and Relationship in Constitutional Law* (Louisiana State University Press 1969) 11.
- 289 See fundamentally Friedrich Carl von Savigny, *System des heutigen Römischen Rechts: Erster Band* (Deit und Comp 1840) 214 (‘Das systematische Element bezieht sich auf den inneren Zusammenhang, welcher alle Rechtsinstitute und Rechtsregeln zu einer großen Einheit verknüpft [...]’). One might further distinguish interpretative arguments based on the external system and those based on the internal-teleological system, see Philipp Heck, *Begriffsbildung und Interessenjurisprudenz* (Mohr 1932) 142–143. Building on that Canaris, *Systemdenken* (n 21) 35; Bydliński, *Juristische Methodenlehre* (n 41) 442–448 (‘systematisch-logische Auslegung’), 454–455 (‘teleologisch-systematische Auslegung’). It is the systematic-teleological approach based on the inner system which is particularly

to look at the structure of the legal document or legal system as a whole. In a way, it is an application of the third premise (*relations*), but it is not directly connected to Structuralism, the movement. Indeed, as a mode of thought, structuralism is much older than Structuralism and common to every systematized acquisition of knowledge.<sup>290</sup> We best conceive of the systematic interpretative approach as a way to understand the statements of the legislator. It therefore belongs to applicational objectivity, not to the distinct structural objectivity. Just like we built Constitutional Pragmatism on the philosophical current of Pragmatism, not on an applied pragmatic thinking within the law (pragmatic adjudication), we develop the notion of structural objectivity based on the intellectual movement of Structuralism, not on some way of structural arguments used in legal reasoning. We again make use of the upper-case letter when we explicitly refer to the movement to avoid confusion.

So far, explicitly Structural accounts in legal theory are rare.<sup>291</sup> However, some legal scholarship can (implicitly) be understood as Structuralist. We might turn to comparative law analysis that focuses on the common structures of legal systems.<sup>292</sup> But we might especially interpret elements of the Critical Legal Studies movement as Structuralist in that it aimed at uncovering the necessary relationship between form and substance in particular and the use of legal doctrine and unconscious ideological implications in general.<sup>293</sup> Even some contributions in the field of law and economics can be understood as Structuralist in that they analyse the costs and benefits of norm design – a particular legal structure.<sup>294</sup>

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close to the American structuralist interpretation (and the original systematic interpretation as defined by Savigny).

290 On that and the distinction between ‘Structuralism’ and ‘structuralism’, see Sturrock (n 284) 22–23.

291 For one of the few explicit applications of Structuralism to law, see Hermann (n 286), 1141 ff.

292 eg Ernst Rabel, ‘Private Law of Western Civilization’ (1949) 10 *Louisiana Law Review* 1, 1; Ernst Rabel, ‘Private Laws of Western Civilization: Part IV. Civil Law and Common Law’ (1950) 10 *Louisiana Law Review* 431, 446 ff.

293 Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard Law Review* 1685. In the German context Auer, *Materialisierung* (n 7) 43.

294 See especially Louis Kaplow, ‘Rules versus Standards: An Economic Analysis’ (1992) 42 *Duke Law Journal* 557; Louis Kaplow, ‘A Model of the Optimal Complexity of Legal Rules’ (1995) 11 *Journal of Law, Economics, and Organization* 150; Louis Kaplow, ‘On the Design of Legal Rules: Balancing versus Structured Decision Procedures’ (2019) 132 *Harvard Law Review* 992.

## 2. *Developing the notion of structural objectivity*

We will approach the concept of structural objectivity through the three premises of Structuralism: by reference to distinctness and unconsciousness we will carve out the specific focus of structural objectivity, and by reference to relations, we will illustrate how we could make it work in the field of law.

### a. *Distinctness*

Let us start with the *distinctness* of structure from both the real and the imaginary. To be operative in our context, we will substitute the real by the kind of objectivity we explored so far on the productional and applicational level, ie the three substantive modes of thought that aim at eliminating the self on normative grounds. In addition, we will substitute the imaginary by the self, the subjectivity or power, as we explored it throughout this essay. Structural objectivity is distinct from both: unlike the three substantive modes of thought, it does not make any normative prescriptions, but unlike subjective approaches, it limits the power of the self in substantive terms.

### b. *Unconsciousness and necessity*

The remodelled premise of *unconsciousness* will help us to see in what exactly structural objectivity differs. If we were to make the unconsciousness as such the specificity of structural objectivity, we could say that whereas the substantive modes of thought aimed at productional or applicational objectivity consciously limit the self, structural objectivity does so unconsciously. The self can gain some sort of intermittent awareness but no complete conscious mastery while operating within the system.<sup>295</sup> In a way, behavioural economics is concerned with these implicit structures of

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295 Claude Lévi-Strauss, *Mythologiques: Le cru et le cuit* (Tome 1, Plon 1964) 19 ('Sans exclure que les sujets parlants, qui produisent et transmettent les mythes, puissent prendre conscience de leur structure et de leur mode d'opération, ce ne saurait être de façon normale, mais partiellement et par intermittence.'). Based on that also Hermann (n 286), 1142.



our thinking.<sup>296</sup> But unconsciousness, for our purposes, is only one manifestation of those limits to the power of the self that *necessarily* exist. In that sense, structural objectivity is open for whichever necessary constraints we face. Some might only persist as constraints as long as we are not aware of them, but most of them, especially classical behavioural biases<sup>297</sup> or physical walls (architecture<sup>298</sup>), will continue to be obstacles even if we know that they exist. Based on that, we can redefine ‘unconsciousness’ as (factual) ‘necessity’. Whereas the described substantive approaches to objectivity described so far *normatively limit* subjectivity according to a substantive mode of thought, structural objectivity *necessarily channels* subjectivity according to a structure. The previously outlined modes of thought aimed at productional and applicational objectivity operate like signs that show the self the right way to take. They limit its power – but only normatively, with the persisting factual option to act otherwise. Structural objectivity equals the paths themselves. They limit the power of the self factually, without the option to act otherwise. Even if one rejects normative concepts of objectivity on the productional or applicational level, structural objectivity is still operative: the self might freely choose one path or the other – but it cannot leave the paths altogether, it cannot alter the architecture. Given the physical force behind legal commands, the distinction might be difficult in some cases, and one might look at one

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- 296 eg Amos Tversky and Daniel Kahneman, ‘Judgment under Uncertainty: Heuristics and Biases’ (1974) 185 *Science* 1124; Daniel Kahneman and Amos Tversky, ‘Prospect Theory: An Analysis of Decisions under Risk’ (1979) 47 *Econometrica* 263; Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011); Richard H Thaler, ‘Doing Economics Without Homo Economicus’ in Steven G Medema and Warren J Samuels (eds), *Foundations of Research in Economics: How do Economists do Economics* (Edward Elgar Publishing 1996). Specifically in the legal field Christine Jolls, Cass R Sunstein and Richard Thaler, ‘A Behavioral Approach to Law and Economics’ (1998) 50 *Stanford Law Review* 1471; Philipp Hacker, *Verhaltensökonomik und Normativität: Die Grenzen des Informationsmodells im Privatrecht und seine Alternativen* (Mohr Siebeck 2017) 79 ff.
- 297 Daniel Kahneman, Dan Lovallo and Olivier Sibony, ‘The Big Idea: Before You Make That Big Decision...’ [2011] *Harvard Business Review* 50, 52 (‘But knowing that you have biases is not enough to help you overcome them. You may accept that you have biases, but you cannot eliminate them in yourself.’).
- 298 On architecture as regulatory tool, see generally Lawrence Lessig, ‘The New Chicago School’ (1998) 27 *The Journal of Legal Studies* 661, 663. Specifically in cyberspace, see Lawrence Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 *Harvard Law Review* 501, 507. See also Michel Foucault, *Surveiller et punir: Naissance de la prison* (Gallimard 1975) 201 ff (on the Panopticon).

limitation from both a normative and a factual perspective. But this only illustrates that we are concerned with different ways of thinking, not with mutually exclusive theories.

c. *Relations*

Let us now have a closer look at these paths – the *relations*. Structural objectivity would turn out to be a banality if we were to consider only the laws of gravity and other physical restrictions as the structure within which individuals operate. Far more complex and less evident relations (to the point that they are often unconscious) are of particular interest. In what follows, we will provide an overview of the interconnected relations with which structural objectivity is concerned.

aa. Form and substance: bundle-structures I

The first relation is the one between form and substance. A significant part of the Critical Legal Studies scholarship is dedicated to this relation, more precisely to the ideological implications which follow from the – in terms of substance – seemingly neutral choice between a *rule* and a *standard*.<sup>299</sup> In the spirit of this analysis, rules are commonly associated with liberalism or individualism and standards with altruism or collectivism.<sup>300</sup> This link is certainly too simplistic – not only because standards are concretized through the dominant societal ideology<sup>301</sup>, which can perfectly be liberal, but also because standards can sometimes promote more individual agency than rules.<sup>302</sup> However, this critique is mentioned just as an aside. The important point here is that the study of the connection between form and substance can be understood as a study of structural objectivity: a lawmaker might be free in choosing a rule or a standard, but she is not free in disposing of the further normative implications that follow from

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299 Kennedy, ‘Form and Substance’ (n 293). See also Auer, *Materialisierung* (n 7) 43.

300 Kennedy, ‘Form and Substance’ (n 293) 1776; Auer, *Materialisierung* (n 7) 43.

301 On that point, cf Kathleen M Sullivan, ‘The Supreme Court 1991 Term – Foreword: The Justices of Rules and Standards’ (1992) 106 *Harvard Law Review* 22, 58 (‘A legal directive is “standard”-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.’).

302 On the latter point in detail Bender, *Personalisierung* (n 267), forthcoming (ch 5).

this choice. The normative implications of rules and standards can also be studied from an economic viewpoint<sup>303</sup> or from the perspective of the rule of law.<sup>304</sup> Furthermore, rules and standards are not the only formal aspects that have normative implications. Indeed, we can open the analysis of the relation between form and substance to other formal aspects such as the *complexity* of legal norms<sup>305</sup> and understand this connection as a broader area of research – the ‘normativity of norm design’.<sup>306</sup> These normative insights might be helpful for pointing to the limits of a potentially unlimited, Big-Data-driven ‘personalization’ of the law.<sup>307</sup>

## bb. Substance and substance: bundle-structures II

Moreover, we might add that there is not only a connection between form and substance but also between substance and substance. In other words, substantive options between which we have to choose also come in packages, in bundles. These bundles are ambivalent in that the elements of each option foster and at the same time inhibit the goals pursued. The cost-benefit-analysis provides a methodological framework in which we can talk about these different substantive connections.<sup>308</sup> However, as such a framework, it does not tell us what costs and benefits are triggered by a possible action. Rather, it presupposes the awareness of structural objectivity: we need to know of the different costs and benefits and their connections before we are capable of applying it. One example of the

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303 See, for instance, the seminal article of Kaplow, ‘Rules versus Standards’ (n 294). Critically Kevin M Clermont, ‘Rules, Standards, and Such’ (2020) 68 *Buffalo Law Review* 751.

304 See, for instance, Antonin Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 *Chicago Law Review* 1175.

305 Kaplow, ‘Optimal Complexity’ (n 294); already Kaplow, ‘Rules versus Standards’ (n 294) 586–590. Building on that, see also Ian Ayres, ‘Preliminary Thoughts on Optimal Tailoring of Contractual Rules’ (1993) 3 *Southern California Interdisciplinary Law Journal* 1.

306 Bender, ‘Default Rules’ (n 48) 374.

307 Omri Ben-Shahar and Ariel Porat, ‘Personalizing Mandatory Rules in Contract Law’ (2019) 86 *Chicago Law Review* 255; Porat and Strahilevitz (n 48); Anthony J Casey and Anthony Niblett, ‘The Death of Rules and Standards’ (2017) 92 *Indiana Law Journal* 1401. Critically eg Grigoleit and Bender, ‘Generality and Particularity’ (n 48); Bender, ‘Default Rules’ (n 48).

308 cf in detail Peter Zickgraf, ‘Economic Analysis of Law: Inherent Component of the Legal System’ (§ 13).

complex substantive implications of a potential policy is the issue of US citizenship for the people of Puerto Rico: the United States might be free in deciding whether to grant full citizenship or not. Likewise, Puerto Ricans might be free in vindicating full citizenship or not. This is a normative question linked to productional objectivity and beyond the interest of structural objectivity. But as soon as citizenship is granted, there will be consequences: on the one hand, Puerto Ricans will claim more rights based on their citizenship. On the other, independence movements will be weakened.<sup>309</sup>

### cc. Thought-structures

We might also go beyond the formal or substantive paths a self can take, beyond the packaging of bundles of choice, and examine the unconscious structures and relations that dominate the process of decisionmaking. Here, we are no longer concerned with the structures that form the bundles out of which we have to choose, but we examine the structures which lead us to this or that bundle. The already mentioned analysis of behavioural biases is in that sense structuralist.<sup>310</sup> But also Structuralist accounts of language are particularly important here.<sup>311</sup> One illustration of this approach is the study of how metaphors influence the decisionmaking<sup>312</sup>: the way judges decide on the burden of proof, for instance, might be determined by whether they imagine a company as a person or as a network.

### dd. Reception-structures

Finally, language does not only pre-structure our thought, but it also pre-structures the way people understand legal decisions. Legal concepts and language in general provide a *numerus clausus* of communicative possibilities of which the decisionmaker cannot dispose. A recent decision of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*)

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309 In detail Alvin Padilla-Babilonia, 'The Citizenship Duality' (§ 16).

310 On the behavioural analysis of biases, see *supra* (n 296).

311 On linguistic structuralism, see generally Sturrock (n 284) 25–47.

312 In detail Jan-Erik Schirmer, 'Metaphors Lawyers Live by: Cognitive Linguistics and the Challenge for Pursuing Objectivity in Legal Reasoning' (§ 15).

may illustrate that point. The Court activated the ‘control of arbitrariness’ to declare an act of the European Central Bank and a decision of the Court of Justice of the European Union *ultra vires*, underlining that ‘arbitrariness’ is used in strictly technical terms.<sup>313</sup> However, the notion is (negatively) loaded with a history from other contexts and the Constitutional Court cannot escape this notional context in the process of legal communication just by saying that the language means something else.<sup>314</sup> It cannot dispose of how the recipients actually understand a notion.

### 3. Parallels in private lawmaking

Structural objectivity does not only limit the selves of individuals when making or applying heteronomous law but also when making or applying autonomous law. The fact that individuals are choosing out of specific options within a given structure might even be particularly familiar when we think of contracting parties because they use the tools of a given legal system. Especially a *numerus clausus* – a limited catalogue of typifications out of which the individual has to choose and which is common in property law, inheritance law, family law, and corporate law – makes the dependency on structure visible.<sup>315</sup> For instance, individuals might be free to choose between a partnership (which implies personal liability) and a corporation (which shields the shareholders from liability). But they cannot choose to create a corporation with personal liability of the shareholders or a limited liability partnership without respecting certain additional rules which aim to protect creditors. Flume went further and promoted the idea that also

313 BVerfGE 154, 17, 91–93 para 112–113 (‘PSPP’).

314 Philip M Bender, ‘Ambivalenz der Offensichtlichkeit: Zugleich Anmerkung zur Entscheidung des BVerfGs vom 5. Mai 2020’ (2020) 23 ZEuS 409, 421.

315 On the *numerus clausus* of property rights, see Thomas W Merrill and Henry E Smith, ‘Optimal Standardization in the Law of Property: The Numerus Clausus Principle’ (2000) 110 Yale Law Journal 1, 26 ff; Henry Hansmann and Reinier Kraakman, ‘Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights’ (2002) 31 The Journal of Legal Studies 373, 379 ff; Wolfgang Schön, *Der Nießbrauch an Sachen: Gesetzliche Struktur und rechtsgeschäftliche Gestaltung* (Dr Otto Schmidt KG 1992) 241 ff. On the *numerus clausus* in corporate law, see Holger Fleischer, ‘Der numerus clausus der Sachenrechte im Spiegel der Rechtsökonomie’ in Thomas Eger and others (eds), *Internationalisierung des Rechts und seine ökonomische Analyse. Internationalization of the Law and its Economic Analysis: Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (Gabler Edition Wissenschaft 2008).

contract law outside the realm of a classical *numerus clausus* is, in some way, based on a *numerus clausus*, a specific structure, because only those contracts are valid that the legislator recognizes as such.<sup>316</sup> If the individual has to use the infrastructure of the law<sup>317</sup>, normative-legal constraints work like factual-structural limits.

In addition to this particular perspective, one can reapply all previous examples of structural objectivity on the individual level: when designing a contract, individuals have to be aware of the respective costs and benefits of the use of a rule or a standard (connection between form and substance). They will also have to consider that an additional warranty normally creates additional costs<sup>318</sup>, which have to be distributed somehow (connection between substance and substance). Their thinking will be structured by language, especially metaphors, just as the thinking of a judge is. Finally, they do not dispose of the meaning of language, in itself a *numerus clausus*, because each notion comes with a certain (interpretative) history. Of course, they might explicitly create their own secret language<sup>319</sup>, which would be binding according to the principle that false denominations are not harmful (*falsa demonstratio non nocet*).<sup>320</sup> But if they use a certain (legal) concept without further specifications, courts will interpret it in a certain way against the backdrop of certain default provisions with a pre-determined meaning.

#### 4. Why to think about structural objectivity

The importance to unveil the structures within which we live the law is important for several aspects, some of which became already clear along this outline. Briefly sketching them out explicitly will allow us to summarize the case of structural objectivity. First, awareness of different *bundle-structures* – knowledge of the different relations between form and substance (the normativity of norm design), as well as between substance

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316 Flume (n 77) 2 (§ 1 2).

317 On this dimension of law, see generally Hellgardt, *Hellgardt 2016* (n 132) 56–59.

318 On the connection between warranties and the price, see Bender, ‘Default Rules’ (n 48) 392.

319 For an example, see former German Imperial Court (*Reichsgericht*) RGZ 68, 6 (*‘Semilodei’*) (there, however, the secret language failed because both parties understood something different by the fantasy-word *‘Semilodei’*).

320 See former German Imperial Court (*Reichsgericht*) RGZ 99, 147 (*‘Haakjöringsköd’*).

and substance – allows us to apply the cost-benefit-analysis or its constitutional corollaries (the principle of proportionality or a balancing test) more accurately. As individuals, for instance, we can more consciously design contracts and decide whether a rule or a standard is more beneficial, the latter leaving room for future renegotiations.<sup>321</sup> In addition, by better understanding *thought structures* that unconsciously limit the self, we can (at least sometimes) open up new paths of thinking (eg by being aware that there is another metaphor we could use). Even if we will not be able to overcome many of the classical behavioural biases that structure our thought, we can at least find some remedies (such as specific and collective processes of decisionmaking<sup>322</sup>). We can try to be aware of the direction in which a metaphor channels our thinking. In that sense, we perceive structural objectivity as a threat to productional or applicational objectivity and we try to handle it.<sup>323</sup> But we can also consciously use those unconscious biases and nudge individuals in a certain direction.<sup>324</sup> In this way, structural objectivity can be the backbone of productional or applicational objectivity. Thought structures are necessarily ambivalent and behavioural economics makes use of structural objectivity in precisely this ambivalence. Moreover, we can become aware of the language and its interpretative history and thereby make sure that what we are saying is not misunderstood (*recipient structures*) – either by the individuals that have to comply with a public decision or by the judge that has to give effect to a private enactment. We will thereby increase general acceptance – (empirical) legitimacy – in both, substantive and procedural terms. Finally, structural objectivity might provide a path for comparing legal systems, underlining the common structures rather than the peculiarities.<sup>325</sup> In that

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321 cf Kendall W Artz and Patricia M Norman, 'Buyer-Supplier Contracting: Contract Choice And Ex Post Negotiation Costs' (2002) 14 *Journal of Managerial Issues* 399.

322 Kahneman, Lovallo and Sibony (n 297), 52(['...] the fact that individuals are not aware of their own biases does not mean that biases can't be neutralized – or at least reduced – at the organizational level.')

323 Structural objectivity challenges, one could say, epistemological objectivity, see Leiter, 'Leiter 2002' (n 4) 973, both on the productional and the applicational level.

324 Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2nd edn, Penguin Books 2009); Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism Is Not an Oxymoron' (2003) 70 *Chicago Law Review* 1159.

325 For such a view on comparative law, see eg Rabel, 'Private Law I' (n 292) 1; Rabel, 'Private Law IV' (n 292) 446 ff.

sense, anthropological Structuralism might yet again serve as a source of inspiration.<sup>326</sup>

## V. Conclusion

This introductory chapter presented different ways of thinking about objectivity. It also stated why and how we should think about it. In doing so, it explored the role of the self and its power within the law. I will summarize its main findings in what follows.

**Productional Objectivity** (II.1.) concerns the elimination of the self on the level of lawmaking. We outlined three modes of thought – *observational*, *deontological*, and *consequentialist* – through which we can pursue that goal, each of them being more or less dominant in different theories of law. We also presented three modes of thought – *decisional*, *procedural*, and *critical* – with which we can deal with the persistence of the self on the level of lawmaking. In the way it is used here, lawmaking encompasses both heteronomous (eg statutory) and autonomous (eg contractual) norm production.

**Applicational Objectivity** (II.2.) concerns the elimination of the self on the level of the application of law. It is concerned with objectivity in legal interpretation. We approached the applicational level in relation to possible positions on the productional level, ie through the perspective of *adjudication*. This led us to distinguish *Subjectivists* (combining productional subjectivity and applicational objectivity), *Objectivists* (combining productional objectivity and applicational objectivity), *full nihilists* (combining productional subjectivity and applicational subjectivity), and *partial nihilists* (combining productional objectivity and applicational subjectivity). Again, we could draw some parallels to theories of contract interpretation.

**Relativity of Legitimacy** (III.1.) explains the relevance of productional and applicational objectivity in law. Whether we can achieve objectivity or not determines the criterion of legitimacy, which is either *procedural* or *substantive*: objectivity requires substantive legitimacy, whereas subjectivity calls for procedural legitimacy. In that sense, legitimacy is a relative concept, both because it depends on objectivity and because neither procedure nor substance can provide for it alone. This is true for *empirical* legitimacy

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326 cf Lévi-Strauss, *The Savage Mind* (n 284) 263; Lévi-Strauss, *Anthropologie structurale* (n 284). See also already Benedict (n 284), eg 21 (underlining that each culture has to cope with the same issues).



(acceptance) as well as for *normative* legitimacy (acceptability). To define the respective areas of procedure and substance for the purpose of normative legitimacy, we need a methodology.

**Constitutional Pragmatism** (III.2.) provides this methodology. It is a suggestion of how to overcome the epistemological difficulties in defining areas of objectivity (following a substantive logic of legitimacy) and areas of subjectivity (following a procedural logic of legitimacy). The main idea is to turn to the authority of the constitution of a given legal system to settle epistemological disputes. In focusing on beliefs (instead of truth), Pragmatism makes this constitutional turn possible (*belief-centrism*). The provisions of constitutional change can be understood as the institutionalization of doubt (*fallibilism*). In addition, Pragmatism even requires seeking answers in the constitution because it takes into account the effects of theoretical positions (*instrumentalism*). Indeed, each epistemological question has normative implications, and like other normative issues, the constitution should decide them. In doing so, constitutions normally take a nuanced approach, giving weight to procedure (eg democracy) and substance (eg fundamental rights) alike.

**Structural Objectivity** (IV.) refers to the structures within which we think and act. It constitutes a third dimension beyond productional and applicational objectivity (*distinctness*). Contrary to these ways of thinking about objectivity, it does not limit the self in a normative way, but it consists in the (factual) paths within which the self is bound to think and act (*necessity*). In that sense, the study of structural objectivity unveils the different relations that constitute these paths (*relations*). They can consist in connections between form and substance and constitute a theory of the normativity of norm design (*bundle-structures I*). But relations also exist between substance and substance (*bundle-structures II*). Finally, they do not only channel our options into bundles, but they also guide our thinking previous to the decision, eg in the form of biases (*thought-structures*), and they determine how our decisions are perceived by their addressees (*recipient-structures*). Knowing these structures is helpful for lawmaking, adjudication, and contracting alike.

