The Other Path of the Law

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> When we study law we are not studying a mystery but a well known profession. . . . The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. . . . The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.[1]

> Certain new attitudes toward the state have emerged. The bureaucracy has lost social standing. Citizens have resigned themselves to the fact that they must corrupt public officials if they want their needs to be satisfied. . . . The inefficiency of the law courts has given rise to a growing disenchantment with, and loss of confidence in, law-enforcement mechanisms. This in turn has led to increasing dissatisfaction with the status quo, which, coinciding with a gradual increase in new activities, has steadily reduced the state's social relevance.[2]

This Essay attempts to assess the contribution of the informal economy to jurisprudence. The very idea of an informal economy suggests that there ought to be no contribution at all. Of what possible relevance to jurisprudence are the activities of people who flee the law or just do not seek it out? The informal economy teems with inlaws and outlaws—tax cheats, drug dealers, undocumented aliens, smugglers, street vendors, sweatshop owners—the last people on earth we expect or hope to influence our fundamental attitudes towards law. But they do, and the fact that they do is, in my view, an unmitigated good.

The jurisprudence we get from the informal economy is one that enhances our power as citizens, that cultivates personality instead of suppressing it, that

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1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

2. HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 6 (June Abbott trans., 1989).

puts persons, not the state, at the center of jurisprudence. I call this jurisprudence bred in the informal economy "dynamic jurisprudence," as opposed to the state-oriented, "static jurisprudence" of the formal economy.

The difference between dynamic and static jurisprudence focuses on the idea of correlation. Static jurisprudence insists that rights and duties be correlated. That is to say, for every right possessed by one person, there must be another who owes a mirror-image duty, and for every duty there must be a mirror-image right. In order for rights and duties to be in correlation, static jurisprudence supposes the role of an agency—typically the state—that defines the correlations and restores them to balance when they go out of whack. Dynamic jurisprudence, by contrast, operates without the benefit of a correlating agency. Persons must make their demands upon other persons for fairness and justice. Dynamic jurisprudence requires persons, as an ordinary incident of legality, to break or alter the correlation of rights with duties; it is state-avoiding jurisprudence. This difference between static and dynamic jurisprudence—that one correlates rights with duties, while the other does not—leads to disparate conceptions of norms, discordant expectations of the role of legality in social life, and distinctive accounts of legal personality and institutions.[3]

Static jurisprudence initially distinguishes the formal from the informal economy by setting a boundary between legal and nonlegal social processes. The state places the boundary where the reach of its regulations ends, and where the state stops its enforcement. The formal economy uses static jurisprudence and obeys its restraints; the informal economy does not. Dynamic jurisprudence, however, sets no boundary. Always expansive, dynamic jurisprudence bombards the boundary set by static jurisprudence, alters the boundary's relative position, and even leaves a trace[4] on the core of

3. *See infra* Part II. Professor Feige kindly pointed out during the symposium that the word "dynamic" could mislead social scientists, who understand the term to mean what economists mean: something that changes over time. In this sense, even static jurisprudence can be "dynamic" in that the universe of norms might very well look different at T_2 than at T_1. I use the term "dynamic" differently. A jurisprudence is "dynamic" when it is impossible to take a snapshot of the universe of norms at any single moment, because persons can never follow norms in dynamic jurisprudence without changing them. A static jurisprudence is not "dynamic" in that it is possible to take a snapshot of the universe of norms at times T_1 and T_2, even though the snapshots may be different.

4. Economists have discussed measuring the hidden economy through "traces." Bruno S. Frey & Werner W. Pommerehne, *Measuring the Hidden Economy: Though This Be Madness, There Is Method in It*, *in* THE UNDERGROUND ECONOMY IN THE UNITED STATES AND ABROAD 3-19 (Vito Tanzi ed., 1982) [hereinafter TANZI]; *see also* Frank I. Michelman, *1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). For a philosophic account of the "trace," see JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri C. Spivak trans., 1976). For guides of the perplexed to Derrida, see DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell et al. eds., 1992); DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT (1992); JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM (1982); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987). For a Derridean approach to microeconomics, see David G. Carlson, *On the Margins of Microeconomics*, 14 CARDOZO L. REV. 1867 (1993).

static jurisprudence: the jurisprudence of the formal economy. Thus altered, formal jurisprudence[5] incorporates and absorbs dynamic elements.[6]

Dynamic jurisprudence leaves a trace on formal jurisprudence when the boundary between the formal and informal economies is permeable; that is, when the state is ready to enforce at least some informal processes. The trace may then be found in doctrines and institutions by which ordinary persons alter or oppose the norms of static jurisprudence, much as they alter or oppose these norms by participating in the informal economy.[7]

The United States has a relatively permeable legal system, and its formal economy is vigorously decentralized. The dominant, but by no means exclusive, jurisprudential style in the United States is devoted to bridging the gap between static and dynamic. This jurisprudence is common law, which may be understood as a jurisprudence of permeability between static and dynamic, between the formal and informal sectors. Central doctrines of the formal jurisprudence in the United States, such as individual rights in public law and fiduciary obligation in private law, reflect the trace of dynamism.

To common lawyers in the United States, the notion that theirs is a dynamic jurisprudence of permeability ought to be unremarkable. They experience dynamism and permeability as a fact, since practice calls upon them

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5. I use the term "formal jurisprudence" to refer to the jurisprudence of the formal economy as it is altered by traces of dynamic jurisprudence. Without these traces, the jurisprudence of the formal economy would be entirely static, and the formal jurisprudence would be identical to static jurisprudence.

6. The jurisprudence of the informal economy may be distinguished from other well-explored ideas. First, norms need not be reflected in formal jurisprudence in order to govern effectively. *See* JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 243 (1990); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4-6, 137-55 (1991); W. Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417 (1985); W. Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and the Public Order*, 12 DENV. J. INT'L L. & POL'Y 165 (1983). Second, norms can govern effectively even when they conflict with formal jurisprudence. *See* ELLICKSON, *supra*, at 141-43; KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 82-83 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) (1933); Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1776-87 (1992); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 360-67 (1993). Third, formal jurisprudence can borrow norms when they are already effective. *See, e.g.*, Karl N. Llewellyn, *The First Struggle To Unhorse Sales*, 52 HARV. L. REV. 873 (1939) (examining interchange between merchant practice and merchant law).

The norms envisioned in these three ideas supplement formal jurisprudence, but are nonetheless fundamentally indifferent to it. They complement, and cooperate or conflict with formal jurisprudence, because they work beside it in the same territory, just as federal law works beside state law, and religious law beside secular law. *See, e.g.*, IZHAK ENGLARD, RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM (1975); Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 830-31 (1993). The informal economy's supplement to formal jurisprudence is of a different order. It is a dangerous supplement. *See* CULLER, *supra* note 4, at 103-07; Balkin, *supra* note 4, at 758-61. *See generally* DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE (Peter Fitzpatrick ed., 1991). The norms of the informal economy are not indifferent to formal jurisprudence, but always threaten to unsettle it. Furthermore, these norms flourish only in estrangement from the state. Proximity to the state masks or suppresses them.

7. For a proposal that formal jurisprudence ought to include "destabilization rights," see ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 39 (1986). These are exactly the rights the informal economy contributes to formal jurisprudence.

daily to arbitrage between formal and informal. Nevertheless, common law is under siege in our administrative state, and though powerful champions defend it,[8] common law has not firmly seized an intellectual place among the jurisprudences. It is tempting to attribute this failure to the common lawyers' hard-boiled anti-intellectualism. A more likely explanation is that the jurisprudences with which the common law is affiliated are strange ones, alien to the main traditions of Western academic jurisprudence. It is to this other path of the law that I shall now devote attention.

I.

Although the distinction between the formal and informal economy belongs to social science, it is a distinction with jurisprudential significance. The formal sector organizes around a state-oriented, or static, jurisprudence; the informal economy, around a state-avoiding, or dynamic, one. To see the jurisprudential significance of the distinction between the formal and informal economy, it is first necessary to find a criterion, or definition, for sorting transactions across the boundary between formal and informal.[9] The boundary between these two realms can be demarcated by determining whether the parties to a transaction orient themselves to applying a rule they expect a judge could apply in the event of a dispute.

A. *Boundary Criteria in Social Science*

Social scientists have typically tried to define the boundary between the formal and informal economies by focusing on the informal economy. However, this effort represents only half the struggle, since only by defining the formal economy as well can we fully address the jurisprudential implications of these activities.

A social anthropologist, Keith Hart, proposed the term "informal sector" in 1973. He used it to criticize an assumption in development economics that official surveys of employment in African cities accurately measured income-earning activities. Hart suggested that only "enterprises run with some measure of bureaucracy are amenable to enumeration by surveys."[10] He put enterprises

8. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960) [hereinafter LLEWELLYN, THE COMMON LAW TRADITION].

9. On boundary maintenance, see Talcott Parsons et al., *Values, Motives, and Systems of Action, in* TOWARD A GENERAL THEORY OF ACTION 108-09 (Talcott Parsons & Edward A. Shils eds., 1951) (boundary maintenance in sociology); Cover, *supra* note 5, at 31; Al Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFF. L. REV. 383 (1979); Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

10. Keith Hart, *Informal Income Opportunities and Urban Employment in Ghana*, 11 J. MOD. AFR. STUD. 61, 68 (1973).

not amenable to enumeration in the "informal sector." "The key variable," he wrote, "is the degree of rationalisation of work—that is to say, whether or not labour is recruited on a permanent and regular basis for fixed rewards."[11]

Once social scientists applied Hart's insight to developed countries, reference to law was inevitable. The informal sector in developed countries also includes enterprises missed by surveys because owners wish to escape regulation, not because work in them has not been rationalized. Thus, in a 1987 paper urging attention to the informal sector in western market economies, Alejandro Portes and Saskia Sassen-Koob tentatively defined the informal sector "as the sum total of income-earning activities with the exclusion of those that involve contractual and legally regulated employment."[12] Their definition includes enterprises fleeing regulation, but does not delineate the boundaries of contract and legal regulation. Setting these boundaries is one of the more difficult problems of legal doctrine and theory.[13]

B. *Boundary Criteria in Law*

State-oriented jurisprudence offers two devices, legal formalism and legal formality, for maintaining a boundary between law and competing social processes. While these devices facilitate the self-maintenance of the legal system as an autonomous social subsystem,[14] they make unsustainable assumptions about the nature of action and the relationship between intention and action. Therefore, legal formalism and legal formality are unworkable criteria. Nonetheless, a careful examination of formalism and formality does point to a third formulation that might prove a helpful boundary criterion. The search for this third definition must begin by revealing the arduous and

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11. *Id.* Hart's definition had three aims. The cognitive aim was to criticize the accuracy of econometric methods as applied to developing economies. He thus focused on the economic incidents of employment, making no reference to law. The policy aim was to caution governments and lending institutions that channeling funds only in directions suggested by data about enumerable enterprises is not necessarily good policy. The ideological aim was to question the Marxist assumption that the informal sector in developing economies is a lagging sector of "petty capitalists," a remnant of imperialist exploitation marginal to development.

12. Alejandro Portes & Saskia Sassen-Koob, *Making It Underground: Comparative Material on the Informal Sector in Western Market Economies*, 93 AM. J. SOC. 30, 31 (1987).

13. Contracts teachers, such as myself, love boundary questions. Doctrines respecting contract formation are an obvious beginning. From there we travel to parol evidence, inadequate consideration, and beyond. *See, e.g.*, Mitchill v. Lath, 160 N.E. 646 (N.Y. 1928) (parol evidence); Fischer v. Union Trust Co., 101 N.W. 852 (Mich. 1904) (inadequate consideration). For an effort to avoid the boundary question, see the definition of "informal economy" in Manuel Castells & Alejandro Portes, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, *in* THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES 11-12 (Alejandro Portes et al. eds., 1989).

14. Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1662-63, 1677 (1989) (criticizing idea of a legal subsystem) [hereinafter Jacobson, *Autopoietic Law*]; Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992). *See generally* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner ed., 1988) [hereinafter AUTOPOIETIC LAW].

unrealistic assumptions of these two approaches, legal formalism and legal formality.

Legal formalism describes a condition under which it is possible to tell in advance a rule's range of application. The condition is that those responsible for administering a rule, principally judges, apply it "mechanically."[15] Mechanical application assumes that the rule refers unambiguously to a well-defined action. This assumption depends, in turn, on our ability to define actions with complete accuracy at a given moment. The rule then serves as a mark or tag for action.

One challenge to the boundary suggested by formalism comes from within the logic of the legal system. Formalism supplies a criterion, if at all, only when judges scrupulously adhere to it. Surely it is possible to imagine a legal system whose judges are faithful to formalism.[16] But that is not our system, and even if it were, the success of formalism would always be open to question. Suppose, in any case, a system that did not run along formalist lines. The formal economy set up by such a system would be no less formal to both lawyers and social scientists. Even lawyers who reject formalism regard tasks they perform as "formal."[17] It is hard to imagine them propounding a doctrine of "legal informalism."[18] A second challenge to formalism's boundary criterion comes from outside the legal system. Society refutes the assumption of well-defined action. The economic and moral costs of insisting that actions be made so are too great for tolerant societies to bear. Even if actions were well-defined, the complexity of fashioning rules to tag them would be intolerable.[19] The cost of incessantly searching for rules would far exceed the economic or moral benefit of sustaining formalism.[20]

Legal formality, by contrast, dispenses with well-defined action, and with rules as marks or tags. It sets the boundary of the legal system by means other than the range of application of rules. A formality allows people to signal that they wish to subject a transaction to some sort of legal process.[21] That

15. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351, 359 (1973). *But see* Ernest J. Weinreb, *The Jurisprudence of Legal Formalism*, 16 HARVARD J.L. & PUB. POL'Y 583, 583 (1993) (mechanical application of rules as caricature of formalism). Roberto Unger has suggested that formalism is one end of a spectrum shared by all approaches. UNGER, *supra* note 7, at 1-2.

16. So even Jacques Derrida supposes. *See* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 921, 961-63 (Mary Quaintance trans., 1990).

17. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 141 (1994) ("The law wishes to have a formal existence.").

18. Lawyers may be willing to claim they are "anti-formalist," but not that they are "informalists." The only exception I know is the acknowledgement of an informal administrative process.

19. *Compare* Pokora v. Wabash Ry., 292 U.S. 98, 105 (1934) (urging caution in framing standards of behavior that amount to rules of law) (Cardozo, J.) *with* Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927) ("[W]hen the standard is clear it should be laid down once for all by the Courts.") (Holmes, J.).

20. The deregulation movement is a response to this calculus. *See generally* STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982).

21. The seal and the memorandum in the Statute of Frauds are examples. *See generally* E. ALLAN FARNSWORTH, CONTRACTS 86-88, 426-34 (2d ed. 1990).

process often is, but need not be, the one described by formalism. The boundary of the legal system is established by election to use the formality. Formality thus marks transactions for *subjection to* the legal system, whereas formalism marks actions with rules for *imposition of* the legal system on transactions.

Though formality does not make assumptions as arduous as those of formalism, it too fails to establish a coherent boundary criterion. Formality establishes two versions of the criterion, not one. In the first, the parties' intention to subject a transaction to legal process establishes the boundary. In the second, the boundary is established by the *expression* of their intention in a formality. In order to produce the same boundary, intention to subject a transaction to legal process must always be perfectly expressed in the formality. However, parties may use a formality without intending to subject a transaction to the legal system. They may, for example, execute a contract without ever intending to sue should one of them breach.[22] Participants in criminal syndicates and consumers of low breach-cost products or services execute such contracts. Also, parties who have used a formality may fail to persuade a judge to subject a transaction to legal process, or a judge might decide to subject it to legal process even when parties have failed to use the formality properly.

Moreover, the boundaries suggested by formalism and formality wrongly assume that the legal system sets the boundary on its own, without interference by other social processes. Yet it is exactly this assumption that the informal economy challenges. Nevertheless, formalism and formality can suggest a workable approach, once we relax their disabling assumptions.

C. *A Workable Boundary Criterion*

A transaction is in the formal economy when parties to the transaction orient themselves towards applying a rule that they expect, in principle, a judge could apply if asked to resolve a dispute over the transaction. Likewise, a transaction belongs in the informal economy when parties do not orient themselves towards applying a rule that way. This is the boundary established by formalism and formality, shorn of assumptions.[23]

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22. *See, e.g.*, New York Trust Co. v. Island Oil & Transp. Corp., 34 F.2d 655 (2d Cir. 1929) (describing sham transaction); *see also* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Professor Macaulay's conclusions are even more compelling in light of alternative dispute resolution.

23. The central proposition of formalism is that it is possible to tell in advance a rule's range of application. For the proposition to be valid, judges must agree to apply rules in a certain way, and actions tagged by rules must be well defined. By broadening "application" to include parties as well as judges so that parties participate in application, the parties can then tell in advance a rule's range of application in the course of carrying out the transaction. The central proposition of formality is that parties may signal their desire to subject a transaction to the legal process by a formality. For the proposition to be valid, parties must be able to express their intentions perfectly in that formality. However, by refashioning

A party orients behavior towards applying a rule when he or she indicates, by speech or deed, that the rule is to be a motivation for action.[24] Parties may pick the "wrong" rule in that the judge does not use it, but orientation does, nonetheless, define a boundary. The parties carry on as if they are on the formal side of the boundary. So long as they sustain that orientation, they remain there. The only limitation on the class of rules is that parties must expect that, in principle, a judge could apply a rule, not that the judge does or would apply it at some moment in the unfolding of the transaction.

The boundary established by the criterion, "orientation towards applying a rule," relegates many of the same transactions discussed in social science literature to the informal sector. These include criminal enterprise, off-the-books business, and employment of undocumented aliens. In none of these transactions do parties orient behavior towards applying a rule, either imposed on them by the state, or supplied by them to the state in the form of contract.

However, the criterion proposed here assigns far more transactions than these to the informal side of the boundary. Any transaction in which parties do not orient behavior towards applying a rule they expect could be applied by a judge must be labelled informal. Contracts implied-in-law are an example.[25] Mechanisms of private enforcement—by private judges, settlement, mediation, grievance procedures—are informal to the degree that participants do not orient themselves towards applying a rule.[26] Intra-firm practices and processes are informal in the dual sense that they lack requisite formality, and the participants ordinarily do not orient themselves towards applying rules they expect to form the basis of judicial application. Merchant clubs, such as the diamond bourse, sponsor complete transactional informality.[27] Trade associations, cartels, and the like may provide forums for illegal or quasi-legal exchanges of information, agreements not to compete, informal standards, and other activity not oriented towards rules the parties expect to serve as the basis for judicial application.

Transactions may be part formal, part informal. Criminal enterprises, for example, must ultimately surface in the formal economy, whether by renting

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"formality" to include any application of a rule, that application signals subjection to legal process and creates a perfect coincidence between intention and expression.

24. On the sociological concept of "orientation" see Parsons et al., *supra* note 9, at 67-76. One example of a complexity that can arise is where one party is oriented towards the application of a rule, while the other is not.

25. Stewart Macaulay's work on informal contract administration suggests another. Macaulay, *supra* note 22; *see also* Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) (examining nongovernmental repeat-purchase mechanism of contract enforcement). A contract the state may not enforce would be on the formal side of the boundary, so long as parties to the contract orient themselves towards applying a rule.

26. ELLICKSON, *supra* note 6, at 52-64. *See generally* Symposium, *Private Alternatives to the Judicial Process*, 8 J. LEGAL STUD. 231 (1979).

27. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992). Inasmuch as the diamond bourse replaces the state as the correlating agency, it is a parallel formal system.

premises, investing funds in legitimate businesses, or other formal transactions. Enterprises may choose to document illegal or quasi-legal transactions formally. Courts in the United States may, in an appropriate case, enforce a contract against public policy, even one with an illegal provision.[28] Even undocumented aliens have rights in the work place—suing in tort, for example, for a job-related injury.[29]

Also, the boundary between formal and informal is uncertain and shifting. Bodies of law nominally in the jurisprudence of the formal economy (the Uniform Commercial Code is a prominent example) can remit parties to informal norms, such as a course of dealing or customs of the trade.[30] Parties may not know whether a course of dealing, custom or practice has ripened to become part of the formal jurisprudence, and if it has, whether it remains there. Even if a practice has been formalized, there is some uncertainty whether it will be applied to a marginal participant in the practice.[31]

It is important to emphasize, as well, that society as a whole engages in a constant exchange of formalization and deformalization. "Going private" is a decision by owners or managers to withdraw corporate processes from aspects of the formal legal system. Legislators deformalize an activity when they decriminalize it. Antenuptial agreements formalize informal family practices. Sexual harassment policies formalize private relations in the work place.

The boundary between the formal and informal economies marks the boundary of a jurisprudence, rather than the range of effective regulation by the state. The jurisprudence of the formal economy—static jurisprudence—is oriented towards the state, whereas the jurisprudence of the informal economy—dynamic jurisprudence—relies on more diffuse mechanisms for enforcement. We now must turn to the principles animating these jurisprudences.

II.

Just as the formal and informal economies reflect two divergent sets of expectations about the role of rules in transactions, static and dynamic

28. *See* Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 743-44 (7th Cir. 1986) ("[C]ontract defense of illegality is flexible rather than rigid. . . .").

29. *See, e.g.*, Rojas v. Richardson, 703 F.2d 186 (5th Cir. 1983), *reh'g granted and rev'd on other grounds*, Rojas v. Richardson, 713 F.2d 116 (5th Cir. 1983).

30. *See* U.C.C. § 1-205 (1989); *see also* Richard A. Epstein, *The Path to the* T.J. Hooper, 21 J. LEGAL STUD. 1, 4 (1992) (urging custom as conclusive evidence of due care in cases arising out of a consensual arrangement). Because the lines between formal and informal are so fluid in the U.C.C., it is easy to argue that informal norms are formal. The real test is not what "we" say, but the orientation of parties.

31. Flower City Painting Contractors, Inc. v. Gumina Constr. Co., 591 F.2d 162, 165 (2d Cir. 1979) (party is bound by a trade usage only if he either knows or has reason to know of its existence and nature); *see also* Epstein, *supra* note 30, at 5.

jurisprudence summarize two orientations towards the operation of law.[32] The key difference between static and dynamic jurisprudence is that in static jurisprudence rights and duties are expected always to be in correlation, while in dynamic jurisprudence, they are not. Static jurisprudence, the jurisprudence of the formal economy, thus always assumes the presence of an agency supervising correlations, to which persons can have recourse should they be unable to ensure that their rights or duties are respected.[33] Hence, when parties use static jurisprudence, they orient their behavior towards a rule that establishes a correlation. The agency is commonly, but not necessarily, the state. Dynamic jurisprudence, the jurisprudence of the informal economy, rejects the presence of a correlation-maintaining agency. Indeed, it breaks correlations. When parties use dynamic jurisprudence, they do not orient their behavior towards a rule that establishes a correlation. Actors in the informal economy are governed by radically different principles, and these principles fuel dynamic jurisprudence. The distinction between breaking and maintaining correlations leads, in turn, to characteristic and contrasting stances on the nature of norms, the role of persons in the jurisprudence, and the structure of legal institutions.[34]

The logic supporting each stance, static and dynamic, organizes jurisprudence into five model positions. Static jurisprudence can be broken down into the positions of positivism and naturalism; dynamic jurisprudence, into the jurisprudence of right, jurisprudence of duty, and common law. Each position is always available in any practicing legal system, and each can serve as the root, or starting point, of a legal system. Once a legal system begins to operate according to one of the models, the others present challenges—hard cases, dilemmas, paradoxes, marginal doctrines, and silent practices. The root position then integrates a response, which is then subject to further challenges.

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32. The logic of static jurisprudence is well known. The logic of dynamic jurisprudence, though it undergirds professional legal activity in the United States, is not often recognized in legal theory. Kelsen was the first to discuss "static and dynamic legal theory." HANS KELSEN, PURE THEORY OF LAW 70-71 (Max Knight trans., 1967). He proposed a hierarchy of norms, in which following a norm dynamically generates inferior norms. *Id.* at 221-78. Llewellyn insisted that common law could not be squared with static models. LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 6, at 184-91. Cover introduced the dynamic jurisprudence of duty into American legal literature. Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987); *see also* Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 307 (1961).

33. Hohfeld uses "correlations" in his table of judicial conceptions. *See* WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 36 (1923).

34. Static and dynamic jurisprudence also take characteristic and contrasting positions on the relationship between consciousness and law, between written and oral law, between community and person, as well as on the role of time in jurisprudence, the nature of language, and the structure of legal rationality. *See* Arthur J. Jacobson, *The Idea of a Legal Unconscious*, 13 CARDOZO L. REV. 1473 (1992); Arthur J. Jacobson, *The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1079 (1990); Jacobson, *Autopoietic Law*, *supra* note 14, at 1681-87; Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877 (1989) [hereinafter Jacobson, *Hegel's Legal Plenum*].

Root, challenge, response, integration, further challenge—this process yields an endless variety of practicing legal systems. Nevertheless, the roots available to a legal system are distinct and enumerable, each coherent and sufficient on its own terms.

A. *Static Jurisprudence*

Correlation-maintaining jurisprudence has four chief characteristics. First, its norms are static in that it is possible to describe precisely the entire normative constitution of the legal universe at a single moment, and persons can fulfill the basic conditions of legality without changing that legal structure. While new or additional norms can be produced through legislation, it is always an extraordinary event in this jurisprudence. Second, the source of norms in static jurisprudence, as expressed in either positivism or naturalism, is always outside the legal system. In positivism, the source is a procedure for marking norms as legally valid. In naturalism, the source is rational observation by a qualified observer. Operation of the legal system by itself never determines the content of norms. Instead, content is always drawn from outside the legal system.[35] Third, law in static jurisprudence does not fill the normative universe. Many socially effective norms are neither marked by a positivist procedure, nor perceived as law by a qualified naturalist observer. Static jurisprudence tolerates or expects corners of the normative universe to be legally unregulated.[36] Fourth, static jurisprudence is organized into two root positions, according to whether the jurisprudence emphasizes legislation (the position of positivism) or enforcement (the position of naturalism).

While legislation in static jurisprudence is always separate from enforcement, the two forms of static jurisprudence, positivism and naturalism, may be distinguished according to the emphases they place on enforcement and legislation. Positivism reduces enforcement to the smallest possible role in the legal system by relying on self-enforcement—"efficacy" in Hans Kelsen's language[37]—and formalist accounts of judging. Positivism assigns the state the role of marking norms as authoritative rules for allocating correlative rights

35. In positivism, content is determined by the arbitrary will of whoever controls the procedure. Thus, content is always political. In naturalism, a qualified observer perceives content as nature. In both positivism and naturalism, legal personality plays no role in determining content. What persons do to get control of a positivist procedure, or what they do with it, owes nothing to personality. They wield the procedure as a club. Similarly, rational observation in naturalism is always an automatic consequence of qualification, owing nothing to personality. Content is observed in nature. Observation takes place from within the legal system, but what is observed is outside. Hence, the legal system takes responsibility for qualifying observation, but not for normative content.

36. The existence of norms rejected or neglected by static jurisprudence poses a moral challenge to static norms; positivists criticize existing static norms, whereas naturalists question the qualifications of the existing naturalist rulers.

37. HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 41-42, 118-19 (Anders Wedberg trans., 1945).

and duties. The marking instrument is always a procedure, whether legislative process, the will of the monarch impressed by a seal, or methods of divination. Positivism takes various positions on the origin of the procedure. H.L.A. Hart, for example, follows John Austin,[38] by looking to the fact of acceptance.[39] Thomas Hobbes supposes that the procedure originates in agreement.[40] Procedures can originate in nature, or in divine fiat. Whatever the origin, positivism looks to some authoritative procedure to mark norms as rules for allocating correlative rights and duties.

Naturalism, in principle, eliminates legislation—the production of novel norms—altogether from the jurisprudence. The only operation of the legal system is enforcement of rules for allocating the correlative rights and duties that a qualified observer perceives. The state's role is to declare who is qualified. Just as positivism must account for the origins of the procedure, naturalism must decide how persons become qualified, relying, for example, on election, natural marks or signs, examination, birth in the right family, or acclamation. Almost universally, the role of rendering an authoritative declaration in naturalist jurisprudence is assigned to a state apparatus. The state apparatus resorts, in turn, to a positivist procedure for marking declarations as authoritative. Similarly, all versions of positivism require a qualified observer to see that the procedure has been correctly followed, and that the procedure, however arrived at, is proper. Thus, positivism always depends on a version of naturalism to stabilize operation of the procedure. In other words, positivism and naturalism are two sides of a single approach to jurisprudence, in which responsibility for supervising the allocation of correlative rights and duties through rules, however it is done, is assigned to a state apparatus. Most contemporary jurisprudence reflects the state-orientation of positivism and naturalism, mixing the two in a virtually unlimited variety of proportions and combinations.

Violence in static jurisprudence is always external to the inner logic of norms and monopolized by a specific agency. Thus, static jurisprudence always has norms for sanctions that are separate from norms for liability, and a violation of a substantive norm does not necessarily lead to a sanction. This existence of a separate set of norms for sanctions is what allows a correlating agency to claim a monopoly of violence. Otherwise, ordinary persons could exercise violence in self-help as part of following substantive norms. Positivists enforce norms like ranchers herd cattle: They nudge, they fence if they can, but if not, they use nastier forms of violence. Violence is the moral or physical force necessary to make persons follow norms. In naturalism, the course of nature is understood to impose its own autonomous violence. However, a

38. JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 220-24 (Robert Campbell ed., 5th ed. 1885) (discussing "habit of obedience" to sovereign).

39. H.L.A. HART, THE CONCEPT OF LAW 105 (1961).

40. THOMAS HOBBES, LEVIATHAN 117-29 (Richard Tuck ed., 1991) (1651).

correlating agency may exercise violence in order to cure or eliminate a disorder of nature.[41]

B. *Dynamic Jurisprudence*

Dynamic jurisprudence rejects the role of an agency supervising correlations in either the positivist or naturalist manner. There are three root positions of dynamic jurisprudence: the jurisprudence of right, the jurisprudence of duty, and common law. These root positions share many fundamental characteristics. First, norms in correlation-breaking jurisprudence are dynamic, making it impossible to describe the legal universe fully at any one moment. Second, the source of norms in dynamic jurisprudence is always inside the legal system. Although the three sorts of dynamic jurisprudence place the source differently, the source can always be found in ordinary interactions between parties. Third, the normative universe of dynamic jurisprudence is a full legal universe. Persons strive to fill it with as much law as possible. However, the legal universe can never be entirely full, since the basic obligation of legality is constantly to create or transform normative material. The legal universe is always in a state of being filled. There are no legally empty corners. Fourth, legislation and enforcement are never separated. Norms are always legislated in enforcement, and never enforced without producing legislation. Because enforcement never appears as such, dynamic jurisprudence uses forms of violence less obvious than static forms of violence. These forms of violence may be understood only within the logic of each dynamic jurisprudence.

In the jurisprudence of right, duty is eliminated or suppressed. Recourse to duty is always a mark of failure. Persons want rights, not because they want to use them (they may well), but because having rights expresses legal dignity.[42] For example, both the publisher of the *New York Times* and I have the right to freedom of the press. Although I do not own a press, the right is as important to me as it is to the publisher—no more, no less.[43] The fact that he uses the right and I do not is of no legal significance. We are persons of equal legal dignity, because we both have the right. Recognition is always mutual, always in the form of right, and the drive for it is incessant, leading to quests for recognition from ever wider circles of persons. Additionally, the drive for

41. AUTOPOIETIC LAW, *supra* note 14, at 1656.

42. "Separate but equal" treats equal rights as if it were a matter of equal facilities, having nothing to do with dignity. The struggle of nonphysician counselors in New York for the physician-patient privilege is an example of the passion for dignity. When enacted in 1962, the Civil Practice Law and Rules adopted the common law privilege for physicians. *See* N.Y. CIV. PRAC. L. & R. 4504 (McKinney 1992). It added psychologists in 1968 (§ 4507), social workers also in 1968 (§ 4508), and rape crisis counselors in 1994 (§ 4510).

43. Similarly, the press has no greater right of access to trials than the public. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 391-94 (1979).

recognition has an erotic component, since one seeks recognition only from persons with whom one has an attachment or for whom one cares or loves.[44] Because recognition must always be mutual, the rationality between persons is one of exchange where the vision of community is one of honest property owners, engaged jointly in recognizing and defending their property in common.[45]

The jurisprudence of duty eliminates right entirely. It is a jurisprudence constructed entirely out of duties. Thus, I do not bring another person to court because I assert a right, but because it is my duty to help or to make the other person fulfill his or her duty. Judges do not resolve disputes; rather, they declare duties. All jurisdiction in this jurisprudence is mandatory. Judges have the duty, not the power, to declare duties. Persons want duties in this jurisprudence because they wish to emulate a perfect legal person. The perfect person in the jurisprudence of duty provides a model to emulate, an ideal commander who has specifically legal virtues. The virtues may be those of a god, a founder, or a hero. The virtues are never the result of legal process, but call instead for its initiation. Because the ideal commander is itself a personality, hence always in process, emulation requires the constant creation and recreation of legal materials. Ideally, persons are partners of the commander in a joint enterprise of legal perfection. Therefore, rationality is not purely one of exchange but of a partnership dedicated to emulating the perfect legal person.

Common law eliminates neither right nor duty, but insists on incessant unsettlement and resettlement of correlations. It is a dynamic jurisprudence that calls on the state to transform correlations in concert with persons. Common law's approach to norms is that law is just application. It realizes this approach in three stages. In the first, persons learn law by reading cases, the record of prior applications. The reading is always oriented towards application to the case at hand, never a reading without orientation. In the second stage, persons learn more about the law as they plan action and then act in light of their reading. The norm itself changes as persons act. Norms in the first stage are necessarily general. They become calculable and specific in the course of application. They also differ from norms generated in prior applications. Persons cannot know a norm fully before they have generated it in action. But

44. This erotic character has also been alluded to by Ronald Dworkin, who describes "a natural right of all men and women to equality of concern and respect." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 182 (1978). I use the term "erotic" in the classical sense of Plato and Freud to include all drives and activities by which individuals help produce and reproduce the species. SIGMUND FREUD, CIVILIZATIONS AND ITS DISCONTENTS (1961); PLATO, SYMPOSIUM, *189-93 (describing reintegration of original human nature).

45. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Of course, Professors Epstein and Nozick would vigorously deny that their rational social arrangements have anything to do with love. That is because they have a naturalist version of the jurisprudence of right that muscles its erotic component.

common law needs a third stage. The norm generated in the second stage cannot be known fully until it too serves as an application for a future application. The process continues *ad infinitum*. The rationality of the system depends on achieving calculability of norms through interaction.[46]

For each of the three forms of dynamic jurisprudence, the source of norms is always inside the legal system, in ordinary interaction. In the jurisprudence of duty, which breaks the correlation of right with duty by entirely eliminating right, the source of norms is a perfect legal person that the community seeks to emulate. In the jurisprudence of right, which breaks the correlation by suppressing duty, the source of norms is the striving of persons for mutual recognition through rights—for legal dignity. Common law eliminates neither right nor duty, but breaks their correlation by constantly unsettling and resettling past correlations. Thus, the source of norms in common law can only be the transformation of norms in specific applications by two or more persons linked together through the process of application.

Just as violence in static jurisprudence consists of action by a state agency to enforce a correlation of rights with duties, dynamic jurisprudence is characterized by forms of violence as well. These forms of violence are not monopolized by the state but represent the logical continuation of the particular normative framework. In the jurisprudence of right, violence is the loss of legal dignity: withdrawal of recognition, its attendant emotional consequences, and the loss of the promise of protection that flows from recognition. Violence in the jurisprudence of duty turns a person who has failed to fulfill a duty into a nonperson by means of banishment.[47] In common law, violence initially takes the form of legal uncertainty—inability to achieve applications of law in concert with other persons. If uncertainty persists and is grave enough to warrant resort to state assistance, common law uses forms of violence employed by static jurisprudence.

C. *Two Cases of Dynamic Jurisprudence*

Because the correlating agency is also keeper of records, publisher of reports, and compiler of static norms, examples of dynamic jurisprudence—exactly the jurisprudence for which the record-keeper, report-publisher and norm-compiler is not responsible—do not abound in legal literature. We see traces of dynamic jurisprudence in formal jurisprudence, but,

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46. Habermas uses the word *Rechtsgenossen*, which William Rehg translates as "equal and free consociates under law." JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., forthcoming 1994) (manuscript on file with author). Rational persons interact so as to make hard cases easy. *Cf.* Marci A. Hamilton, Book Review, 14 CARDOZO L. REV. 1011, 1019 (1993) ("[E]asy cases are only easy in retrospect.").

47. For descriptions of Jewish Law as a jurisprudence of duty, see Cover, *supra* note 32, at 65-68; Jacobson, *Hegel's Legal Plenum*, *supra* note 34, at 892-95; Stone, *supra* note 6, at 865-72. Suzanne Stone has argued that Robert Cover underestimated the role of violence in Jewish Law. *Id.* at 871-72.

as we shall see, these traces are easily masked by static perspectives. It is now possible to find dynamic jurisprudence in a pure form, not just as traces, because legal ethnographers have begun to examine legal systems that use western notions of right and duty.[48]

Consider an obvious case. In his celebrated study of the political economy of the informal sector in Peru, *The Other Path*,[49] Hernando de Soto describes the "extralegal norms" created by laborers in the informal economy, known as informals, to govern their work and home life.[50] These norms must work substantially, but not entirely, without recourse to the coercive threat that remains, in principle, a monopoly of the state. De Soto's work is rich with data validating the intuition that persons without access to a correlating agency will either make their own, informal correlating agency[51] or form communities according to principles of dynamic jurisprudence. De Soto's study shows that Peru's informal sector in the early 1980's reflected both possibilities.

Informal housing provides an excellent case in point. De Soto describes communities formed around an "invasion contract," whereby a group of informals agree to occupy government or private land.[52] Invasions can be gradual or violent.[53] The "contract," de Soto reports, ideally lacks formality, since it depends on the free consent of the parties.[54] De Soto describes the gradual growth of what he calls an "expectative property right" once informals have invaded land.[55] This right depends, initially, on the mutual recognition of parties to the invasion contract, first established by appearance before the community[56] and then in informal property registers maintained by community organizations.[57] Withdrawal of recognition and expulsion from the

48. Robert Cover devotes much of Nomos *and Narrative* to a description of groups practicing a jurisprudence of duty. Cover, *supra* note 6, at 26-35. Such groups are common enough in a tolerant society. The jurisprudence of right, though, slips under the radar. For all our preoccupation with rights, we always see them in terms of what we shall discover in Part III is only their trace in the formal jurisprudence: the doctrine of individual rights. Cover himself wrongly associated rights with static jurisprudence. Cover, *supra* note 32, at 68-73.

49. DE SOTO, *supra* note 2. Despite the significance of de Soto's work for policy and theory, it has received little attention in legal literature. Two noteworthy exceptions are Peter H. Schuck & Robert E. Litan, *Regulatory Reform in the Third World: The Case of Peru*, 4 YALE J. REG. 51 (1986), and Jane K. Winn, *How To Make Poor Countries Rich and How To Enrich Our Poor*, 77 IOWA L. REV. 899 (1992) (reviewing DE SOTO, *supra* note 2).

50. DE SOTO, *supra* note 2, at 19.

51. Nothing prevents informals from developing their own static jurisprudence, if they can. In the United States, it would be interesting to compare the level of violence employed by organized crime with that of the state. This comparison would require distinguishing random, anomic killings—as much a product of the formal economy as the informal—from informal "executions," as well as recognizing the inability of organized crime to lock people up. Organized crime's level of static violence may prove to be comparable to that of the state.

52. DE SOTO, *supra* note 2, at 22-23.

53. *Id.* at 19.

54. *Id.* at 23.

55. *Id.* at 23-26.

56. *Id.* at 25.

57. *Id.* at 28.

community is one penalty for criminal behavior.[58] But participants in an invasion seek wider recognition for their expectative property right, and, in particular, recognition from the state.[59] As the participants achieve wider recognition, they can transfer the property rights directly, as an ordinary transfer of legal title, without needing recognition by community organizations.[60]

De Soto describes all but one of the elements of a dynamic jurisprudence of right: demand for recognition, exchange of recognition, drive for wider recognition, and withdrawal of recognition.[61] He does not report material on the erotic character of recognition. An economist, de Soto attributes the drive for recognition to efficiency and profit. Legally recognized property is, on average, nine times more valuable than informal property of equivalent quality.[62] Occupants of informal housing may or may not love each other, but they certainly want the profits flowing from wider recognition of the expectative property right.

To validate the role of the erotic character of the dynamic jurisprudence of right we must turn to a less obvious case of rights-based jurisprudence: Robert Ellickson's account of relations among rural landowners in Shasta County, California.[63] Ellickson reports that the landowners he studied knew little about the formal laws governing damages for cattle trespass, responsibility for fence maintenance, and liability for the collision of automobiles with stray cattle. He also reports that what they do know, they ignore. Instead, the landowners have developed informal norms to govern rights and duties for cattle trespass and fence maintenance, and persist in their ignorance about the formal law governing collisions.

Ellickson derives the content of these norms from a rational-actor model, in which people pursue self-interested goals and rationally choose among various means for achieving those goals.[64] Using techniques developed in game theory, Ellickson's model elegantly predicts that the landowners would ignore the formal law governing cattle trespass and fence maintenance. His model also predicts an overarching norm of neighborliness, and the content of subsidiary norms governing cattle trespass and fence maintenance. His hypothesis is that members of a close-knit group, such as the landowners in Shasta County, "develop and maintain norms whose content serves to

58. *Id.* at 29.

59. *Id.* at 33-55.

60. *Id.* at 25.

61. The other response is the jurisprudence of duty, which is the likely province of the political and social movement that was and is in competition with de Soto's informals—the Shining Path.

62. DE SOTO, *supra* note 2, at 24.

63. ELLICKSON, *supra* note 6.

64. *Id.* at 156-58. Needless to say, Ellickson's description of informal norms in Shasta County is a naturalist supplement to formal jurisprudence. Ellickson observes the rational content of norms that the landowners derive "by drawing upon general cultural traditions, role models, or personal habits developed after trial-and-error experimentations." *Id.* at 157.

maximize the aggregate welfare that members obtain in their workaday affairs with one another."[65] A norm is welfare-maximizing, he says, "when it promises to minimize the members' objective sum of (1) transaction costs and (2) deadweight losses arising from failures to exploit potential gains from trade."[66] Ellickson finds that the cattle-trespass norms and boundary fencing norms vindicate his hypothesis.[67] The Shasta County landowners act rationally.

By persisting in their ignorance about collision cases, however, they do not act rationally according to Ellickson's model. Cattlemen believe that they are strictly liable for the collision losses in closed range, but that motorists are strictly liable in open range.[68] In reality, both formal law[69] and the insurance companies[70] tend to treat closed and open range the same. The cattlemen's belief leads traditionalists among them, who do not graze cattle on fenced tracts,[71] to drop summer grazing leases on unfenced tracts near newly closed areas, presumably in favor of less desirable tracts.[72] This is irrational. Their belief also leads traditionalist cattlemen to oppose closing the range. This too is irrational, albeit less costly. Even more irrational are the modernist cattlemen, who do graze cattle on fenced tracts,[73] but join traditionalists in opposition to closing the range.[74] Why do cattlemen persist in opposition?

Ellickson's rational-actor model cannot explain the cattlemen's behavior in collision cases. Indeed, Ellickson says almost nothing about collision cases in the rational-actor part of the book. Instead, he mounts three explanations from social science to explain the cattlemen's irrationality in collision cases: symbolic politics, cognitive dissonance, and costly markets for information. But these explanations are all exogenous to the rational-actor model. While compelling from the perspective of social science, the cattlemen's "irrationality" is consistent with a jurisprudential explanation, which Ellickson's data implicitly confirms. These cattlemen care so much about closing the range because it symbolizes a threat to their way of life,[75] which they love.[76] The cattlemen recognize each other as having a special legal dignity—the dignity of their occupation. They seek to protect that dignity, and are driven, against Ellickson's rational norms, to gain wider recognition for it.

65. *Id.* at 167 (emphasis omitted).
66. *Id.* at 184.
67. *Id.* at 185-89.
68. *Id.* at 82-83.
69. *Id.* at 87-93.
70. *Id.* at 95-97; *see id.* at 115 ("[C]attlemen repeatedly get reports that insurance companies and courts have not followed the adage that 'the motorist buys the cow in open range.'").
71. *Id.* at 22-24.
72. *Id.* at 104, 110-13.
73. *Id.* at 24-25.
74. *Id.* at 30-39, 115.
75. *Id.* at 116-17.
76. *Id.* at 25 ("[M]embers of both groups [modernists and traditionalists] believe that the life of the cattleman is the best possible in western America.").

Ellickson's model perfectly predicts the cattlemen's persistence in informality, but it does not tell us everything they do there. Ellickson's rational-actor model gets it right for trespass and fence disputes, but not for collision cases. The logic of the jurisprudence of right, otherwise consistent with Ellickson's model, explains why the cattlemen behave irrationally.[77]

These are the logics of static and dynamic jurisprudence. The formal economy uses static jurisprudence and is governed by its logic. The informal economy uses dynamic jurisprudence and is governed by *its* logic. Common law bridges the gap between static and dynamic jurisprudence, between the formal and informal economy. It gives the state a dynamic role, unsettling and resettling correlations. A common law system routes all norms through the informal process—and applies norms nominally outside the legal system. The life history of every norm has informal, as well as formal, moments.

III.

Though any jurisprudence may, in principle, serve as the root position of a legal system, nations are not free to choose legal systems as Paris picks fashions. Culture, economics, and politics favor one form of jurisprudence over another.[78] It is hard to imagine a liberal pluralist democracy having perfectionism as a root,[79] or a theocracy having a jurisprudence of right. In modern states, dynamic jurisprudence certainly cuts against the grain. Rights- and duty-based jurisprudences have been root positions only in revolutionary states. They never last. Only common law, of all the dynamic forms of jurisprudence, seems able to sustain a root position in the modern state, because it accords the state a role, albeit limited, in the legal system. The politically active representatives of centralizing bureaucracies prefer naturalism or positivism in the root position, since correlation-maintenance provides an attractive justification for power.[80] Once static jurisprudence occupies a root position, bureaucracies suppress dynamic jurisprudence as a threat to this justification.

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77. *Id.* at 116-20.

78. The exemplary text on the embeddedness of law in a tradition is FREDERICK C. VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Legal Classics 1986) (Abraham Hayward trans., 1831). The counter-revolution underway in certain countries of the former Soviet Union may be described as "Savigny's revenge." The root position of a jurisprudence must grow out of history, language, and culture.

79. Though "civic republicanism" sometimes has that flavor. *See, e.g.*, Michelman, *supra* note 4, at 18-19; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

80. Rights-based jurisprudence is anathema to the command principle of centralizing bureaucracies. Duty-based jurisprudence can provide certain charismatic officers a role as "great teacher," but it too is ultimately anathema to bureaucratic principles. *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 244 (Guenther Roth & Claus Wittich eds. & Ephraim Fischoff et al. trans., 1968).

Nevertheless, a legal system cannot eliminate forms of jurisprudence not in the root position—it can only suppress them. It is hard to stop people from organizing action around unrecognized forms. A legal system may cast them into oblivion, but they always return to challenge the root position. A jurisprudence in the root position may resist the challenge, or rejected forms of jurisprudence may transform its doctrines, logic, and practice. Let us call "impermeable" the boundary set by a jurisprudence resisting transformation by unrecognized forms of jurisprudence, and "permeable" the boundary set by a nonresisting jurisprudence.

A. *Permeable and Relatively Permeable Boundaries*

A legal system whose boundary is impermeable tightly controls the class of rules that parties, orienting themselves towards applying a rule, expect judges to apply. Control is maintained by clearly marking rules that belong to the class and limiting inclusion in the class. Limiting inclusion may, but need not, take the form of positivist procedures to restrict methods for determining inclusion.[81] Similarly, inclusion may be limited by naturalist efforts to narrow the class of persons by whom, or occasions upon which, membership may be determined.[82] A legal system whose boundary is permeable does not control the class of rules in these ways.

Certainly the forms of jurisprudence ought to vary in their potential for permeability. While we know little about these potentials,[83] we do know that one root position—common law—has a structure consistent with a permeable boundary. Though common law celebrates the ongoing achievement and destruction of correlations, it must tolerate momentary freezings of correlations, justified on either positivist or naturalist grounds, in order to accomplish what it celebrates.[84] Common law thus can serve as the jurisprudence of a

81. Hart's "rule of recognition" is such a method. HART, *supra* note 39, at 92-96.

82. Owen Fiss describes this restriction as "bounded objectivity." Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982).

83. Take, for example, the jurisprudence of duty. It must resist forms of jurisprudence in which the virtues of a legal commander are not the immediate motives of actors. What if one of the virtues was loving fellow members of a perfectionist community? Rights-based jurisprudence would be the appropriate instrument for achieving this virtue. But the love persons bear each other must be conditioned on striving to perfect all the virtues, not just the virtue of love. How would the legal system formed by this jurisprudence arbitrate tensions between love and perfection? We do not know.

Take, again, correlating jurisprudence, when a duty-based jurisprudence impermeably occupies the root position, as it did, say, in Maoist China. We would expect the formation of hidden correlating agencies, apart from the state, and an invisible exercise of violence. Other connections among the forms of jurisprudence pose other, equally difficult, questions.

84. *Cf.* Charles Yablon, *Timeless Rules: Can Normative Closure and Legal Indeterminacy Be Reconciled?*, 13 CARDOZO L. REV. 1605, 1617 (1992) ("[N]ormative closure, the ability to differentiate legal from nonlegal action and communication, is a necessary condition for the assertion of legal indeterminacy."). Frank Michelman pointed out to me in a letter that common law differs qualitatively from other forms of dynamic jurisprudence, precisely because it can easily encompass all other static and dynamic root positions.

centralized, bureaucratic state by permitting and incorporating positivist and naturalist elements. It also welcomes the disruption of correlations by either rights- or duty-based jurisprudence, which then become auxiliaries to the common law project. In the Anglo-American system, it permits and incorporates a duty-based jurisprudence in the parallel system of equity, and commodiously accommodates a constitutional jurisprudence of right.

If common law could act without challenge as a jurisprudential position, we would expect the boundary of the legal system to be completely permeable. We would expect no difference between informal and formal. Yet the very permeability of its boundary exposes common law to colonization[85] by static jurisprudence.[86] Common law then evolves into positivism or naturalism, or both at once.[87] As static jurisprudence colonizes a legal system, its boundary becomes less permeable. A common law system, thus altered, has a relatively permeable boundary.[88]

B. *Three Predictions: The Trace*

Permeability suggests three predictions. First, an impermeable boundary ought to yield a large informal sector; a permeable boundary, a small one. Second, informal institutions facing an impermeable boundary ought to be highly developed, but poorly developed when facing a permeable boundary. Finally, the jurisprudence of the informal sector ought to have an impact on formal jurisprudence when the boundary is permeable, and ought not when the boundary is impermeable. The impact ought to have two components: a free exchange of norms between informality and formality, and a trace of forms of dynamic jurisprudence in the formal jurisprudence.

These predictions are borne out in a comparison of the informal sectors of the United States and Peru. Hernando de Soto describes a densely positivist legal system, impermeable to the "extra-legal norms" governing the informal sector of Peru's economy.[89] On the other hand, the root position of jurisprudence in the United States is common law, the jurisprudence of permeability. These are good cases for testing the predictions.

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85. I refer here to Jürgen Habermas's notion of "colonization of the lifeworld," in JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOLUME TWO: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 355, 392 (Thomas McCarthy trans., 1987).

86. LLEWELLYN, *supra* note 6, at 191-95.

87. Duty-based jurisprudence tends to degrade into positivism; rights-based jurisprudence, into naturalism.

88. Legal systems whose root position is static can achieve a relatively permeable boundary from the other direction, by incorporating common law elements. *See generally* JOHN P. DAWSON, THE ORACLES OF THE LAW 503-06 (1968).

89. DE SOTO, *supra* note 2, at 132-51, 196-98.

1. *Size*

During the six year period in the early 1980's that de Soto's *Instituto Libertad y Democracia* studied Peru, 48% of Peru's economically active population and 61.2% of its work hours were devoted to informal activities, contributing 38.9% of GDP as recorded in the national accounts.[90] Forty-seven percent of Lima's population lived in 42.6% of its dwellings on illegally acquired land.[91] In the United States in 1980, informal GDP was only 14% of total GDP.[92] The informal sector in Peru occupied almost triple the percentage GDP occupied by the informal sector in the United States.

2. *Institutions*

Peru has a vast network of informal institutions. The informal sector has been forced to develop, as well as it can, substitutes for the formal legal system, since access to the formal legal system is prohibitively expensive.[93] Shasta County landowners, by contrast, live for the most part in the formal economy. They enter informality for the same reason de Soto's informals do in Peru, because it is cheaper, but over a far slimmer portfolio of transactions.

3. *The Trace*

De Soto describes a state wholly resistant to informal processes, with exchanges between formal and informal only by corruption. In one extraordinary instance the government sponsored an invasion to create a housing project.[94] But this event only underscores the state's resistance. In the United States, by contrast, mechanisms abound for the exchange of norms between formality and informality. A handful of these were described in Part I.

Formal jurisprudence in the United States has two exemplary doctrines, fiduciary obligation and the constitutional doctrine of individual rights that engrave a trace of dynamic jurisprudence in the formal jurisprudence. Traces, in general, are of two sorts. They record an absence (a removal of a portion of the material of the receiving medium, like a track in sand), or a presence (an addition of material of a different sort on top of the receiving medium, like crayon).

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90. *Id.* at 12.

91. *Id.* at 13, 18.

92. Barry Molefsky, *America's Underground Economy*, *in* TANZI, *supra* note 4, at 52. The estimate was based upon the relationship between currency in circulation (cash) and demand deposits (checking accounts). The result is obviously different than the result one would obtain using the definition of informality described in Part I.

93. DE SOTO, *supra* note 2, at 26-29.

94. *Id.* at 51-53.

Fiduciary obligation is a trace of the first sort. It records an absence of normative material, suspension of the norms of static jurisprudence. The norm that will govern the fiduciary's obligation cannot be known in advance of the fiduciary's exercise of judgment and thus has none of the qualities of positivist or naturalist norms. A fiduciary norm applies only to the situation of the parties to which it is being applied retrospectively, not to "like" cases.[95]

Nevertheless, because they are etched in the legal system established by static jurisprudence, fiduciary norms take the form of generally applicable, forward-looking norms. Fiduciary law warns fiduciaries that they have a duty of loyalty and must manage the affairs of beneficiaries prudently. Fiduciary law develops rules of thumb for these duties, which begin to resemble ordinary norms of static jurisprudence. On the surface, fiduciary law looks as if it can be colonized by static jurisprudence, like common law. Yet rules of thumb are only presumptive—starting-points for analysis.[96] Fiduciary law reserves a right to scrutinize every aspect of a transaction, possibly ousting rules of thumb.[97] It asserts a limitless, general supervisory power.

Because fiduciary norms take the form of generally applicable, forward-looking norms, lawyers can easily forget or reject their inherent supervisory power. Thus, law and economics scholars have urged the formulation, in advance, of crisp, precise fiduciary rules that parties can opt out of by contract.[98] Their vision of fiduciary obligation utterly suppresses its supervisory power, shifting it from trace to static jurisprudence. The drafters of the new Revised Uniform Partnership Act have thoroughly implemented the contract model of fiduciary obligation by confining it to a list of precise obligations that fiduciaries can alter by contract.[99] The old Uniform Partnership Act assumed the existence of a supervisory power, without even expressing it in the form of a static norm.[100]

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95. *See* Arthur J. Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 BUFF. L. REV. 599, 623-27 (1980).

96. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 909-10 (arguing that analysis of fiduciary obligations is content-dependent).

97. *Compare* Sharp v. Kosmalski, 40 N.Y.2d 119 (1976) (laying down rules for applying constructive trust remedy) *with* Simonds v. Simonds, 45 N.Y.2d 233, 241-42 (1978) (criticizing laying down of rules).

98. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) ("[A] 'fiduciary' relation is a contractual one characterized by unusually high costs of specification and monitoring.").

99. For a thorough review and criticism of this adventure, see Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993). Professor Vestal describes the "desire of some contractarian proponents for a static and inflexible regime of partnership law." *Id.* at 542; *see also* Claire Moore Dickerson, *Is It Appropriate To Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111, 156 (1993) ("[T]o apply the corporate law contractarian model to partnerships is to prevent users of different business forms from having available the unique characteristics of partnerships."). For related issues raised by the American Law Institute's *Principles of Corporate Governance*, see William W. Bratton, *Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law*, 61 GEO. WASH. L. REV. 1084 (1993).

100. The old act uses the term "fiduciary" only once, in the title to the section on accounting. *See* Unif. Partnership Act, § 21, 6 U.L.A. 258 (1969).

The doctrine of individual rights is a trace of the second sort—an addition of different normative material on top of the receiving medium. Individual rights describe a power of resistance to static jurisprudence. Unlike fiduciary obligation, the doctrine of individual rights does not put norms into suspense. Rather, it sets a boundary around the reach of norms. It is a normative constraint on the production of norms. The issue is whether constraining norms have the same structure as constrained ones. Do they give rise to correlative duties? We do not usually think of the state as having a duty not to enact norms exceeding the constraint; judges simply do not apply them. Do constraining norms mark a limit in advance, as do static norms, or do they work in the supervisory way of fiduciary obligation?

These dilemmas suggest two familiar axes of dispute: whether an individual right is enumerable or not enumerable,[101] and whether it is a rule or a standard.[102] These axes yield, in principle, four positions, each assigning to individual rights successively more supervisory power: they are enumerable rules, enumerable standards, inenumerable rules, or inenumerable standards. At least two positions were crisply taken in opinions from a canonical text on individual rights, *Griswold v. Connecticut*.[103] Justice Douglas, in his opinion for the Court, derives a constitutional right of privacy from the "penumbra" of enumerated rights.[104] Some rights, at least, are inenumerable standards. Justice Black, in dissent, rejects the creation of a right of privacy independent of a "specific constitutional provision" protecting it.[105] "Surely it has to be admitted," he writes, "that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous."[106] For Black, individual rights are enumerable rules.[107]

The extreme approaches to individual rights, as inenumerable standards and enumerable rules, show the same tension between static and dynamic that

101. One collection of essays debating enumerability is JACK N. RAKOVE, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990).

102. On rules versus standards in constitutional interpretation, see generally Kathleen M. Sullivan, *Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

103. 381 U.S. 479 (1965).

104. *Id.* at 483-86.

105. *Id.* at 510.

106. *Id.* at 512.

107. It is tempting to locate the separate concurring opinions of Justices Goldberg, Harlan, and White in intermediate categories. Justices Goldberg and White seem to treat individual rights as enumerable standards, by virtue of their emphases, respectively, on a penumbra of the Ninth Amendment, *id.* at 487, 499, and an interpretation of "liberty" in the Fourteenth Amendment, *id.* at 502. Justice Harlan seems to treat individual rights as inenumerable rules, by virtue of his emphasis on the "basic values 'implicit in the concept of ordered liberty.'" *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Intermediate positions, including these, most often have too many subtleties and tensions to be allocated neatly to boxes. After all, judges taking these positions sometimes want to avoid being seen as taking a position.

marks fiduciary law.[108] The trace preserves dynamism when judges and legislators emphasize an illimitable supervisory power and is absorbed by static jurisprudence when they reduce it to enumerable rules or contract.

IV.

The informal economy asks lawyers to stop, look, and listen as they approach the boundary of a legal system. Only regulatory law, such as criminal law or administrative regulation, looks over the boundary to transactions on the other side. Static jurisprudence otherwise treats transactions over the boundary in a live-and-let-live fashion, as if they were in a legally unregulated condition, and as if the unregulated condition has no effect on its norms. A legal system run along dynamic lines, by contrast, never reaches a boundary. It has no outside, no inside. All transactions, in principle, belong to it.

Neither position, static or dynamic, is true. Neither is false. Static jurisprudence can create a boundary. Dynamic jurisprudence always breaches it. How little, how much, affects the character of norms within the boundary.

All persons, especially ones in a legal system run along static lines, live and work in the informal economy. The informal economy is much more vast from a legal perspective than social scientists might have wished or imagined. Our rights and powers in transactions depend on the experience of living and working outside the legal system, in the informal economy. We are less powerful as persons without it.

The effect of the jurisprudence bred in the informal economy is an unmitigated good, enhancing our powers in general, and in particular the power to resist or reform commands of the state. Nevertheless, the cost of achieving that effect may be higher than we, as a moral community, wish to pay. These are the choices we must make collectively in our work as citizens.

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108. The citizens' suit in environmental law is a third doctrine exemplifying the trace. It shows the same tension as do the law of fiduciaries and the doctrine of individual rights. The fault-line expressing the tension is whether "private attorneys general" ought to be able to settle citizens' suits to promote non-environmental benefits over the environmental values expressed in the statute. *See generally* David S. Mann, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENVTL. L. 175 (1991); Eric Felten, *Money from Pollution Suits Can Follow a Winding Course*, INSIGHT, Feb. 18, 1991, at 18-20; *cf.* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 342 (1990) ("[E]nvironmentalist enforcers reap economic rewards and . . . their strategies and case selection are necessarily determined by these rewards, not by public (environmental) benefits.") The environmental review process implicitly accommodates private interests in the implementation of statutory standards. *See* Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1723-37 (1993) (urging a "human impact statement" in new property settings).