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BOOK SYMPOSIUM

The Why-Question Methodology, The Guise of the Good and Legal Normativity

Veronica Rodriguez-Blanco*

I am grateful to the three commentators for their thought-provoking suggestions and comments on my book *Law and Authority Under the Guise of the Good* (from now onwards *Law and Authority*). Their questions and objections have given me an invaluable opportunity to further reflect on some of the ideas and arguments that I aim to defend in my book. I am also deeply grateful to my friends and colleagues in *Jurisprudence* for granting me this space to respond to the commentators. Critical conversations on our work force us to face our intellectual demons and, as Socrates taught us, there is no way other than through critical conversations to approach the heart of a matter. I hope that in the future there will be many more opportunities to continue the conversation.

WEBBER ON THE WHY-QUESTION METHODOLOGY AND THE COMMON GOOD

Webber advances two lines of inquiry for further reflection on *Law and Authority*. First, he advances an interpretation of my reading of Anscombe's why-question methodology.¹ Second, he argues that the idea of 'undifferentiated good-making characteristics' as the end of intelligent action might not be a secure foundation for understanding law and its connection to the common good.

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¹ E Anscombe, *Intention* (Harvard UP 2000 [1957]).

Webber's reading of the 'why-question' methodology is different from the one I defend in my book and in this paper I advance some clarifications of my interpretation. This paves the way for discussion on Webber's second line of inquiry.

In Chapter 2 of *Law and Authority* I attempt to show that there are important differences between the observer of an action and the agent who performs the action. The former provides a theoretical perspective because the observer aims to explain the action as a rationalisation. This means that the observer needs to attribute beliefs and desires to the agent who performs the action. The latter is practical because it is about execution or performance and it necessarily entails an intention or desire whose origin is in the agent. The agent knows *what* she is doing and *why* she is doing what she is doing. I have tried to show in the book that the first-person perspective or deliberative point of view is naïve and primary to any theoretical perspective. Theoretical explanations are intelligible as long as they account in a sound way for the first-person or deliberative perspective that we already know. I take intentional action as practical, i.e. from the first-person or deliberative point of view, as the paradigmatic case of intentional action, and not the theoretical perspective of intentional action (40–41).

The focus of what I call 'the two-component view' of the standard account of intentional action is on mental states, i.e. beliefs and desires, that cause our bodily movements. This model only provides a theoretical view on action to the detriment of the diachronic and direct intention of the action. The theoretical view is important but is parasitic on a more naïve explanation which is the first-person or deliberative perspective (see Chapters 5 and 6 of *Law and Authority*). I will come back to this point in my discussion of Priel's comments.

I use Anscombe's 'why-question' methodology to explain the diachronic dimension of intentional action. The 'why-question' methodology is a strategy to show how the structure of practical reason, which runs in parallel to the structure of intentional action, works as the exercise of a capacity (26). Chapters 3 and 4 add further elements to the complexity of the explanation of the diachronic structure of practical reason that begins in Chapter 2.

The core motivation of the 'why-question' methodology is to pay attention to the structure or articulation of an intentional action (47). The 'why-question' methodology enables us to focus on the structure of practical reason through a focus on the structure of intentional action (59–60). The 'why-question' methodology is Anscombe's central device in *Intention* for elucidating the connections between the different parts of an action and (our) practical reasoning.² Practical reason can be illuminated by both the practical syllogism and the 'why-question' methodology, but both are artificial ways to understand this crucial structure. I introduce

² Anscombe's exposition follows very closely Aquinas's explanation of intentional action. A Kenny, *Aristotle's Theory of the Will* (Yale UP 1979) points out that Aquinas' model should be understood more as a Gestalt psychology. See also GG Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologicae, 1–2, Question 94, Article 2' (1965) *American Journal of Law and Jurisprudence* 168 on the focus of the dynamic structure of intentional action. Recent work on Anscombe emphasises the point that acting intentionally should be interpreted as a series of successive steps towards an action. See Michael Thompson, *Life and Action* (Harvard UP 2008) 85–119.

the concept of *energeia* (actuality) as advanced in Aristotle's *Metaphysics* to grasp the idea of practical reason as a capacity that is not privative, but constitutive (Chapter 4).

Webber asserts, *á propos* of the 'why-question' methodology, the following:

When deployed to question agents on the reasons for their actions, the inquirer attempts to know the mind of the agent under study.³ True to the why-question methodology, the theoretical knowledge of the inquirer seeks to acquire is one of 're-enactment' of the thoughts (reasons) of the agent in the *mind of the inquirer*. The need for re-enactment affirms Rodriguez-Blanco's insistence that the actor's intentions are not transparent for the observer and that the observer is therefore attempting to *acquire theoretical knowledge of the actor's practical knowledge*. The complications for the enactment will be lesser or greater depending on whether, with Rodriguez-Blanco, you imagine yourself in conversation with the acting person.

Webber then continues: In its most straightforward sense, the why-question methodology attends to the agent's deliberative point of view. It is a retrospective methodology, inquiring into the reasons the agent had for acting the way he did.

Webber seems to interpret the why-question methodology as a theoretical inquiry where a 're-enactment' of the reasons will enable us to discover what was in the agent's mind when she carried out the action, i.e. it aims at grasping the agent's reasons for actions. I do not use the idea of 're-enactment' in *Law and Authority* nor do I consider that it soundly reflects Anscombe's 'why-question' methodology. On the contrary, this is the model that I have rejected as being too theoretical. The 'why-question' methodology does not aim to impose or attribute reasons to the agent, neither does it involve the discovery of the mind of the agent and her reasons for actions. It does not focus on retrospective action but on forward-looking actions. It is an artificial device to investigate the diachronic structure of practical reason as a capacity (64). Similarly, we cannot pretend that practical syllogism is a strategy to theorise and discover the mind of the agent and her reasons. The 'why-question' methodology is similar to the methodology of practical syllogism. It is an artificial device to illustrate something that is *already in operation* when we act. There is no theorising or interpretation (210–13).

Aristotelian metaphysics emphasises the element of movement that is involved in activities that are in progress and actualised. The key example in Chapter 4 of *Law and Authority* that exemplifies this movement is speaking a language. We say, for example, that a child has not learned a language, he has a potentiality to speak English. When an adult already knows how to speak English, she is in a second potentiality in comparison with the child. Finally, when the adult is actually speaking, she is actualising her capacities as an English speaker. When we and others speak English, we do not theorise or impose an interpretation on our activity. We do not 're-enact' their thoughts. We know *what* they are doing and *why* they are doing what they are doing, i.e. speaking English. We learned this within public reasons that 'we share as creatures with certain constitutions and belonging to a particular time

³ The emphasis is mine.

and place' (63). Like speaking a language, the exercise of practical reason is a capacity. I have argued that it is a two-way capacity (68–71). The 'why-question' methodology enables us to understand the structure of practical reason and the way the exercise of this capacity works.

Webber, correctly in my view, considers that the focus for the understanding of intentional action in connection to the normativity of law should be the first-person or deliberative point of view when the agent asks herself 'What should I do?' (40). However, I disagree with Webber when he asserts '*Rather, the key distinction is between did and should, is and ought, fact and value*'. *Law and Authority* aims to show that at the level of the first-person or deliberative perspective there is no distinction between motivational reasons and normative reasons, what I am doing and what I ought to do, between facts and values (2). I try to show in the final chapter and in Chapters 3 and 4 of the book that contemporary philosophy has been trapped by Hume's formulation of the problem of normativity, emphasising that the domain of oughts and normative judgements is not connected to a domain of facts. Indeed I have argued that when from the first-person or deliberative perspective intentional action and performance of an action is involved, the person asks the deliberative question, but the response needs to be given as if it were a theoretical question (47). She needs to consider what she ought to do, inevitably, from her point of view and as things seem to her and with the knowledge of facts that she has. In *Law and Authority* I put the example of a painter (65) where what she desires and values and her knowledge of why she values what she values is present in the action. Her desires and knowledge are not separated. Her knowledge is practical, but she also has learned and knows different facts such as what colours are available, the size of the canvas, shapes and figures, ideas of space and time and so on. She puts this knowledge of facts into the action.

The second line of inquiry advanced by Webber concerns the idea of undifferentiated 'good-making characteristics' and the common good as key for the understanding of law. His worry is that undifferentiated good-making characteristics do not create obligations to act and he wonders whether a lawmaker should appeal to a subset of good-making characteristics. Webber considers that an important question is the question of why members of a community should associate themselves with a political community governed by law. He traces the Aristotelian thought from family to neighbourhood association to political community. The political community aims to secure a set of conditions that will enable its members to attain goods and a flourishing life. Obligations arise from the laws that ensure the set of conditions required for a flourishing life. Webber argues that even if the addressee of a directive avows the good-making characteristic that grounds the directive, the addressee still has a course of action open, therefore the good-making characteristic will not help us to rank the directive's course of action as the course of action that the addressee ought to pursue.

Law and Authority does not aim to show the way law is connected to the common good generating legal obligations. This has masterfully been done by Finnis in his *Natural Law and Natural Rights*.⁴ The aim of *Law and Authority* is to focus attention

4 J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

on the structure of practical reason and to engage in an analysis of *how* the law intervenes and participates in the practical reasoning and actions of the addressees of the law when *it already does so*. I argue that an explanation of how this happens is an explanation of the normativity of law. The normativity of law explains how we engage and use reasons for actions and I try to show that reasons for actions are necessarily connected to values and provide the grounds for legal directives and legal rules. I do not engage in an explanation of legal obligations and the word ‘obligation’ only appears on rare occasions in the text when I discuss what other authors have said about it, e.g. Austin, Hart and Raz.

However, Webber’s concern is important because it helps me to clarify the role that the idea of good-making characteristics plays in understanding law’s normativity. The idea of good-making characteristics is not sufficient to explain how the legal addressee or agent acts and how she closes all other possible actions. The agent also needs to have an *intention*, and I argue that intentions have a diachronic structure and involve the intelligible unity of different parts. The intelligible unity of action is achieved because the end of the action is seen by the agent as having good-making characteristics. So if the agent still has options open and considers the different options as having good-making characteristics, he has not chosen and does not yet have an intention-to act. Webber asserts: ‘By choosing to devote my time and resources this way rather than another, I closed off other courses of action which themselves had good-making characteristics as their ends.’ We form intentions and choose. Our obligations can make us choose but this is not always the case. We certainly need to have an intention if the action is done intentionally, but we do not need to have an obligation to act intentionally. The structure that I have explained as plausible is the structure of intentional action. So the central question is how other-directed intentions are possible. *Law and Authority* aims to show that the lawmaker needs to connect to values or good-making characteristics in order to make possible other-directed intentions, i.e. to make it possible for addressees to choose the law and its directives.

The question on how the obligatoriness of law arises within my theoretical framework will be considered in the next section where I discuss Essert’s comments.

ESSERT ON PROGRESSIVE ACTION, PROMISES AND ‘JUST BECAUSE IT IS THE LAW’

Essert’s insightful comments problematise my way of executing the project of connecting law, intentional action and ‘good-making characteristics’. Although he is sympathetic to the line of arguments I advance in *Law and Authority* he is nevertheless not completely satisfied. Essert’s first worry is my use of Aristotle’s *Metaphysics*, Book Θ to illuminate the structure of practical reason as an exercise of a capacity. He thinks that further exploration and development of the contrast between actions and states should be carried out in terms of a study of what grammarians call ‘the progressive and perfective aspect of verbs’ in order to better understand Anscombe’s interpretation of the question ‘why’?

Let me explain the background of what is called ‘the progressive and perfective aspect of verbs’. Aristotle’s notion of activity is developed in light of two different analyses. First, we find the distinction between activity (*energeia*) and motion (*kinesis*); second, Aristotle examines activity as the exercise of a capacity (*energeia* as actuality and potentiality). Examples that illustrate the former distinction are seeing, thinking, living. They are activities *per se*. On the other hand, walking and building are motions (*kinesis*). Two examples of activity as a capacity are the following. First, an individual closes his eyes and cannot see, then he opens his eyes and can see. Second, when a child has not yet learned to speak English and then after learning starts to speak English.

The focus of the analysis of the idea of activity that distinguishes between activity *per se* and motion (*kinesis*) is on temporal development. Thus, living and thinking do not aim at completion whereas building a house and walking to the supermarket to buy milk have a beginning, a middle and an end. By contrast, *in the analysis of activity as a capacity, the emphasis is on the learning, acquisition and exercise of a capacity.*

The explanation of the distinction of *energeia* (activity) and *kinesis* (motion) is found in *Metaphysics Book Θ 6* and in *Nichomachean Ethics X, 4*. In the case of motions, the action has an end and it reaches an end or completion. By contrast, activities *per se* are endless. The end is achieved as soon as we begin the action and is present as long as I am performing the action. If I am seeing I achieve the end of seeing while I am still seeing. Aristotle points out that it is true that when I am seeing I have seen *at the same time*. By contrast, if I am building a house *it is not true* that I have built a house *at the same time*. In the literature this test is called the ‘grammar test’ for discriminating between activities *per se* and motions. If in our use of the present tense of the verb we also entail use of the perfect tense of the verb, then it is an activity (*energeia*). If this entailment does not obtain, then it is a motion (*kinesis*). By contrast to the discussion in Aristotle’s *Metaphysics*, the discussion in *Nichomachean Ethics* is about pleasure. Aristotle aims to show that pleasure is an activity and not a becoming or motion (*kinesis*).

In Aristotle, a motion (*kinesis*) or becoming depends on time. Because intentional action is motion, it is time-dependant, but it is also thought-dependant. This is the focus of Thompson’s *Life in Action*, inspired by Anscombe’s *Intention*. Thompson takes the progressive form of action and its manifestation in the grammar of the progressive verb to show the differences between states and processes, where the latter is time and thought-dependant. Here processes are equivalent to motion (*kinesis*) in Aristotle. The opposition is now between a state, e.g. being hungry, and a motion or a becoming. Thompson uses the interpretation of the Aristotelian distinction between state and motion or becoming, including ‘performances’, as advanced by Ryle, Kenny and Vendler (Kenny introduces the distinction between activities [*energeia*], motion [*kinesis*] or performances and states; however, the terminology changes in Vendler).⁵ Thompson draws on this

5 See A Mourelatos, ‘Aristotle’s Kinēsis/Energeia Distinction’ (1993) 23 *Canadian Journal of Philosophy* 385 for a clarification of Kenny-Vendler’s terminology and his own terminology. See also D

material and distinguishes between the progressive and imperfect tense and the perfect tense of a verb. When I say 'I was walking to school' I do not mean 'I walked to school'. Intending or trying involves the progressive and imperfect tense, but there is no guarantee of success.⁶ From the first-person perspective, I am reporting the process in the progressive and imperfect form.⁷ For both Thompson and Aristotle, the grammatical aspect of the verb guides us into the metaphysical elements of the action and logical insight.⁸ The grammar test shows a practical-psychical structure.⁹

Focusing on the usage of our grammar enables us to unveil the practical structure of intentional action. This is impressively achieved by Thompson's *Life and Action*. In Chapter 2 of *Law and Authority* I begin with this grammar to show the reader its importance in the context of understanding the normativity and authority of law. But in Chapter 4 I aim to show how the Aristotelian analysis of activity as a capacity is crucial to understanding the structure of practical reason and intentional action. The distinction between *energia* (actuality) and potentiality which focuses on capacities and the way we perform our capacities is the key to unlocking another layer of the grammar of the progressive. I use Aristotle's *Metaphysics, Book Θ* to show how intentional action and the structure of practical reason reflected in the progressive and imperfect form unfolds as two-way capacities.

Practical reason is an exercise that goes from what is already constitutive in us and therefore non-privative. In the example of speaking a language, the potentiality is actualised when we are in silence but know how to speak English, and then begin to actually speak English. This is, in my view, a different perspective from Thompson's analysis of the progressive action and the psychic-practical reality in terms of grammar. Thompson's analysis and my view do not stand in contradiction. On the contrary, they are complementary and they both presuppose that intentional action is time-dependant and thought-dependant and that there are genuine changes when we act intentionally, contrary to what rationalism and empiricism say. This underlying metaphysics is also crucial to understanding the space occupied by practical reason. The motivation of my investigation is to clarify this space, where the *specific human way* of production and movement happens. It is neither rationalistic nor empiricist. Rationalism presupposes that all reality, including psychic-practical, is static in time. Therefore, all relations in time are artificially analysed as one state of affairs. Consequently, within this framework practical reason cannot produce anything and if it is an active principle the changes are not real. Empiricism also presupposes the rationalistic premise, i.e. there is no real change in active principles like practical reason. Therefore, practical reason and human action as manifestation of capacities are reduced to predictions about the future, again another

Graham, 'States and Performances' (1980) 30 *The Philosophical Quarterly* 117. For a more metaphysical view see R Stout, 'Processes' (1997) 72 *Philosophy* 19.

6 Thompson (n 2) 126.

7 *ibid* 125.

8 *ibid* 125–26.

9 *ibid* 131.

static state of affairs.¹⁰ Aristotelian metaphysics explains this space of movement and change that is caused by practical reason as a two-way capacity. This dynamic structure that underlies our grammar can only be explained by Aristotelian metaphysics, or so I have argued in *Law and Authority*.

Essert's second worry is the connection between intentional action as the exercise of our practical reasoning capacities and my analysis of compliance with the law. In his view, my explanation cannot account for mere compliance with the law or for Holmesian 'bad men'. Essert puts the example of a man slowing down his car in order 'to keep a safe distance'. His answer to the question 'Why are you following the law?' might be 'I did not know I was doing that'. According to Essert, the man is not intentionally following the law. Essert also asserts that my explanation of intentional action cannot explain cases where the agent might respond 'I follow the law just because it is the law'. Furthermore, he thinks that my explanation cannot make sense of the idea that we keep promises merely 'because it is a promise'. He rejects the view that in these cases there are 'any purported external benefits that doing so might bring'.

In *Law and Authority* I argue that practical reason is a capacity and we learn how to do things in the world intentionally in virtue of this capacity. I also address (199) the Holmesian objection of the 'bad man'. I argue that my focus is on the paradigmatic case in which law and directives are effective and there is a symmetrical relationship between the values of lawmakers and the values or good making characteristics of actions that citizens avow. I advance the following point:

Imagine, similarly, a legal system where citizens do not throw litter in the streets and teach their children not to do so purely because they fear being sanctioned and not because they believe that it is a good sort of thing to live in an unpolluted and clean city. This view does not contradict the point that some citizens in different kinds of legal systems might *occasionally* be alienated from the legal system and will have no capacity to avow either the grounding reasons of the legal rules or the goodness of legal authority. However, it seems possible that only a few will be *systematically* alienated in this way. (209)

At pages 160 to 169 of *Law and Authority*, I advance an analysis of the entire spectrum of actions of compliance with the law, including the possibility that the agent avows the law because the law is good. In my view, this provides the grounding for the answer 'because it's the law'. The argument is that our human form and action presuppose a directionality towards what is intelligible. Intelligibility is given by what is good and of value as seen by the agent. This is a naïve and primary explanation of action. We learn concepts and bodily movements in order to do things in the world directed by values and good-making characteristics. It is not that there are 'purported external benefits' so that doing things *will make us* do those things. It is rather that the structure of our action already reflects that we are doing things in order to pursue good-making characteristics as seen by the agent from the first-person or deliberative perspective. In the example given by Essert the man is 'slowing down his car in order to keep a safe distance' and this is done '*because it*

¹⁰ See Grisez (n 2); Stout (n 4) for excellent expositions of this point.

is good to be safe. The lawmaker needs to address the structure of the intentional and practical reason of the driver. He needs to put forward a law that should be complied with *in order to be safe*. Imagine that the lawmaker makes a law concerning 'keeping a safe distance between vehicles' simply for flies to freely move between cars, this will make the law unintelligible in our society as we conceive ourselves and our institutions. It will make difficult compliance with it. It might, however, be intelligible in a Buddhist society where other values and good-making characteristics are salient.

I have said in *Law and Authority* that we learn reasons for actions in the public sphere. However, I do not unpack this in detail. In my view, this entails thoroughly developing the position of Elizabeth Anscombe in her article 'Brute Facts'.¹¹

The thesis in 'Brute Facts' involves the view that the description of an action 'A' in terms of facts *is not a description of the institution behind 'A'*.¹² However, the *existence* of the description of action 'A' *presupposes* the institution A. But what is the *institution behind the description*? Let us begin with the simple example provided by Anscombe:

I owe the Grocer Five Pounds for the Potatoes that he Has Supplied to Me

I order 1 kg of potatoes from the grocer and the grocer puts the potatoes in his delivery van, rings my bell, unloads the potatoes and hands me a bill for £5.

Let us say that you are at my house and observe the actions of the grocer and my actions. As an OBSERVER (with no theoretical purpose in mind) you establish that 'I owe the grocer money'. How did you reach that conclusion? Is it because you ask me what am I doing? But this question only makes sense *in real life* when my doing is unintelligible. When my actions are intelligible to you, you grasp my bodily movements and the reasons 'why' I am moving my body in the way I am moving it *as a unity*. Let me explain. The problem is that if you already possess the concepts of 'five pounds', 'owing' and 'supplying', the mere observance of the bodily movements of the grocer and my bodily movements of receiving the potatoes and bill will not tell you anything about the fact that, 'I owe the grocer £5 for the potatoes he has supplied'. If you are able to grasp the action and make it intelligible to you, it is because the concepts 'five pounds', 'supplying' and 'owing' constitute a set of concepts that you, the OBSERVER, myself and the grocer have all learned in the context of the social practice of 'buying and selling'. We learned these concepts at a very early age when we also learned that obligations arise from the exchange of goods in our society. The bodily movements and the grounding or underlying *reasons 'why'* we buy, sell and fulfil our obligations that arise from purchasing contracts are learned *as a unity*. In the example, the bodily movements of the grocer and the grounding reasons or *logos* are grasped as a whole. But as an OBSERVER when you grasp the unity of physical movements and grounding reasons, you are not describing the institution of 'buying and selling'. The action is practical and therefore it needs to be grasped as practical. This means, the action is practical because it is about the intentions of the grocer and the intentions

11 E Anscombe, 'Brute Facts' (1958) 18 *Analysis* 69.

12 Thompson (n 2) 72.

of the buyer. The buyer and the grocer aim to produce a state of affairs and they know *why they are doing what they are doing*. The grocer knows why he is putting the potatoes in the delivery van and unloading them at my house, and I know why I am ordering the potatoes, taking them from the grocer and receiving the bill. Anscombe asks¹³ whether there is a difference between this scenario and a similar scene of a film where one actor is supplying potatoes and another actor is receiving them. In the case of the film scene, we would not say that the actor who receives the potatoes ‘owes’ the actor-grocer £5 pounds. The difference is in the ‘intention’ of the agents. The actors do not intend with their bodily movements to generate obligations or to create a purchasing contract. By contrast, when I receive the bill I know that ‘I owe the grocer £5’. The OBSERVER grasps that I owe £5 to the grocer because he or she can grasp the bodily movements and the grounding reasons of the actions as a unity of intelligibility, but the OBSERVER in grasping the actions is not contemplating a description of the institution. He or she is not saying to himself or herself, ‘Here is a grocer and a purchasing contract between a buyer and a seller, and the corresponding obligations that arise from this contractual situation’. On the contrary, the OBSERVER apprehends why the grocer is supplying potatoes and that I consequently owe him five pounds.

To further understand this subtle and difficult point, we need to understand Anscombe’s conception of intentional action which rejects actions as an interior act, i.e. mental states such as beliefs and desires that cause an action. This is what I have tried to explain in the book.

We learn about promises and obligations in the same way we learn the actions of ‘buying and selling’. We know that when we promise, we need to keep our promises and that having an obligation entails fulfilling it. But this does not mean that promises do not engage with the good of the action to perform or with the good of the institution. Of course when I fulfil my promises, I know how to do it and *what* I am doing and *why*. I do not need to remember or rehearse in my mind *why* we have promises, but this does not mean that there is nothing else but promises and obligations beyond the act ‘I promise’ and ‘I have an obligation’.

There is a deeper structure related to what is good that enables us to make intelligible why we should keep our promises. Grisez reminds us in his commentary to Aquinas’s *Summa Theologicae*,¹⁴ that law clearly depends on final causality and therefore obligation is strictly a *derivative* concept, with its origin in ends. Grisez points out that Aquinas’s early work on *Lombard’s Book of Sentences* tells us that natural law is the end towards which men are inclined. If we learn legal rules and legal directives at the same time we make intelligible the *logos as values and ends* of these legal rules and legal directives, then why would it be different for promises and obligations? In Anscombe’s example, I pay the grocer £5 *because I owe* her £5. If we excavate deeper, we discover that there is a structure that we learned and the ‘why-question’ methodology guides us through this deeper structure, i.e. that we ought to fulfil our

¹³ *ibid* 70.

¹⁴ Grisez (n 2) 184.

promises because others have trust in us and that it is good to preserve the trust of others. Of course, I do not need to stop and think at each step of my action whether I owe £5 to the grocer. I know this practically because *I intend* to buy 1 kg of potatoes and have learned this and the underlying *logos of values and ends* within the institution of ‘buying and selling’.

PRIEL ON EMPIRICAL METHODOLOGY, THE COMPLEXITY OF THE LEGAL SYSTEM AND PRACTICAL EDGE

Priel has two main concerns with the ‘guise of the good’ model of intentional action as an explanation of the normativity of law as advanced in *Law and Authority*. First, he asserts that the ‘guise of the good model’ relies on introspection and on the idea that we are transparent to ourselves. This idea he tells us, however, has come ‘under considerable empirical attack’. He cites Timothy Wilson’s *Strangers to Ourselves*¹⁵ as one of the key pieces of psychological research that shows that individuals ‘do not have access to their reasons for actions’. Priel brings to our attention Wilson’s chapter ‘Knowing Why’ which, according to Priel, successfully shows that our answers to the question ‘Why?’ may be inaccurate.

First, let me clarify the view put forward by Priel and the notion that the model of the guise of the good relies on introspection. Introspection is a term used in the literature of self-knowledge. It is the idea that we can retrieve our mental states by looking inwards and observing our mental states. By contrast the outward-looking approach, as advocated by Evans, Moran and Wittgenstein to name just few, defends exactly the opposite idea. In other words they reject that we can have self-knowledge by inference from observation of our mental states. They argue that the agent who acts intentionally and therefore from the first-person perspective or deliberative viewpoint, looks directly at the world and the kind of knowledge she or he has is non-observational. In *Law and Authority* I use Moran, Evans and Wittgenstein’s transparency claims to show how non-observational knowledge works. I argue that intentional action cannot be explained by mental states, and even less by introspection. In Anscombe’s *Intention*, we also find a defence of the transparency condition (see s 3.3 *Law and Authority*). But the guise of the good is not only characterised by the idea that the agent engaged from the first-person perspective or deliberative point of view has non-observational or transparent knowledge of her actions. I provide other features that characterise intentional action as running parallel to practical reason and conceived as a capacity (see s 4.2 *Law and Authority*).

I should also emphasise that the model of the guise of the good is not an explanation of all human actions as Priel suggests. Nor is it an explanation of desires, beliefs, attitudes, or judgements which are at the centre of Wilson’s *Strangers to Ourselves*. It is an explanation of *intentional action*.

¹⁵ Timothy Wilson, *Strangers to Ourselves* (Harvard UP 2002).

Wilson's *Strangers to Ourselves* aims to question the idea that we truly know what we *desire or believe*. He illustrates this with a simple example. Susan *believes* that she is in love with her boyfriend, but it is obvious to all her friends that she really does not love him. Susan convinced herself that she *felt* something she did not. Wilson focuses on why it is that people do not know themselves very well and how we can increase our self-knowledge. Wilson wishes to show that we do not know ourselves because what we want to know about ourselves resides outside our conscious awareness. Wilson distinguishes between the process of unconsciousness in Freud and what he calls the 'adaptive unconscious'. The former is about primary and animal tendencies, whereas the latter idea involves the view that high level sophisticated thinking is managed by the unconscious. We can then avoid danger, set goals and initiate actions in an efficient manner.

In the example provided we see the process of self-deception working in Susan. The theme is vast in the philosophical literature but Wilson prefers to argue that this is a case of unconscious behaviour. Wilson relies on empirical study to test the *hypothesis* of the 'narrative of the unconscious'.¹⁶ Wilson provides the following story: a social psychologist advances an explanation of agents' actions by attributing these actions to their beliefs. After hearing these explanations the agents responded, 'That's a very interesting theory, professor, but I am afraid that I do not recall having had any thoughts remotely like that'.¹⁷ This shows, Wilson tells us, that there are unconscious thoughts directing our actions. They are repressed for a reason.

Law and Authority aims to undermine the idea that intentional action resides in consciousness understood as a mental state. We act intentionally in virtue of our capacities due to the unity of reason and desire directed towards an end as good-making characteristics. We do not have an introspective knowledge of our desires ('desires' in the context of classical intentional action is a *desire of reason*), but a manifestation in action as ordered by the unity of desire and reason. I agree with Wilson that what we desire does not reside in our consciousness. Contrary to the focus of *Law and Authority*, the focus of Wilson's explanation is not on intentional action but on *all* kind of actions, including states such as 'being in love' (see above Essert's discussion on the distinction between states and progressive action and my own comment on Essert's point).

Self-deception and weakness of the will can also be explained within the framework of moral psychology and philosophy of action. This understanding can be completed by empirical studies and an excellent example is Holton's *Willing, Wanting and Waiting*.¹⁸ However, his starting point is the conceptual framework and formulation of the problem of weakness of the will given in Plato's *Protagoras*¹⁹ and in general the philosophical idea of intention. Holton relies on philosophical concepts, e.g. will, and interconnects these concepts with empirical results to further

¹⁶ *ibid* 13

¹⁷ *ibid* 4

¹⁸ R Holton, *Willing, Wanting and Waiting* (Oxford UP 2006).

¹⁹ Plato, *Protagoras* in *The Collected Dialogues of Plato* (E Hamilton and H Cairns eds, Princeton UP 1961).

illuminate our common sense view of action and mind. This is an excellent example of what I call the ‘parasitic thesis’, which I defend in *Law and Authority* and later in this paper.

Wilson advocates and defends the idea of *adaptive* unconscious. In the case of the study which provided subjects with a social psychological explanation of their actions, we could argue that their puzzling responses are due to the fact that the social psychological explanation is a *theoretical* explanation of agents’ actions, rather than the *naïve explanation* defended in *Law and Authority*. In the book I also try to show that theoretical explanations are parasitic on the naïve explanation. This now takes me to Priel’s complaint that in the study I ignore empirical research.

The parasitic thesis that I defend in *Law and Authority* is the following. If a theoretical-empirical project does not take the first-person deliberative perspective as the privileged position, then it is doomed to fail because it presupposes that we can make intelligible our activities by ‘observing them’. By contrast, our activities are given to us, i.e. we know *why* and *what* we are doing when we are doing it, and it only makes sense to point at paradigms or central cases that organise the diversity and multiplicity of our social practices. Since we have a specific form of life, e.g. we love, play, have friends, write poetry, think, mourn and so on, this form of life can only be understood if we *primarily* understand the underlying grammar or logic of our activities (*logos*). This is what I have tried to unveil in *Law and Authority*. I attempt to show the underlying grammar of intentional action when we comply with the law and the underlying grammar of lawmakers. By contrast, empirical investigations such as sociological, economical, biological, chemical and physical research studies aim to discover their object of study. Research on unconscious processes, Freudian or adaptive processes, are also about discovery of an object of study. The inner logic of such investigations is not given to us; we need to discover it. However, *the case of human activities is at variance with this since the internal logic or grammar of our activities is given to us and defines the limits of what we can make intelligible.*

An empirical question posed as a description of an action or social practice that searches for determination of a social practice that we *can and should discover* is a sham question because it presupposes what it needs to explain, i.e. the intelligibility of human action. In contradistinction, the investigation of central cases or paradigms begins with a grammar or logic that *we already use*. The inner grammar or logic determines the limits of what we can say. For example, a constitution that is created by legislators with the intention of helping citizens ‘*learn to cook*’ can neither be a central case nor a marginal case because it is unintelligible to call what is really a manual for ‘good cooking’ a ‘constitution’. Alternative possibilities are excluded.²⁰ Central cases or paradigms of activities help us to organise our actions and social practices. Marginal cases make sense, e.g. law as the absence of coordination, law as unjust, law as norm-subjected, law as coercion *are all intelligible* when we place them in relation to the paradigmatic or central case of law, i.e. law that intends to coordinate and be just. Our forms of life establish the limits and

²⁰ L Wittgenstein, *Philosophical Investigations* §637 (GEM Anscombe tr, Blackwell 2001).

internal logic of our actions and social practices. There is, however, room for fluidity, openness and multiplicity.

On the other hand, social action is not an ideal because this presupposes a point outside practical reason where we are guided by the contemplation of 'good' and 'absolute' platonic entities and where this gives intelligibility to our actions. Within the central-case methodology the limits of what we can say and describe are established by our practical reason due to the kind of creatures we are. If there are no limits and the possibilities are beyond our internal logic, e.g. a constitution is merely a manual for cooking, then we push the limits of our language, intelligibility and the human world. There is no gap between the description of an action and the evaluation of an action from the first-person perspective or the point of view of practical reason because our practical reason establishes the intelligibility of our action and social practice while we are acting. There is no neutral place from where we can 'observe' our own doing, including our engagement with specific social practices, *while* we are doing the action. The central case or paradigm-methodology is a method about the limits of empirical knowledge.

If the above is sound then we cannot say there is a continuity between social scientific investigation and conceptual investigations construed as central cases or paradigmatic cases. The latter is *primary* because it provides the intelligibility of the subject matter of social scientific research. That is, it establishes the limits of what can be said and what cannot be said in social-scientific research. Of course, social scientific research is important to illuminating further our theoretical understanding, but my argument is that this theoretical understanding is parasitic on the *naïve explanation* of the central case of action, i.e. intentional action.

Let us return to Wilson's hypothesis of the adaptive unconscious. This presupposes the distinction between conscious and unconscious, that there are actions that we are able to direct and think about, and actions that—when we are doing them—we do not fully understand why we are doing them. *The adaptive unconscious idea presupposes an understanding and demarcation of the subject matter to be studied.* Wilson insists that we can gain knowledge of ourselves by looking outward at our behaviour and by seeing how others see us and react to us. '*We must be like biographers of our lives, distilling our behaviour and feelings into a meaningful and effective narrative.*'²¹ It seems that for Wilson also, empirical knowledge has its limits. We are not going to make intelligible our outward behaviour through experiments but by making sense of ourselves, and my argument in *Law and Authority* is that the starting point for this 'making sense' is the naïve conception of action.

Priel's second worry is that the guise of the good cannot explain key features of modern legal systems. The everyday examples that dominate *Law and Authority*, Priel tells us, are relevant to explaining law only if we assume that law is a set of rules that indicate what we can and cannot do. In Priel's view this image of the law is, at best, two centuries out of date. Priel asserts that law is technical, voluminous, complex and pervasive. The complexities of modern law cannot be explained by the

²¹ Wilson (n 14) 16.

simple model of the guise of the good. Finally, Priel is worried that the philosophical view has no impact on actual law.

I have argued that the paradigmatic example of legal normativity is the case of the agent who complies with the law because, from the deliberative or first-person perspective, she avows the values or good-making characteristics of the law. As a response to the possibility of coercive or fear mechanisms that cause the majority of the population to comply with the law, I state that it seems possible that only a few are alienated from the law (199).

Priel affirms that realities like the European Union suggest this is optimistic. The majority of the population feel alienated by European Union legislation because it is often difficult to see the contribution of complex legislation to the pursuit of the good. Priel finalises this point as follows:

It is here that a political conception of law's normativity, one where the normativity of law is derived from an account of political authority, that can prove more promising, not by explaining how individual laws make sense in the practical reasoning of particular individuals, but by showing how laws can make sense within a larger political scheme.

This concern is related to the question of the common good raised by Webber, and I have already pointed out that my task in the book was not to advance the political justification of law at the level of the political community. This work has masterfully been done by important philosophers including Aristotle, Aquinas, Finnis, Locke, Rawls, Nozick, Dworkin and Raz among many others. If this had been the task I set myself, *Law and Authority* would not have much originality. Priel, I suspect, wishes I had written a different book.

When I started the book, I found that the connection between moral psychology, including ancient and contemporary philosophy of action and law was under-researched. The point of the book is to show that any justificatory framework ought to take into account the structure of our agency. Or, put differently, that we act according to values or good-making characteristics because of the kind of creatures we are, creatures who have ends and who are inclined to produce objects, states of affairs and institutions as having good-making characteristics due to the exercise of our capacities, including our most precious one, practical reason. The aim of the book was to bring attention to the dynamic structure of practical reason and to show that the underlying intelligible structure of complex institutions, including legal systems, is the structure of practical reason. If the citizens of a legal system, e.g. the European Union, feel *systematically* alienated from the laws that are imposed on them and cannot avow the ends as good-making characteristics that law-makers intend to produce then, I have argued in the book, we are confronting, most likely, a marginal case of a legal system. I have explained that marginal cases arise due to inversion of values, the misunderstanding of good-making characteristics in law, and defective realisation of elements that constitute the Rule of law, e.g. clarity, coherence and so on.

Priel indirectly seems to argue that the normal citizen cannot have access to the technicalities of certain laws in complex legal systems. If the law is excessively

technical and there is no *logos* in terms of values that can connect to the practical reasoning of the citizen, then one might say that the practical reasoning of the lawmaker has been defectively exercised. Priel's supposed counterexample is an excellent example of my point. Lawmakers can fail because of a defective exercise of practical reason.

But is it the case that the *entire* EU legal system alienates its members? Let us take the Toy Safety European Directive 2009/48 EC as a case in point. Chapter 1 of the directive establishes the subject matter and the scope of the Directive and the definitions used by the Directive, e.g. risk, harm, hazard. Chapter 2 establishes the obligations of economic operators. Chapter 3 describes the rules for conformity of toys, including warnings. Chapter 4 indicates how the conformity assessment will proceed. Chapter 5 describes the notification of conformity assessment bodies. Chapter 6 considers the obligations and powers of the Member States. The final chapters concentrate on committee procedures, administrative provisions and transitional provisions. Article 2 (1) indicates: 'This Directive shall apply to products designed or intended, whether or not exclusively, for use in play by children under 14 years of age.' Economic operators are defined in the Directive as 'the manufacturer', 'the authorised representative', 'the importer' and 'the distributor'. A 'chemical toy' is defined as 'a toy intended for the direct handling of chemical substances and mixture and which is used in a manner appropriate to a given age-group and under the supervisor of an adult'. 'Harm' is defined as 'physical injury or any other damage to health, including long-term health effects'. Article 10 (2) establishes the essential safety requirements: 'Toys, including the chemicals they contain, shall not jeopardise the safety or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the behaviour of the children.'

Despite the complexity of the Directive, the ends as good-making characteristic that the lawmaker intended are clear. If I am a manufacturer, I am able to avow the end of the Directive as an end seen with good-making characteristics. I manufacture toys with chemical substances and need to ensure that these substances do not cause harm to children. The underlying *logos* is that the health of children is a value or good. Of course, it might be that as the owner of a toy manufacturing company I am completely insensitive to the health of children, but this only shows that I fall short of the good exercise of practical reason.

Law and Authority aims to explain all the spectrum of possibilities, from good and full performance of practical reason to a defective exercise of practical reason. This is, in my view, the power of the guise of the good model to shed light on legal authority and legal normativity.