

**TITLE**

Make it new! The redeeming Modernism of law and the collapsing of its polarities

**AUTHOR**

Condello, Angela and Mason, Luke

**JOURNAL**

Polemos

**DATE DEPOSITED**

25 September 2018

**This version available at**

<https://research.stmarys.ac.uk/id/eprint/2620/>

---

**COPYRIGHT AND REUSE**

Open Research Archive makes this work available, in accordance with publisher policies, for research purposes.

**VERSIONS**

The version presented here may differ from the published version. For citation purposes, please consult the published version for pagination, volume/issue and date of publication.

*Make it new!* The redeeming Modernism of law and the collapsing of its polarities

by Angela Condello and Luke Mason

**Keywords:** Law, Modernism, Rule of Law, polarity, exemplarity, normativity

### Abstract

This article argues that law is an inherently modernist normative practice. Constructing a vision of Modernism which is at once an epistemology and an attitudinal disposition to doubt and make anew our assumptions about the world, the authors demonstrate that legal practice encounters the world through individual cases, ‘examples’. Through these examples the law is capable of both interacting with and comprehending that world, while also being forced to question the law’s own precepts and their application. In this manner, the law’s generalisations and abstractions become concrete, and can indeed be upended, through fleeting, impressionistic and highly case-specific examples. This *exemplarity* within law explains how law is able to navigate its apparently contradictory aspirations and natures which have bedevilled legal philosophy for millennia. In reality, law exists within a series of polarities, rather than contradictions, which are navigated through the law’s encounters with examples from the extra-legal world. The authors conclude that this aspect of the law’s nature also has practical consequences, requiring the law to maintain the fora in which new and novel cases are heard, and through which law’s modernist spirit can thrive.

#### 0. Introduction: The law’s modernist spirit

For non-lawyers, and even to some non-reflective lawyers and legal scholars, the mysteries which have occupied the minds of legal theorists and jurists for millennia often come as a surprise, and appear to be rather inconsequential. After all, law is, it would seem, simply a system of more or less clear rules or commands issued by those in power to achieve some end or other, and backed up by some credible force or threat of violence. And while there might be some lack of clarity regarding the nature or content of those rules, these uncertainties, it would appear, can be cleared up through some form of adjudicatory system or changed through the creation of new rules. In reality, however, law is riddled with contradiction, complexity and existential uncertainty. Law, and its accompanying political philosophies and ideologies, such as the rule of law, are remarkably difficult to pin down even to their most central tenets.

Legal theorists, as well as sociologists, anthropologists and philosophers of law, reach diametrically opposed conclusions regarding law’s nature, revealing its Janus-faced aspects in many regards. On the one hand, the law is seen as a clear set of rules,<sup>1</sup> yet on the other it is viewed as infinitely indeterminate and vague;<sup>2</sup> law is at once seen as the rejection and pre-emption of any moral debate,<sup>3</sup> replacing this with its own view of justice, and also bringer of justice and fair resolutions to the world;<sup>4</sup> law is seen as general, abstract and indifferent to the complexities of individual

---

<sup>1</sup> Hans Kelsen, *Reine Rechtslehre: Mit einem Anhang: Das Problem der Gerechtigkeit* (Vienna: Verlag Franz Deuticke) 1960; HLA Hart, *The Concept of Law*. (Oxford: OUP, 2012).

<sup>2</sup> Oliver Wendell Holmes, “The path of the law,” *Harvard Law Review* 10 (1897): 457.

<sup>3</sup> Joseph Raz, *Practical Reason and Norms* (Oxford: OUP, 1975)

<sup>4</sup> Ronald Dworkin, *Law’s Empire* (London: Fontana, 1986).

circumstances,<sup>5</sup> yet also flexible, practical and existing in the world.<sup>6</sup> These apparent deep paradoxes or contradictions in the law's nature appear to be inevitable tensions in the way in which a social system of rule generation, interpretation and application operates, rather than merely superficial aspects which can be bypassed to reveal the true nature of law. As such, law inhabits an existence which is permanently characterised by these internal tensions. Desmond Manderson has characterised law's existence in this manner as its 'polarity',<sup>7</sup> existing and negotiating between such apparent poles, and existing as a forum for their resolution. Indeed, it would seem that law exists within a series of such polarities. The aim of this article is to exhibit and explain these polarities and seek to present the law's use of exemplary cases through which it collapses or reconciles its polarities. By forcing the law's abstract and ideal characteristics to come into contact with, and be questioned by, the realities of the sites of law's application, the law finds a forum within which its poles meet. In this light, law is revealed to possess certain additional characteristics, in particular an inherently modernist nature, making law capable of self-doubt, new paradigms and deep introspection, rather than simply the imperialist interpellation of the world and its inhabitants.

This evocation of Modernism allows a deeper reflection on legal theory and critique as well as law as the object of critique or theorisation: while legal theory is an attempt to describe both a social phenomenon and the nature of normative systems, law is an epistemically constructivist phenomenon. By understanding it in a certain way, we make it anew. Legal theory is an attempt to understand law, but as law is generated by self-knowing lawyers, legal theory is also a way of understanding ourselves. Lawyers are therefore capable, through the use of exemplarity, of inhabiting the personification of legal theory. While Modernism is an account of the world and how it can be recreated, it is also an account of a particular world-view, a mindset, and an approach to art, literature, and how we depict reality. Lawyers, once they understand that they are faced with the inevitability of the task of collapsing the law's polarities, are capable of embracing this modernist aspect of law to a greater or lesser extent, and, indeed, of bearing the weight of its responsibility. Law's inherent modernist attitude should not itself be romanticised however: it can be used well or badly. Nonetheless, the force of moral responsibility which it places on the law's officials to collapse the law's polarities in an appropriate manner cannot be avoided, and reveals law's deeply open, democratic and anarchic essence.

### 1. Modernism, the fleeting and challenging authority

Modernism is a way of seeing the world.<sup>8</sup> Modernism's essence has become lost slightly among its more theoretically muscular off-spring: post-Modernism, post-structuralism, *critique* and deconstruction. Within law, Modernism is lost almost entirely among the myriad insights of *critical*

---

<sup>5</sup> On such ideas, see Frederick Schauer, "Formalism," *Yale Law Journal* 97 (1988): 509; Ernest Weinrib, "Legal Formalism: On the Immanent Rationality of Law," *Yale Law Journal* 97 (1988): 949.

<sup>6</sup> Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*. (Stuttgart: G. Fischer, 1965); Felix S. Cohen, "Transcendental nonsense and the functional approach," in *Columbia Law Review* 35 (1935): 809–849.

<sup>7</sup> Desmond Manderson, "Modernism, Polarity, and the Rule of Law", *Yale Journal of Law & Humanities* 24 (2012): 475.

<sup>8</sup> For an excellent overview of the cultural and epistemic aspects of Modernism within their historical and artistic context, see George Steiner, *After Babel: Aspects of Language and Translation*. (Oxford: Oxford University Press, 1975), 489–490.

*legal theory*<sup>9</sup> and *law and critique*,<sup>10</sup> both of which drink plentifully at the well of post-structuralism.<sup>11</sup> These upstart visions are perspectives largely on power, with a particular focus on seeking to see past deep-lying power structures. Modernism is somewhat different. It is a vision of how we see and recreate the world, how we can reflect upon, and also recast, universalisms through a rejection of certain precepts. In many ways Modernism has attempted to achieve this through the adoption of new forms, often fleeting, impressionistic or disjointed. This made Modernism not only a reflection on the nature of the world and our understanding of it, but also a particular attitudinal disposition. To be a *modernist* is to approach and depict things in a certain way, not merely to understand them according to a new theoretical standpoint. Modernism is at once to question the way we understand the world, and also to rebuild that understanding in new ways.<sup>12</sup> Crucial to Modernism is the emancipatory and empowering nature of many of its forms, in particular the rejection of traditional ideals within painting or literature, and the adoption of impressionistic approaches and personalised, flow of consciousness-type narratives. While Modernism is a reflection on epistemology and the nature of things therefore, it is simultaneously a method of interrogating perspectives and understandings through confronting them with singular experiences.<sup>13</sup> Modernism is therefore a hyper-democratic manner of challenging authority with the use of the single example, whether the author's own viewpoint or the heuristic single perspective. It illustrates the power of the single example and of the individuals' interior experience to challenge universal claims or assumptions.<sup>14</sup> It is a dialectic tension between singularity and generality.<sup>15</sup> Its power can even be seen in the most abstract of sciences of the Twentieth Century, analytical philosophy, where the single example is the most employed tool in the philosopher's toolbox, moving away from the types and ideals which characterised earlier works of philosophy. Equally, the single experiment which fails to repeat the findings of a previous scientific paradigm, is capable of causing deep disruption within our idealised understandings within the natural sciences. More than a way of questioning positivistic certainties as such, the modernist attitude considers the equally relevant individualistic spirit embodied by the single narrative and the single psychic experience.

Moreover, the exemplary force of *landmark cases* mediates between the grammar of norms and the grammar of life both in artistic Modernism and in legal Modernism. This dynamic interrelation between norms and narratives is one in which law does not simply demand its supporting narrative but becomes itself a narrative of possible worlds of ends and means; not simply *nomos and narrative*, but *nomos as narrative and narrative as nomos*.<sup>16</sup>

---

<sup>9</sup> Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press 1983).

<sup>10</sup> Alan Hunt, "The Critique of Law: What Is "Critical" about Critical Legal Theory?" *Journal of Law and Society* 14.1 (1987): 5–19.

<sup>11</sup> For an early influential example of how these themes and approaches all merge, see Gillian Rose, *Dialectic of Nihilism: Post-Structuralism and Law*. (Oxford: Blackwell) 1984

<sup>12</sup> Peter Gay, *Modernism: The Lure of Heresy - From Baudelaire to Beckett and Beyond*. (London: Vintage, 2009).

<sup>13</sup> On Modernism as a particular attitude and manner of thinking, see generally Everdell, William, *The First Moderns: Profiles in the Origins of Twentieth Century Thought* (Chicago: University of Chicago Press, 1997).

<sup>14</sup> For a seminal discussion of the aspirations of Modernism and its disruptive nature, see John Barth, "The Literature of Replenishment" in *The Friday Book* (New York: Panam, 1984): 193-206.

<sup>15</sup> This evocation of the bipolar nature of modernist-structuralist thought, as opposed to the more diffuse aspirations of post-modernist thought is of course not coincidental. A more overarching scepticism of this type can be found in Gerald Graff, "The myth of the postmodernist breakthrough," *TriQuarterly* 26 (1973): 383-417.

<sup>16</sup> Steven D. Fraade, "Nomos and Narrative Before Nomos and Narrative", 17 *Yale Journal of Law & the Humanities*, Iss. 1, Article 5 (2005).

The reference to exemplary cases can therefore be seen as redemptive for the precepts which it challenges, whether implicitly or otherwise: it also our understanding of the world to self-correct, not through the proposing of a new universalism or ideal but rather through the presentation of a single instance of something, implicitly challenging those ideals. In this manner, the modernist nature of law can be located within a broader genesis of ideas, whether in social theory, literature or politics. As Luban puts it, '[s]piritually and emotionally, the modernist predicament appears in the form of a heightened awareness that all our beliefs and routines are conditioned by background presuppositions, coupled with a dismaying realization that those presuppositions may well be arbitrary.'<sup>17</sup> Some theorists of law, in particular, but not only, those who are influenced by *deconstruction* within other areas of thought, have concluded that this means that law must slip into a worldview which rejects any notion of truth or general narrative, or that the law or its content has any autonomous nature or meaning. For various reasons, to be outlined in the sections below, such drastic conclusions should be rejected. Law's inherent modernist nature modernist attitude is precisely one of its most crucial ordering elements. Far from leading to drastic conclusions regarding the law's inherent emptiness, it underlines the deep connection between reality and law and the law permanent ability to be reshaped by the demands of the fields of tension and by the systems of meaning which it seeks to regulate. As Manderson himself also argues, Modernism allows us to understand the law as a locus of debate.<sup>18</sup> We take this idea further in this article, to argue that Modernism as an approach to understanding and reshaping the world, including the legal world, means that law is not simply a forum for discussion, but rather an encounter between the world and the stories we tell to make sense of the world.

## 2. The law, its ideals and its polarities

Law inhabits a series of apparent paradoxes or even contradictions, both in its ideal forms and in its everyday operation. On a very basic level, law seeks to recast the world and the actions of its inhabitants according to its own normative requirements, pre-empting any moral deliberation, yet at the same time speaks of justice, adjudication and restitution. Equally, law asserts itself as clear, authoritative and singular in its demands, yet is also experienced as vague, contingent and open to interpretation and meaning. Law seeks to regulate society and all its various social spheres with their special logics and grammars, but it is also put in place and maintained by those same social spheres adopted and moulding law's apparent demands into concrete meanings with specific social functions.

Such apparent contradictions within the law and its operation would seem to permanently characterise the law's essence. Law is a form of authority, with the ideal forms which all theoretical authority possesses, yet it is characterised by permanent doubt, dependence, vagueness, openness and social re-interpretation. Law asserts itself, and is understood as, a firm set of rules, principles and rights, yet is also equally characterised by a contradictory set of characteristics: the need to be just, to be fair, to make sense, to be respected, to be followed and to be comprehensible. Law must

---

<sup>17</sup> David Luban, *Legal Modernism* (Chicago: University of Chicago Press, 1994), 11.

<sup>18</sup> Desmond Manderson, "Modernism, Polarity, and the Rule of Law", *Yale Journal of Law & Humanities* 24 (2012): 477. Manderson develops his structuralist perspective along the following lines:

*Polarity allows us to see the rule of law as a site for oscillation rather than determination, as a place for unending public discourse rather than decision, and therefore as the occasion for the widening and deepening of our social involvement in law and justice rather than its settlement.*

exist in the world and also be open to the world for this to be possible, otherwise law is simply an abstraction with no ‘bite’ on social reality. Ultimately, this tension characterises law’s nature: law is a narrative which purports to assert itself imperially upon social reality, yet that social reality is required in order for law to *exist* from an ontological viewpoint. This inevitably means that, on some level, law must inhabit both of Robert Cover’s famous visions of normativity.<sup>19</sup> It must, in order to perform its purported regulatory function, possess certain ‘imperial’ aspects, but, if it is to exist within the world and possess meaning therein, it must also be ‘paideic’, that is be given meaning by the community subject to it, and an infinite potential number thereof.

The permanent *dual* nature of law means that law inhabits a series of complex polarities which it must navigate. It is clear and general, yet vague due to its constant reinterpretation; it seeks to regulate the social world, yet is given effectiveness and meaning by that social world and its practices. Within legal philosophy and other attempts to characterise law’s nature or essence, theorists struggle with these polar aspects of law’s nature and often seek to focus on one particular element thereof, relegating the other(s) to some secondary or penumbral importance. Various stripes of modern legal positivism seek to demonstrate law’s nature through its systemic structure, both governed by and generative of *rules*.<sup>20</sup> On the other hand, ideas such as legal realism<sup>21</sup> and legal interpretivism<sup>22</sup> seek to emphasise the inability of law’s rules alone to provide the outcome to any given legal question,<sup>23</sup> instead focusing on the random or, alternatively, deeply moral, nature of legal reasoning. In many ways, mainstream legal theory hides behind rather emotive abstractions regarding the place of morality in legal reasoning and/or criteria of legal validity, and even the methodology of legal philosophy.<sup>24</sup> While these are important questions, they can often obfuscate the polarities of law’s nature, with these being lost in powerful polemics which seek to accentuate certain elements of law’s functioning, rather than shedding light on the constant tensions within which law exists. As this article argues in subsequent sections, it is precisely through a focus on such polarities and how they are negotiated that the law’s relationship with morality becomes clearer.

A proper understanding of law therefore seeks to locate law’s operation within these polarities and understand how law negotiates these tensions. Law can never be entirely self-governing and indifferent to the world, yet nor can it be entirely subsumed by some particular social sphere or alternative narrative.<sup>25</sup> Such an account of law risks, however, coming across as vague and imprecise, and indeed, succumbing to the forms of reductivism and romanticism which characterise the very traditions of legal theory which have been criticised within the preceding passages. An account of a phenomenon characterised by its polarities with no additional account

---

<sup>19</sup> Robert M Cover, “Foreword: Nomos and narrative,” *Harvard Law Review* 97 (1983): 4.

<sup>20</sup> The most celebrated instances of such theories are Kelsen’s account of a system of norms or “ought propositions” which are part of a legal system by virtue of a unifying assumed ‘Basic Norm’; and the more socially located vision of Hart which sees law as created by a shared ‘critical reflective’ practice of following a Rule of Recognition, which, in turn, validates all other rules within a legal system. Hans Kelsen, *Reine Rechtslehre: Mit einem Anhang: Das Problem der Gerechtigkeit* (Vienna: Verlag Franz Deuticke) 1960; HLA Hart, *The Concept of Law* (Oxford: OUP, 2012).

<sup>21</sup> For an account of realism within the legal theory cannon, see Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007).

<sup>22</sup> Ronald Dworkin, *Law’s Empire* (London: Fontana, 1986).

<sup>23</sup> Ronald Dworkin “The model of rules,” *University of Chicago Law Review* 35.1 (1967): 14-46.

<sup>24</sup> For an excellent example of how legal theory has become hyper-focused on myriad instances of the minutiae of this question, see Julie Dickson, “Methodology in jurisprudence,” *Legal Theory* 10.3 (2004): 117-156.

<sup>25</sup> On this issue, see Niklas Luhman, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1995).

of how this takes place could be justly criticised as an attempt to minimise the significance of apparent contradictions within a theoretical account and therefore as a failure to fully characterise the object of analysis. In order to avoid such charges, this article instead seeks to shed light on the locus of negotiation between these polarities within the law, thus revealing certain aspects of law's inherently modernist nature.

### 3. Narratives, social spheres and the interrogative function of the example

In its imperial or regulatory guise, law appears as abstract, general, clear and in an ideal form. It embodies normativity in a functional sense: through a series of rules. This is the same *Law* as is found in the *Rule of Law*, whereby law's role within political organisation is lauded precisely due to its ability to structure social interaction in a general and predictable manner.<sup>26</sup> In this manner, the law presents itself as clear both in terms of its means of communication and in terms of its content. Its value and its essence on this view are content-independent, that is they do not make reference to what the law says or requires, simply the form and function which it has. According to systemic visions of legal positivism, the legal system itself generates and determines the content of those rules according to other rules of the same legal system.<sup>27</sup> As even arch-anti-positivist John Finnis recognises, this is a relatively sound account of how a lawyer within any given legal system would recognise the law as operating.<sup>28</sup> However, as this article has sought to underline in the previous section, to limit one's account of law in this way would be to underplay the various polarities within which law exists, creating tensions with this straightforward account as law as a self-generating system of rules. Firstly, law is itself generated by the very social reality which it creates, and is therefore a product of that social reality and its idiosyncrasies. Secondly, law's rules are subject to interpretation and application, which inevitably reveal vagueness and lead to random outcomes. Thirdly, law, if it is to be anything but an abstraction, is used to particular social spheres, from commerce to the workplace, to the family, to the public highway, all of which have their own grammars and logics and which give law its own social function. Fourthly, law - while seeking to replace the need for moral reason and logic - makes moral demands on the real world which require it to be at least perceived as morally legitimate, whether in terms of its content or for some other content-independent secondary reason. In shorts, law's generalities and abstractions necessarily come into contact with the world, its logics and its demands. Abstract forms of legal knowledge are highly prized within doctrinal legal scholarship, and Roman Law is still studied by both students and professors of law the world over, partly because of the 'purity' of its content, unsullied by encounters with the complexities of the real world. If law in general is to avoid the relegation to mere ideal and abstraction, while also avoiding being completely subsumed and colonised by the competing demands upon it, law must find a way of negotiating between its many polarities. It does this through the use of examples, of single instances, allowing it to enter into conversation with the world.

The law exists as an ideal and narrative among many competing ideals and narratives which exist in the extra-legal world, many of which the law indeed seems to want to pre-empt or usurp. While the law exists as a system of coherent and abstract rules, there exist myriad other demands on our

---

<sup>26</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

<sup>27</sup> HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), Ch. 5-6.

<sup>28</sup> John Finnis, "The Truth in Legal Positivism," in Robert P. George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1999), 195-205.

lives and structures of meaning which order how we live. These include various competing conceptions of justice and fairness, in a general sense, but also, equally importantly, the strong or 'thick' normativities which govern our lives, such as culture, religion, the 'logic' of the market and the workplace, the family, and so on. These provide not only potential rival sets of normativity in the sense of rules and order, but also a deeper and stronger sense of thick normativity in that they are an inhabited world of meaning.<sup>29</sup> For law to exist in any way other than as a quaint abstraction it must interact in a meaningful way with these competing sources of rules and meaning. If it is unable to achieve such a structural coupling, to adopt Luhmannian language,<sup>30</sup> the best the law can hope for is its adoption according to the logic of those competing social spheres and its social function becoming generated by the organic processes of the thick normativities of the 'real' world. The manner in which the law does this is crucial for understanding its negotiation of the polarities discussed in the previous sections on this article. This manner is through the individual or single case; the single set of facts and single embodiment of an alternative social sphere or normativity. When a single set of facts is set before the law, the law encounters the real world in a manner which it is capable of understanding and interpellating using its categories of knowledge. It is therefore capable of generating an outcome to the individual case which is both capable of generalisation and abstraction within the legal system, and also within that particular social sphere: through their encounter with an individual instance from the extra-legal world and seeking to interpellate it in some way, the law's perspectives have been given a meaning which the grammars and norms of that social sphere are capable of comprehending.

This may initially strike the reader as a remarkably modest observation, but it is of crucial importance for understanding the operation of the law. The law is incapable, in and of itself, of comprehending the myriad cultural, economic and power-based complexities of the workplace, for instance. Indeed, there is a deep strand within labour law theory which sees the law as a secondary force<sup>31</sup> within the regulation of the workplace, which instead should be seen as self-regulating according to other sources of regulation and normativity.<sup>32</sup> In reality, while such perspectives are perceptive in that they comprehend the inherent limitations of the abstractions of the law, they are also themselves limited in failing to grasp the locus of communication between the world of work and the world of law, that is the fora of communication generated by the adjudication of the individual case. Where a lawyer might talk of a contract of employment, for instance, in any given legal order, this bears no resemblance to the complex socio-psychological and economic arrangements which characterise a worker's relationship with her employer.<sup>33</sup> At the

---

<sup>29</sup> For a similar account of normativity based on the meaning attached to action and the world by its participants, see Robert M Cover, "Foreword: Nomos and narrative," *Harvard Law Review* 97 (1983): 4.

<sup>30</sup> Niklas Luhmann, "Operational closure and structural coupling: the differentiation of the legal system," *Cardozo Law Review* 13 (1991): 1419.

<sup>31</sup> This notion receives its most famous rendering in Otto Kahn-Freund, *Labour and the Law* (London:Stevens, 1997), 2. However, this idea has a far deeper influence in legal thinking about work, and can be found within seminal works on national and international systems of employment and labour regulation. See, for instance, the focus on 'autonomy' in Antonio Lo Faro, *Regulating Social Europe: Regulating Social Europe. Reality and Myth of Collective Bargaining in the EC Legal Order* (Oxford: Hart Publishing, 2000).

<sup>32</sup> In this manner, labour law thinking placed itself at the vanguard of sociological visions of 'legal pluralism'. An early seminal example of this is Georges Gurvitch, "Théorie Pluraliste Des Sources Du Droit Positif," in *Annuaire de l'Institut International de Philosophie Du Droit et de Sociologie Juridique*, Vol. 1. (Paris: Recueil Sirey, 1934).

<sup>33</sup> On this complex relationship between psychological and legal versions of legal relationships, see Katherin VW Stone, "The New Psychological Contract: Implications of the Changing Workplace for Labor an Employment Law," *UCLA Law Review* 48 (2000): 519.



same time, those very social arrangements and the meanings attached to them are equally incapable of making sense of the rival abstractions of the law without any institutionalised encounter between the two.

However, if an employee were to bring a claim before a court, the logics and grammars of the work place would be encapsulated within the narrative of a single story which would make sense of that separate social sphere in a manner which the law was capable of comprehending. Equally, the law's reaction to the single example of narrative would provide a comprehensible reaction, in concrete form, to the logic of that social system, which it might be capable of extrapolating into a more general set of norms and meanings within that field. This is, of course, an idealised vision of this process: the law might fail to grasp certain things about the world it is seeking to regulate, and, in turn, the world might be incapable of transposing the outcome of the single case into more general practices of meanings. However, without the instance of the singular case, the law and its social function would be entirely separate: the law's role as a source of normativity in both a *thin* regulatory and *thick* narrative sense would be entirely illusory. The law would simply be a set of ignored interpellations of the world which it was, in truth, incapable of understanding.

The law therefore is capable of 'talking' to the world and its competing normativities, both thick and thin, precisely because its encounters with the singular cases which is called to adjudicate upon. The individual stories and instances which make up these singular encounters are therefore the motors behind the law's ontological essence, that is, how it goes from *being-on-the-page* to *being-in-the-world*.<sup>34</sup> The broad narratives and meanings of law and other social spheres are therefore forced into conversation precisely through the non-abstract and the concrete instances of single cases where the narratives of the law and the narratives of the world are condensed and meet each other.

#### 4. The law's Modernism and collapsing the law's polarities

This requirement of the single case to come to have meaning and indeed 'bite' in the real world, to achieve even the possibility of Luhmann's structural coupling, has a number of important consequences regarding the nature of the law and its operation, in particular with regard to the polarities discussed in the opening sections in this article. For the law to exist in the world, it is required to make sense of it through individual instances and cases.

Law is open to ideas, meanings and narratives which come from outside its own categories of understanding the world and which it uses to seek to interpellate that world in the conversation which emerges from the encounter of normativities engendered by the singular case. This in itself explains how law exists between the polarities of abstraction and the concrete: it does so through the mediation of these elements through the single case. However, more powerfully still, the law's inevitable encounter with the single case makes the law a profoundly modernist institution, with a series of consequences for its nature.

Firstly, the law's encounter with the real world through the single exemplary case forms the site of the encounter between the two most obvious polarities: the law as setter of standards, and the law as adjudicator of disputes. The law exists as a simultaneous site of two poles of authority: the *ex*

---

<sup>34</sup> The usage of Heideggerian language here is of course not coincidental; it is argued here that law's ontological status depends on its encounter with the world. See, generally, Martin Heidegger, *Sein und Zeit* (Tübingen: Max Niemeyer, 1927).

*ante* authority of directing action, and the *ex post* authority of judging behaviour and consequences. These are, in fact, two contradictory forms of authority when they exist entirely separately, at least in the way they are experienced by those subject to the law.<sup>35</sup> The law purports to guide your behaviour and your understanding of the world, and simultaneously reserves the right to determine the acceptability of that behaviour. The single case which the law faces allows these two forms of authority to co-exist simultaneously in several important ways, thus providing these space in which other forms of the law's polarity meet and collapse. Most importantly, it provides for a meeting point for the law's dual focus on pre-emption of moral reason and its seemingly contradictory claims to justice. When confronted with an individual case, a singular narrative, the law is placed into a position whereby it must justify its own application, either in terms of the justifiability of its content, or through some second-order justification of the application of its content despite its inherent injustice. In this way, the singular case, the fleeting encounter with other social spheres, their normativities and their narratives, is a mechanism through which the law is forced to engage in a form of introspection. When the law is confronted with a concrete instance of a legal abstraction, it and its officials are necessarily faced with the question: is this outcome acceptable? This is doubly the case due to the law's normative language and aspirations, of *ought* and *should* and *must*, of *duty* and of *right*. At the same time, the justice which the individual case demands must make sense within the interpellations which the law imposes on the world. The polarities of abstract and concrete, of forward-looking and backward-looking, of closed and open, and of imperial and just are collapsed through the law's inevitable reliance on the singular case.

This is of relevance because it reveals a fundamentally modernist aspect within the law. The fleeting individual instance is capable of questioning the overarching precepts of the law, and of entering into a dialogue, and even refounding, the universal and the abstract. When the law generates a landmark case, breaking with the past or dealing with a novel situation, this incorporates into the law social narratives and normativities from outside the law in a general way, but does so through a single case, a single story, with its own singular meanings and narratives. This helps to underline the importance of work on exemplarity within the law.<sup>36</sup> Landmark cases, based on seemingly run-of-the-mill constellations of facts, can, through this modernist element of law's relationship with the case, come to question and recast deep normative orders through the questions which they pose for the legal system. In this manner, the facticity of the world and the normativity of the law become inexorably intertwined. Such cases, often well-known as cultural artefacts outside of the legal world, come to stand for these modernist encounters between facts and norms and stand as examples.<sup>37</sup> What is significant about such encounters between the world and the law through examples is not that they are either inevitable or random, but that they are the result of a particular combination of timing and reflection at a given moment of encounter between the law's narratives and the challenges which the fleeting examples from the real world pose. In this way the law must always become, to some degree, a form of lived narrative which gives meaning to real events, as

---

<sup>35</sup> On this theme, see Luke Mason, "The intractably unknowable nature of law: Kadi, Kafka and the law's competing claims to authority" in M Avbelj et al (eds) *Kadi on Trial: A multifaceted analysis of the Kadi judgment* (London: Routledge, 2014)

<sup>36</sup> Alessandro Ferrara, *The Force of the Example. Explorations in the Paradigm of Judgement* (New York: Columbia University Press, 2008).

<sup>37</sup> For a detailed account of how exemplarity functions within the law, with references to particular landmark cases, see Angela Condello, Angela. 'Exemplarity: Story, Time and Gesture of a Threshold'. *Law & Literature*, A. Condello & A. Ferrara (eds.) special issue on Exemplarity and its Normativity, (2017): 1–12.

well as simply an imposed set of norms. The normative universe – the values, rules and structures which give meaning to action is, after all, held together by interpretive commitments in order to give the abstract norm meaning. This occurs within the law's encounters with individual cases in the world. The objectification of the norm entails a narrative, therefore, and the exemplary case embodies both the narrative and the norm so it allows for an encounter between these two grammars: it contributes to enrich the interpretability of norms because it enlarges or narrows their content, but also allows their meaning to be challenged, contextualised and changed.

This article has sought to underline that this is not an inherently 'modernist' way to approach to law, but rather something which characterises the law's encounter with the world more generally, and constitutes its means of collapsing the polarities which would otherwise simply be contradictions. For the law to encounter to world, it must step outside its abstractions; in stepping outside its abstractions, it opens itself up to the demands of justice, of alternative narratives, of concreteness, of flexibility and all the other competing poles which characterise it. Equally, we could see this from the opposite perspective: for the singular case to encounter the law, it must step outside its more or less simple intrinsic meanings and narratives and step into the world of the law's abstractions and ideals.

##### 5. The modernist lawyer and the epistemically constructivist nature of legal theory

This article has sought to underline the importance of a series of overlapping theses: the law encounters the real world and its competing narratives through single cases; single cases provide the forum within which law's polarities are collapsed; and individual cases force the law into a simultaneously introspective and outward looking act of projecting its abstractions onto the world while questioning whether it can justify its demands. An overarching thesis of this article has been to thereby underline the relevance of modernist understandings of the world and of knowledge to our understanding of the law. Modernism, while a family resemblance concept, is characterised as a tradition of ideas through its focus on the ability of the thinker or the creator to overturn orthodoxy of thought, in particular in the guise of idealised forms, through the sheer power of new perspectives, in particular those which utilise the immediacy of experience or the fleeting or personalised nature of the encounter with the world. This characterises the law's nature, if we are to think of the law as something more than a simple set of ideals or abstractions, due to its encounters with the world's competing narratives and normativities through single cases.

However, Modernism is not simply an understanding of the world, but also an understanding of the power of the author and of the creator. Modernism is often best understood as an attitudinal disposition, an embracing of the epistemic insights behind modernist thought to actively seek to make the world anew. The same could be said of a modernist vision of law. When we discuss the nature of law, we often speak in solemn tones of abstract theoretical models, as if we were describing something which possessed its own essence due to its normative forms and systemic structure. We understandably seek to de-anthropomorphise our account of law.

Law is a social and normative practice of a very particular type: it is epistemically constructivist, in the sense that, by understanding or perceiving it in a certain way, we create it in that image. When we talk of law's nature, we are discussing our understanding of ourselves, in particular ourselves as lawyers, legal scholars and legal officials. While law's structures and encounters with the world make it easily categorisable within the frameworks provided by Modernism, therefore, law can also

*embrace* this modernist aspect to a greater or lesser extent. Lawyers themselves can be more or less modernist, more or less embracing of the individual case as a means of talking seriously the law's encounters with competing narratives and normativities, and its own introspection. Lawyers can embrace this element of law's nature or they can shy away from it, just as authors and artists can embrace Modernism's insights regarding the ability of new forms to challenge ideals. Because of law's modernist essence, law is particularly amenable to this form of thought: while it projects itself as connected to authority in various ways, its own encounters with the world provide for a forum to challenge, question and recast that authority in myriad ways. Law, in this manner, is deeply anarchic in a non-glib or reductivist way. It is open to deep moral questioning and appraisal and the recreation of its moral claims and demands under the weight of its encounters with singular cases and examples.

#### 6. From theory to praxis: the institutionalisation of law's Modernism

Fittingly for the substance of this article, the discussion has flitted between the rather abstract to the relatively concrete and applied. However, the ramifications of the theoretical reflections and characterisations of this paper are rather practical, or rather the questions which it poses are. This paper has argued that law's modernist character stems from its inevitable encounter with individual instances from the real world and the latter's many narratives and normativities. For the law to *be-in-the-world*, these encounters must take place, and, in so doing, they collapse the law's inherent polarities, creating space for dialogue and conversation between the demands of its competing poles. For this to take place, for the law to be-in-the-world, such fora of adjudication must exist in a meaningful way. There exist, in many legal jurisdictions, both national and transnational, tendencies which moves away from these forced encounters between the law and the world, and therefore also between the law's competing polarities. The rise of commercial arbitration within trade agreements, of privatised justice, of fees to appear in court, of waivers of jurisdiction, constitute the law's, the legislator's, or private individuals and companies' attempts to close the law off to both the demands of the world and the law's own capacity for introspection. In so doing, the law ceases to collapse its polarities and ceases to exist in the world. If the single employee is incapable of bringing a case before an appropriate tribunal for instance, the social sphere within which the employee lives develops its own social function for the norms which govern it, and the law becomes cut off from the very world it seeks to interpellate and structurally couple with. This also therefore means that the law itself is incapable of questioning its own precepts through singular cases, of engaging in the introspection which is embodied by modernist thought. It is here that Modernism re-encounters its intellectual heirs, of postmodernism and *critique*: law's Modernism depends on the structures of power which enable such modernist recasting to take place.